THE CONTRIBUTION OF THE ARAB SPRING TO THE ROLE OF TRANSITIONAL JUSTICE AND AMNESTY LAWS: A REVIEW OF TUNISIA, EGYPT AND LIBYA

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Given the uncertainty of the role of amnesty laws in international law and with the uprisings in the Middle East and North Africa, most commonly known as the “Arab Spring,” this paper assesses what these countries will contribute to transitional justice and the role of amnesty laws in the international forum. The two predominant questions that this paper addresses is whether transitional justice, as we know it, will be useful for the Arab Spring countries and whether their use of transitional justice will change the way it's viewed in international law. In this assessment, emphasis will be on the role and contribution of amnesty laws in the transition process. The goal of this paper is to provide a comprehensive view and some insight into transitional justice and the role of amnesty laws, particularly in Arab Spring countries by focusing on Tunisia, Egypt, and Libya, beginning with their uprisings in late 2010 up to the situation in early August 2012. A brief overview of the contributions of other regions of the world, including Europe, the Americas, Africa, and Asia, to the role of transitional justice and amnesty laws has been included as a background of the role amnesty laws played in those regions of the world.
Table of Contents

I. Introduction ........................................................................................................... 3

II. Background ......................................................................................................... 4
   a. Transitional Justice ......................................................................................... 4
   b. Amnesty Laws .............................................................................................. 5
   c. The Actors Involved ..................................................................................... 9

III. International Obligations of a State ................................................................. 9
   a. States’ Responsibility to Respect, Protect, and Fulfill ................................... 9
   b. States’ Obligation to Investigate, Prosecute, and Punish ............................. 10

IV. Regional Contributions to the Role of Transitional Justice and Amnesty Laws .... 10
   a. Transitional Justice and Amnesty Laws in Europe ....................................... 10
   b. Amnesty Laws in the Americas .................................................................... 13
   c. Transitional Justice and Amnesty Laws in Africa ....................................... 19
   d. Amnesty Laws in Asia .................................................................................. 21

V. Contributions of the “Arab Spring” to the Role of Transitional Justice and Amnesty
   Laws .................................................................................................................. 24
   a. The Transitional Justice Process in Tunisia ................................................... 24
      Overview: Ben Ali’s Regime 24
      Transitional Justice begins 25
      General Amnesty as a form of reparations 27
      Elections 28
      Accountability for past abuses 29
      What’s next for Tunisia? 31
   b. The Transitional Justice Process in Egypt ....................................................... 33
      Overview: The Mubarak Regime to Present 33
      Commissions of Inquiry 34
      Elections in Egypt 35
      Amnesty Laws 36
      What’s next for Egypt? 37
   c. The Transitional Justice Process in Libya ....................................................... 39
      Overview: The Qaddafi Regime to Present 39
      International Commission of Inquiry on Libya 41
      Amnesty Laws 42
      Elections in Libya 44
      What’s next for Libya? 44

VI. Conclusion ........................................................................................................... 48
I. Introduction

The role of amnesty laws are a fiercely contested issue in international law, with views ranging from them being a “necessary evil” to them perpetuating impunity and allowing States to forgo their role of protecting and upholding human rights. There is no general international standard when it comes to amnesty laws, which helps to fuel the debate. This paper seeks to explore the role of amnesty laws through denoting the contributions of each region, including in Africa, the Americas, Asia, and Europe.

With the uprisings in the Middle East and North Africa, known as the “Arab Spring,” our goal is to assess what these countries will contribute to transitional justice and the role of amnesty laws in the international forum. First, we will look at whether transitional justice, as we know it today, will be useful for the Arab countries. Secondly, we will assess whether transitional justice, if applied to the Arab countries, will change the way we view it. In this assessment, emphasis will be on the role and contribution of amnesty laws in the transition process.

From the oft-forgotten Gdeim Izik protest camps in Western Sahara, to the ousting of rulers in Tunisia, Egypt, and Libya, and the ongoing conflicts in Syria, Bahrain, Algeria, and Yemen, we cannot explore all that the Arab Spring has to offer. Also, because the Arab Spring countries are vastly different, it is impossible to accurately predict what it will, as a whole, contribute to the development of transitional justice and international treatment of amnesty laws. But, we hope to provide a comprehensive view and some insight into transitional justice and the role of amnesty laws, particularly in Arab Spring countries by focusing on Tunisia, Egypt, and Libya, beginning with their uprisings in late 2010 up to the situation in early August 2012.

We would like to sincerely thank Professor Juan E. Mendez, visiting professor at the American University Washington College of Law and United Nations Special Rapporteur on torture and other cruel, inhuman and degrading treatment for the profound insight he offered to assist us in the focus of this project.
II. Background on Transitional Justice & Amnesty Laws

a. Transitional Justice

The concept of transitional justice is likely best known through the Nuremburg trials, the Pinochet dictatorship and the Truth and Reconciliation Commission in South Africa. It is known as the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses in order to ensure accountability, secure justice, achieve reconciliation, and establish and strengthen the rule of law.¹

There are three emerging pillars used by organs to enact the principles of transitional justice: international crimes, right to remedy, and non-derogability of certain rights.² If derogation is not allowed for certain rights, impunity after a state of emergency is equally impermissible. There are also four obligations flowing from transitional justice. First, there is the obligation to investigate and discover the truth.³ Second, there is the obligation for alleged perpetrators being investigated to tell the truth.⁴ The transitional government should offer redress for the victims. Finally, there is an obligation to establish constitutional reform to prevent future institutional abuse.⁵

Transitional justice is a controversial issue in light of the obligation to uphold human rights and granting amnesties for human rights violations is highly contentious. One of the major issues surrounding amnesty laws is that they are perceived to be unfair. The ones responsible for violating human rights are not held responsible under the auspices of ‘transitional justice’. After amnesties are passed in many countries, victims’ relatives and human rights lawyers will then challenge their legality on constitutional and international law grounds.⁶

b. Amnesty laws

There is no internationally accepted definition of amnesty laws, however, amnesties have traditionally been understood in a legal sense to denote efforts by governments to eliminate any

¹ UN Secretary General, Guidance Note on the United Nations Approach to Transitional Justice.
² Juan Mendez, Lecture on Regional approaches to human rights, 23 April 2012, American University Washington College of Law.
³ Id.
⁴ Id.
⁵ Id.
record of crimes that has already occurred by barring criminal prosecutions and/or civil suits for particular categories of crimes or individuals. They are designed to end violent internal conflict and foster reconciliation within a damaged state. Amnesty laws have played a prominent role in time of political crises. They are usually extended after gross human rights violations, crimes against humanity, extreme violence or civil war and are only applied to individuals who have not yet been prosecuted and sentenced.

Among various national legal systems, amnesty might be defined differently and varying governmental bodies may be empowered to grant amnesties. Thus, there is considerable diversity among amnesty laws. Some exclude the most serious crimes and human rights violations or certain individuals. Others offer unconditional impunity also known as blanket amnesties while some are limited amnesty laws, which are designed to complement other modalities of post-conflict justice. The three contexts in which an amnesty is usually passed include amnesties granted by the outgoing government or self-amnesties; amnesties related to truth commissions; or amnesties to end conflict.

Self-amnesties are typically passed when a government becomes concerned that it is losing political control and that it will be held accountable for human rights abuses committed during its regime. The government will pass the amnesty law before leaving office and absolve itself of any crimes committed while in power.

Amnesties related to truth commissions can come about in many ways but the essential purpose is to assist the state in its transition to a more democratic form of government. An amnesty may be granted immediately after the release of the truth commission’s report as in the case of El Salvador.

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11 See id.
12 See id.
13 Id. at 587 (Between 1979 and 1990, El Salvador was engaged in a civil war where death squads were rampant, and forced disappearances, torture, and execution were carried out by all parties. A U.N.-established truth
An amnesty may also be granted to induce former government officials to participate in the truth commission as in the case of South Africa (further discussed below).  

Alternatively, there are amnesties that are granted to end a conflict that otherwise would be impossible. This is typically the case when those who have committed crimes or mass atrocities refuse to negotiate without the promise of amnesty, such as in Haiti. In these instances, amnesty is used as a means to end a conflict and prevent the continuation of hostilities that lead to the suffering of thousands.

As noted above, there are many controversies surrounding amnesty laws. Courts that uphold amnesties tend to devalue the role of international law while those invalidating amnesties stress the integral role of international law in the domestic constitutional scheme. Courts that uphold amnesties often find that amnesties are constitutional because the legislative and executive branches in the exercise of powers granted to them by their constitutions enact them and the amnesties are valid under international law. However, lower courts that have struck down amnesty laws have found that instruments including the Geneva Conventions of 1949, the American Convention on Human Rights, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights are applicable and prohibit such laws.

Because international and regional laws are inconsistent in their treatment of amnesty laws, it further fuels the debate. However, analysis of international and domestic laws suggest that amnesties do not violate international law as long as it is not a blanket amnesty and they do not exempt international crimes, such as genocide, war crimes, and crimes against humanity.

14 Id.
15 Id. at 591 (After a military junta overthrew President Jean-Baptise Aristide, the government sought to eliminate all opposition. Torture, illegal detentions, rape, and destruction of property were rampant. The peace agreement negotiated with the assistance of the United States and the United Nations provided for Aristide’s return to power and a blanket amnesty to ensure the end of hostilities.)
16 The Developing Jurisprudence on Amnesty, supra note 6, p.870.
17 See id. at 862.
18 Id.
c. The Actors Involved

*Governments* are the main actors during transitional justice. As noted above, amnesties are often granted as dictatorships or an authoritarian government transitions to a more democratic government. Newly elected governments are expected to deal with the mistakes and violations of previous regimes. Oftentimes they are tasked with establishing and implementing the rule of law to ensure that instances of serious human rights violations do not reoccur.

The *victims* are the groups of people that are subject to the human rights violations, whether directly or indirectly, including the actual victims’ next of kin or other relatives. These can consist of suspected opposition groups or sympathizers. They may be subject to human rights violations including torture, enforced disappearances, arbitrary detentions, and even death at the behest of the government and/or military or opposition group. Depending on the type of amnesty granted, victims may receive little more than an apology to actual reparations. From the point of view of individual and collective persons entitled to a specific duty from the state, the states’ obligations correspond to a set of rights: a right of the victim to justice, a right to know the truth, an entitlement to compensation and other non-monetary forms of restitution, and a right to new, organized and accountable institutions.\(^\text{19}\)

*Truth Commissions* are oftentimes established to assist in the transition of power, usually from an authoritarian form of government to a democratic form of government. Many times they are set up as a compromise, wherein the former government will cooperate in exchange for amnesty from prosecution for some or all crimes committed during its regime. These commissions investigate all relevant facts related to human rights violations committed during the outgoing government’s regime. The cooperating actors will usually disclose evidence and motivations in regards to the violations in exchange for partial or full amnesty. Upon the close of the commission’s duties, a report may be issued as well as recommendations for prosecution and reparations to the victims. The commission’s duties and authority can be very inclusive and all-encompassing or, on the other hand, extremely limited.

The predominant role that *civil society* plays is one of persuasion. Civil society organizations and Non-

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governmental Organizations (NGOs) will usually get involved to assist in persuading the transitioning government one way or another. They may try to persuade the new regime to allow for some form of amnesty or to revise or completely get rid of an existing amnesty. Civil society and NGOs try to ensure that the government does not perpetuate impunity by holding it accountable to its citizens. This may include documentation of abuses, organizing demonstrations, and meeting with government officials to discuss moving forward through a repressive and abusive past to a more rights-based future.

*International (human rights) bodies* contribute to transparency when human rights and freedoms, such as the freedom of expression, have been suppressed in a way that the international community cannot know what has been going on in the country. Through country visits, recommendations, reporting-systems and cooperation with the transitional government(s), international bodies can also contribute to the transitional justice.

The International Criminal Court (ICC) can also play a major role in regards to accountability for past crimes. The ICC is complementary to national criminal jurisdictions and has the power to exercise its jurisdiction over persons for the most serious crimes of international concern. However, this requires a State to be party to the Rome Statute. Because the Rome Statute does not explicitly mention amnesties, it is unclear whether the ICC has jurisdiction when a national amnesty law bars the prosecution of persons accused of crimes falling under the scope of Article 5 of the Rome Statute. But, neither the ICC nor third States are bound by the domestic laws of the country going through transition. The objective of the Court is to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”

III. International Obligations of a State

a. States’ Responsibility to Respect, Protect, and Fulfill

The question of the responsibility of a state in case of disaster implicates what the state or government should have done to protect the human rights of its citizens and prevent human rights

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21 *Id.*, Preamble.
violations. However, to suggest that a state is responsible for the violations of human rights does not necessarily mean that a state can be held accountable.

Under international human rights law, a state has three main obligations towards the people within their jurisdiction. First, there is the obligation to respect, meaning that the state must refrain from intervening in the life of its people in a negative way. For example, a state must not adopt laws or regulations that constitute or contribute to human right violations. Second, a state has the responsibility to protect. This obligation compels a state to take positive measures to prevent violations of human rights by third parties. Furthermore, it requires states to exercise due diligence in preventing human rights violations by third parties and ensuring third parties’ accountability. To satisfy this obligation in practice, a state should adopt laws that criminalize human right violations.

Finally, there is the obligation to fulfill. This means that the state is obliged to put measures in place to ensure that human rights are actually protected. It thus requires states, inter alia, to make remedies available and accessible and to afford reparation. For example, there must be an effective judicial court system that is accessible to all people.

b. States’ Obligation to Investigate, Prosecute and Punish

Though amnesties are usually granted within the domestic sphere of a state, there are also obligations under international law as well as customary law that States are bound by and to which they must adhere. The 1949 Geneva Conventions set out the basic law of armed conflict. Parties to the Geneva Conventions have an obligation to investigate grave breaches of the Conventions and prosecute and punish the perpetrators responsible for such acts.22

Many of the atrocities committed by authoritarian governments and dictatorship constitute torture within the meaning of Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention requires each state party to ensure that all

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acts of torture are offenses under domestic law and that state parties criminalize acts which “constitute complicity or participation in torture.”

IV. Regional Contributions to the Role of Transitional Justice and Amnesty Laws

a. Transitional Justice and Amnesty Laws in Europe

After the Second World War in Europe, transitional justice processes took place in Germany, Italy, Austria, Belgium, Denmark, France, Hungary, and Norway. The Nuremberg trials conducted by the International Military Tribunal in Germany following the end of the Second World War are landmarks for the introduction of transitional justice. The purpose of these trials was to prosecute crimes against humanity that had been perpetrated during the War. Many officials who were part of the Nazi-regime were convicted on charges of crimes against humanity. According to Samantha Power, “the effect of the Nuremburg Tribunal was that future perpetrators of atrocities—even those acting under explicit state authority—could no longer be confident that their government or their borders would shelter them from trial.”

Though most known for its success, the Nuremberg trials were not without complications. For example, the fact that only the four victorious allied powers served as judges compromised acceptance of the Nuremberg trials among the German population. Further, in Germany, all the instruments of transitional justice were put into practice from the beginning – with the exception of truth commissions, which only decades later became a widely disseminated measure of societal reconciliation.

One of the greatest contributions of the Nuremburg trials to transitional justice is the acknowledgement of accountability so that crimes against humanity do not go unpunished. It helped initiate the essence of universal protection of human rights. Principles of the Nuremburg Trial have been recognized as principles of international law adopted by the International Law Commission of

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23 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, Article 4.
26 Id.

The first principle entails that any person who commits an act that constitutes a crime under international law is responsible and liable to punishment.\footnote{28}{Id.} Principle two expresses that the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.\footnote{29}{Id.} Principle three conveys that the fact that a person who committed an act that constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.\footnote{30}{Id.} On the basis of principle four, the fact that a person acted pursuant to an order of his government or of a superior does not relieve him from responsibility under international law if there was a possible moral choice.\footnote{31}{Id.} Principles five and six cover the right to a fair trial and recognize the crimes punishable as crimes under international law, including crimes against peace, war crimes and crimes against humanity.\footnote{32}{See id.}

The devastations and gross human rights abuses that took place during the Second World War allowed for an emphasis on responsibility, accountability and subsequent punishment of perpetrators of human right abuses. There was little room for amnesty laws in any form that relieved those responsible for human rights violations.

Transitional justice in the 1970s and 1980s is known from its application from military regimes to democracies. Amnesty laws have often been introduced in response to political events. In countries such as France, Italy, and Austria, amnesties were introduced as countries transitioned from a dictatorship to a democracy.\footnote{33}{See Dr. Louise Mallinder, supra note 9.} The predominant political transitions took place in Spain, Portugal,
and Greece in the early 1970s which were considered to have been political successes.\textsuperscript{34}

In 1939, Spain was under the dictatorship of General Francisco Franco. After his death, opposition parties formed a broad coalition demanding political reform and a complete political amnesty.\textsuperscript{35} In 1976, a partial political amnesty was introduced for persons sentenced or awaiting trial for political offenses or offenses of opinion, those accused of military rebellion and sedition, military absentees or deserters, conscientious objectors and persons who had escaped from prison while serving sentences for offenses covered by the amnesty.\textsuperscript{36} This amnesty covered crimes committed by both government supporters and the opposition. It ensured that those particular crimes committed during Franco’s regime would not be prosecuted. However, the amnesty excluded those accused of killing or endangering the lives of others, and those accused of economic crimes.\textsuperscript{37}

In Portugal, the transition to democracy started with the Portuguese military coup of 25 April 1974 which subsequently led to the authoritarian regime completely collapsing.\textsuperscript{38} This sent the state into full crisis mode thereby allowing the democratic opposition, led by the Portuguese Communist Party, to seek to punish the members of the old regime and to ban them from public life. It also led to the mobilization of the citizenry around an agenda designed to challenge the political order established by the old regime, including the social and economic status quo, by contesting property rights in the countryside and the major urban centers.\textsuperscript{39} Conversely to Spain, Portugal underwent a transition without negotiations or pacts between those governing the dictatorship and the opposition.\textsuperscript{40}

In Eastern Europe, after the fall of Communism in 1989-1990, transitional justice took place in Bulgaria, Czechoslovakia (now the Czech Republic and Slovakia), the former GDR, Hungary,

\textsuperscript{34} Eric A. Posner and Adrian Vermeule, \textit{Transitional Justice as Ordinary Justice}, The Law School at the University of Chicago (March 2003), Available at The Public Law and Legal Theory Working Paper Series: \url{http://www.law.uchicago.edu/academics/publiclaw/index.html}. p.6

\textsuperscript{35} See Dr. Louise Mallinder, supra note 9.

\textsuperscript{36} \textit{Id.} at 88.

\textsuperscript{37} \textit{Id.}


\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.}
Poland and Romania. The dictatorship in the Soviet Union was defined by the only political party, the “KGB”, which was known for its terror, mass deportations, forced labor, prison camps, torture, and murders. The imposition of Russian language, identity, and culture were characteristics of the Soviet regime. The transition to democracy in Central and Eastern Europe was subsequent to a public demand for accountability of human rights abuses.

In the 1980s, transitional justice was identified as a central tool of democratization where truth commissions and compensation gained importance in light of human rights as a universal standard. At the end of the Cold War, amnesties were given to political prisoners in the countries of the former Soviet bloc. Eastern Europe is also known for the applications of lustration laws in the process of transition. However, the "lustration" laws that have been applied in different forms in Eastern Europe almost always constitute punishment without a fair trial.

In the Czech Republic, Poland, and Hungary, the transition to democracy took the form of pact negotiations and lustration. While the Czech Republic approved a lustration (vetting) law based on the traditional method of dismissals, Hungary and Poland devised alternative models that granted their tainted officials a second chance in exchange for truth. Hungary and the Czech Republic also implemented restitution programs which are considered two of the most successful transitions from the 1980s.

b. Amnesty Laws in the Americas

While amnesty laws have been treated inconsistently by the international community, the Inter-American Court of Human Rights (“Inter-American Court” or “Court”) has set precedence with its amnesty jurisprudence. Though still not consistently applied throughout the Americas, the Inter-

43 See id.
44 See *Dealing with the Past, Transitional Justice and Reparation*, supra note 25.
45 Id.
46 See *Accountability for Past Abuses*, supra note 19.
49 *Transitional Justice as Ordinary Justice*, supra note 34.
American Court has been an active defender of human rights and a strong opponent against impunity. With a history of amnesty laws frequently shielding perpetrators of severe human rights violations from prosecution in the Americas, particularly Latin America and the Caribbean, the Inter-American Commission on Human Rights and later the Court issued advisory opinions and decisions against the legality of amnesty laws. The seminal decisions by the Inter-American Court arose out of sweeping amnesty laws in countries such as Chile, Peru, Argentina, and Uruguay.

One of the most notable cases regarding amnesty laws is the Pinochet case in Chile. General Augusto Pinochet overthrew the regime of Salvador Allende in 1973, who had won the presidency in 1970. General Pinochet, with the assistance of the military, initially targeted peasant and union organizers, government members, and leftist party members. Under General Pinochet’s rule, disappearances, abductions, torture, and executions were carried out as the military “weeded out” suspected leftists and sympathizers. General Pinochet also declared a state of siege and time of war, abolished Congress by decree, banned labor and leftist parties, and issued decrees to amend the Constitution allowing security forces to detain citizens incommunicado.

In 1978, General Pinochet then issued a blanket amnesty that protected all persons from prosecution for “non-excluded criminal acts.” Murder, kidnapping, and assault were a few of the crimes that were covered by the amnesty. Though the amnesty included all parties including opposition, it was particularly beneficial for the military as it had committed most of the named crimes. Further, any suspected opposition had been murdered, disappeared, or exiled. 

50 See generally Christina Binder, The Prohibition of Amnesties by the Inter-American Court of Human Rights, 12 German L.J. 1203 (2011), citing Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, the Jurisprudence of the Inter-American Court of Human Rights in Les Grandes Décisions de la Cour Interaméricaine des Droits de l’Homme (2008) (discussing the Court’s developing jurisprudence regarding forced disappearances, extrajudicial killings, violations of indigenous peoples’ rights, and undocumented migrants’ rights, etc.)

51 See for example Inter-American Court, Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50, 51 of ACHR), Advisory Opinion OC-13/93 of 16 July 1993, Series A, No. 13, paras 30, 37, 57(1).


53 See id.

54 Id.

55 Id.

56 Id.

57 See The Developing Jurisprudence on Amnesty, supra note 6.

58 Id.
succeeding government was unable to rescind or legally annul the amnesty without the support of Congress. Thus, a Truth Commission was created. However, it was limited in scope as it could not examine cases for surviving victims, including torture victims, or identify individuals responsible for crimes to recommend sanctions. Though the amnesty law was challenged and overruled by lower courts, the Supreme Court of Chile held that it was constitutional and consistent with international law.

Similarly, the Supreme Court of Peru upheld an amnesty that was passed to shield police, military personnel, and civilians from prosecution for acts committed during the period between 1980 and 1995. From 1912 to 1980, many military coups were staged to overthrow the governments in place. Also, towards the end of this period a Maoist guerrilla group, the Sendero Luminoso, expanded and launched a terrorist attack in 1980. However, in 1982, President Belaunde declared a state of emergency and responded with force launching a “bloody conflict” between the Sendero and the military. States of emergency became commonplace and many rights were suspended. This conflict continued through 1992 when Alberto Fujimori gained power through a self-coup.

Soon thereafter, the Sendero’s terrorist activities increased significantly. The government then authorized detentions, disappearances, and extrajudicial executions of suspected leftist sympathizers. The principal leaders of Sendero were captured and the terrorist activities decreased. In 1995, an amnesty law was passed for acts linked with the “fight against terrorism” between 1980 and 1995. Sendero members and associates were not protected by this amnesty law

60 See The Developing Jurisprudence on Amnesty, supra note 6, citing Insunza Bascuñán Case, Recurso de Inaplicabilidad, Corte Suprema de Chile, Revista de Derecho y Jurisprudencia y Gaceta de los Tribunales, pt. 2, § 4, at 64 (May-Aug. 1990) and Romo Mena Case, Corte Suprema de Chile (26 Oct. 1995).
64 See id.
65 Id.
66 Id.
67 Id.
but were subject to criminal and civil liability. However, no truth commission was set up and there were no other means of reparation for victims of human rights abuses. Though the lower court ruled that the amnesty was unlawful and inapplicable, the Superior Court overruled the lower court as Congress passed a law stating that it did not violate international law or human rights. The Supreme Court upheld the Superior Court’s decision.

Serious human rights violations followed by amnesty laws similar to these two far-reaching amnesty laws led to the Inter-American Court’s landmark judgments in Barrios Altos v. Peru in 2001, then La Cantuta v. Peru and Almonacid v. Chile in 2006. The Barrios Altos and La Cantuta cases were in relation to the massacres in 1991 and 1992 by the paramilitary death squad “La Colina” under the orders of President Fujimori. The Inter-American Court found the amnesty law to be inadmissible because the acts committed, such as torture, extrajudicial, summary, or arbitrary executions, and forced disappearances, “violate non-derogable rights recognized by international human rights law.” Ultimately, the Inter-American Court held that the laws “contributed to the defenselessness of victims and the perpetuation of impunity and thus [is] manifestly incompatible with the aims and spirit of the American Convention on Human Rights.” The Court ruled that the amnesty laws were “devoid of legal effects.”

Similarly in Almonacid v. Chile, the court found that killings under the Pinochet regime constituted crimes against humanity and that non-prosecution of those responsible is a violation of the American Convention. In addition to ruling the amnesty law devoid of legal effects, the Court established its doctrine of conventionality control (control de convencionalidad). This doctrine obliges domestic courts to give effect to the human rights guarantees enumerated in the American

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69 Id.
70 See id.
71 See Peru Upholds Amnesty, supra note 61.
72 Inter-American Court, Merits, Judgment of 14 March 2001, Series C, No. 75.
73 Inter-American Court, Merits, Reparations and Costs, Judgment of 29 November 2006, Series C, No. 162.
75 See The Prohibition of Amnesties by the Inter-American Court, supra note 50.
76 See Barrios Altos v. Peru, supra note 72, para. 41.
77 See id., para. 43.
78 See id., para 4.
79 See Almonacid v. Chile, supra note 74, para. 111-115.
80 See id.
Convention, including not applying laws that are in contravention of the American Convention.\textsuperscript{81} Thus, the “[j]udiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”\textsuperscript{82} States cannot justify non-compliance with an international treaty by referring to a contrary domestic law.\textsuperscript{83} Further, the conventionality control obligation is not conditional on having received a prior judgment by the Inter-American Court, but instead judges must exercise this control in its own case law.\textsuperscript{84}

Reception of the Inter-American Court’s jurisprudence on amnesty laws, including the ruling that amnesty laws that perpetuate impunity by shielding perpetrators of grave human rights violations from prosecution are devoid of legal effect and the obligation of conventionality control, has largely been positive in the Americas. Peru fully complied with the Barrios Altos decision and incorporated the American Convention into the domestic legal system and national legal provisions so that international decisions would have a binding effect on national authorities.\textsuperscript{85} Additionally, measures were taken to nullify and eliminate the effects of the 1995 amnesty law, including a 25-year prison sentence for President Fujimori and the reopening of cases for prosecution where the amnesty law had been applied.\textsuperscript{86}

Though the application of Almonacid is not as direct, the Chilean Supreme Court has consistently ruled that the amnesty by the military government in 1978 is inapplicable to war crimes or crimes against humanity, as well as these crimes not being subject to a statute of limitations.\textsuperscript{87} Further, the Chilean Supreme Court has referred to the Almonacid and Barrios Altos decisions when determining

\begin{flushright}
\textsuperscript{81} See id., para. 124.
\textsuperscript{82} Id.
\textsuperscript{83} See id., para 125.
\textsuperscript{84} See id., paras. 123-125.
\textsuperscript{85} See The Prohibition of Amnesties by the Inter-American Court, supra note 50, citing Art. 55-57 of Peruvian Constitution.
\textsuperscript{87} See id., citing Interview with Gonzalo Aguilar Cavallo, Professor for Public International Law and Human Rights Law at the Universidad de Talca, Heidelberg, 29 June 2010 and Human Rights Watch, Chile, Events of 2009, http://www.hrw.org/en/node/87512.
\end{flushright}
that domestic legal norms could not be used to shield perpetrators of serious human rights violations from prosecution.\textsuperscript{88}

Other domestic courts, such as those in Argentina and Colombia, have also emphasized and referred to the Inter-American Court’s jurisprudence, particularly in the Barrios Altos case. The Argentine Supreme Court has relied extensively on the Barrios Altos decision to conclude that Argentina’s amnesty laws are unconstitutional.\textsuperscript{89} One of its most important decisions was in Mazzeo Julio Lilo y otros where it determined that the 1989 decree by President Menem, which pardoned thirty former military officers of crimes against humanity, was unconstitutional.\textsuperscript{90} In making its determination, it relied on the criteria set by the Inter-American Court in analyzing a state’s duty to investigate and prosecute crimes against humanity.\textsuperscript{91} Through the Mazzeo ruling and other similar rulings, Argentina has indicated its general acceptance of the Inter-American Court’s jurisprudence on amnesty laws.

Similarly, the Colombian Constitutional Court has extensively relied on the Inter-American Court’s reasoning and decisions in regards to amnesties. The Constitutional Court declared unconstitutional a provision on the general inadmissibility of amnesties for perpetrators of serious crimes, though it has permitted amnesties for specific, lesser offenses, such as political offenses.\textsuperscript{92} Additionally, the Constitutional Court has expressly noted the binding jurisprudence of the Inter-American Court.\textsuperscript{93}

Though the Inter-American Court’s jurisprudence on amnesty laws has been generally accepted in some Latin American countries, not all countries in the Americas have shown this general acceptance. For example, the recent Case of the Moiwana Community v. Suriname regarding the 1986 “Moiwana Massacre” and later amnesty law that to this day is being challenged.\textsuperscript{94} However, time will

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\textsuperscript{88} Id.
\textsuperscript{89} See id., citing Argentine Supreme Court, Recurso de Hecho Deducido por la Defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/Privación ilegítima de Libertad, etc., Causa No. 17.768, Judgment of 14 June 2005.
\textsuperscript{90} See id., citing Argentine Supreme Court, Mazzeo Julio Lilo y otros, Judgment of 13 July 2007, Jurisprudencia Argentina 2007-III-573, para. 21.
\textsuperscript{91} See id.
\textsuperscript{92} See id., citing Colombian Constitutional Court, Judgment C-578/02 of 30 July 2002, 4.3.1.2.5.
\textsuperscript{93} See id., citing Colombian Constitutional Court, Judgments T-568 of 10 August 1999, C-010 of 19 January 2000 and C-200 of 19 March 2002, \url{http://www.corteconstitucional.gov.co}.
\textsuperscript{94} In a recent press dated April 13, 2012, the Inter American Commission on Human Rights (IACHR) expressed its deep concern with respect to the amnesty legislation approved by the Parliament of Suriname on April 5, 2012. The legislation seeks to consolidate immunity for human rights violations committed during the military era (1982-1992) in Suriname, and to remove the exception in the 1992 Amnesty Law that applies to crimes against humanity
only tell if more States will embrace and implement the Inter-American Court’s jurisprudence on amnesty laws.

c. Amnesty Laws in Africa

The most prominent example of amnesty laws in Africa was during the transition from apartheid South Africa. From 1948, South Africa was administered by a white minority government that enforced an apartheid regime causing many to suffer ill treatment and discrimination on the basis of race. Those races and ethnicities outside of the white race had very limited rights as the apartheid regime was characterized by segregation and oppression.\textsuperscript{95} Police brutality and torture of prisoners were widespread. To combat this regime, armed opposition arose, including groups that used force, engaged in crimes, and also violated international human rights laws.

During the negotiations to end the apartheid regime, the main opposition political party, the African National Congress, refused to accept any proposal that allowed for a blanket amnesty for those who committed politically motivated crimes.\textsuperscript{96} However, the interim 1993 Constitution gave the South African Parliament the authority to decide whether and how amnesties would be applied. In July 1995, the Parliament established a Truth and Reconciliation Commission (TRC) through the Promotion of National Unity and Reconciliation Act. The Parliament granted the TRC the authority to grant amnesty for acts motivated by political objectives.\textsuperscript{97} Individuals seeking amnesty had to apply for it and would only be granted it if they made a full accounting of the relevant facts and proved that their actions were politically motivated.\textsuperscript{98} If the individual could not prove political motivation, he or she would be subject to criminal prosecution.\textsuperscript{99} Otherwise, the individual was free from criminal prosecution as well as civil damages.\textsuperscript{100} Ordinary citizens, members of the police and members of the African National Congress, the ruling party at the time of the trial, could seek

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and war crimes. The IACHR stated that, initiatives of this nature impede compliance with cases that have already been decided by the Inter-American system, including the Massacre of Moiwana case. In the case of Suriname, more specifically because the amnesty law could prevent the country’s current president from being punished for his alleged role in the 1982 December Murders. Furthermore, the Moiwana Massacre took place in 1986, the retroactive effect of the amnesty law will exempt those responsible for the Massacre from responsibility.

\textsuperscript{97} James Gibson, \textit{Truth, Justice, and Reconciliations: Judging the Fairness of Amnesty in South Africa}, p.541.
\textsuperscript{98} \textit{id.}
\textsuperscript{99} \textit{id.}
\textsuperscript{100} \textit{id.}
amnesty. Out of 7112 petitioners, 5392 people were refused amnesty while 849 were granted amnesty. South Africa opted to use the possibility of amnesty as a measure to attain the truth demonstrating that, in this case, truth and reconciliation outweighed punishment.

Conversely, the amnesty in Sierra Leone was granted as a means to end hostilities and conflict in the nation. In 1991, the Revolutionary United Front (RUF) armed militia entered Sierra Leone from Liberia with the proclaimed aim of ending the corrupt, authoritarian rule of the All Peoples Congress (APC), while also fighting to gain control of the diamond mines. The RUF, with its leader Foday Sankoh, and other rebel factions fought to gain control of the government. The civil war that ensued was characterized by gross breaches of human rights, including mass atrocities against civilians and peacekeeping forces and the displacement of thousands of people. As a measure to end the hostilities, the Abidjan Peace Accord of 1996 was drafted with a pledge to grant general amnesties to all members of the RUF in the name of peace. However, the Abidjan Accord ultimately failed and the conflict worsened.

After formal negotiations, with the support of the Economic Community of West African States Monitoring Group (ECOMOG), West African peacekeepers, and the exiled government, a new agreement, the Lomé Accord was signed in 1999. This agreement mirrored its predecessor by granting “absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement,” and pledged that the government would take “no official or judicial action” against any of the combatants. This amnesty was specifically extended to Foday Sankoh. However, the amnesty did not apply to “international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international law,” as modified by the United Nations. A truth commission was also established to document human rights abuses and provide a sense of accountability through truth by allowing victims and perpetrators to disclose their truth.

102 Id.
103 Louise Mallinder, supra note 9, p. 103.
104 Id.
106 Lomé Accord, art. IX (1999) (Sierra Leone).
Many other countries in Africa have followed a similar path as Sierra Leone, such as Angola, Mozambique, and Uganda, and granted amnesties with the aim to end violence and gross violations of human rights. However, South Africa is most noteworthy, not only in Africa but also the international community, because of its precedent-setting approach to amnesty laws. Though many perpetrators of human rights violations did receive a “blanket amnesty,” it was contingent on full disclosure of their acts and political objective. Thus, amnesties in South Africa were granted in an individualized manner as opposed to a traditional blanket amnesty that covered groups of oftentimes unnamed perpetrators. South Africa's efforts have been praised as a model of transition and reconciliation.

d. Transitional Justice and Amnesty Laws in Asia

Though amnesty laws in Asia are not as widely discussed as those in the Americas, South Africa, and Eastern Europe, there have been some particularly notable ones in the region. The Cambodian amnesties, for instance, illustrate a significant variation from the types of amnesties granted in other regions. The Cambodian amnesties of 1994 and 1996 reflect the type of impunity that international and customary law expressly condemns though they were extended as an effort to reduce the ongoing violent conflict within Cambodia.

Between 1975 and 1979, Cambodia was ruled by a brutal Communist group known as the Khmer Rouge. During this time, mass atrocities and substantial human rights violations were committed, including torture, mass murders, rape, and pillage, which resulted in approximately 1.7 million deaths.\textsuperscript{108} Following an armed invasion by the Vietnamese, the Khmer Rouge retreated to the jungle where they enjoyed impunity. \textit{In absentia} criminal proceedings were held against the leaders of the Khmer Rouge but were ineffective as the Khmer Rouge continued to fight state forces and posed a serious threat to the security of the state.\textsuperscript{109} Vietnam withdrew its troops in 1989.

In 1991, the United Nations sponsored a peace deal that was signed by the parties to the conflict as well as 18 other nations.\textsuperscript{110} This peace deal was an effort to encourage the Khmer Rouge to disarm and participate in a future government. Instead, the Khmer Rouge carried out attacks on UN

\textsuperscript{108} See Dr. Louise Mallinder, supra note 19.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
peacekeepers.\textsuperscript{111} Finally, on July 7, 1994, after a period of negotiations, the Cambodian government passed an amnesty banning the Khmer Rouge and offered amnesty to Khmer Rouge guerillas who defected to the government between the time the amnesty was passed and January 7, 1995.\textsuperscript{112} The amnesty covered all crimes committed, including those against civilians and those against the state.\textsuperscript{113} However, the leaders of the Khmer Rouge were excluded from the amnesty though the law allowed for the King to pardon them at his discretion.\textsuperscript{114}

On September 14, 1996, the King issued a royal decree granting a pardon to the former Deputy Prime Minister of the Khmer government, Ieng Sary.\textsuperscript{115} Though he had previously been sentenced to death and confiscation of all his property \textit{in absentia}, the King also granted Sary an amnesty for the gross violations of human rights covered in the 1994 amnesty in return for his defection from the Khmer Rouge.\textsuperscript{116} The 1994 and 1996 amnesties were introduced to weaken the Khmer Rouge by encouraging defections as opposed to seeking the truth or facilitating reparations for victims.\textsuperscript{117} The perpetrators have enjoyed significant impunity for the mass atrocities committed. However, an agreement approved by the UN General Assembly in May 2003, ratified by the Cambodian Parliament in October 2004, and entered into force on April 29, 2005 has allowed for limited trials and investigations of the senior leaders of Khmer Rouge.\textsuperscript{118}

The United Nations was very instrumental in facilitating transitional justice and amnesty in Timor, moreso than in many other countries. Prior to Indonesia invading Timor-Leste in December 1975, there was a period of civil turmoil and political instability because of competing factions struggling for independence or integration with Indonesia.\textsuperscript{119} During the Indonesian invasion and until 1979, there were mass human rights violations and military clashes between Indonesian forces and the

\textsuperscript{111} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} See id.
\textsuperscript{118} See Dr. Louise Mallinder, supra note 9.
\textsuperscript{119} Id.
independence movement, Frente Revolucionária do Timor-Leste Independente (FRETILIN).\textsuperscript{120} During the occupation, there was less violence though the rebellion continued.\textsuperscript{121}

However, in January 1999, widespread violence re-ensued as pro-Indonesian militia, supported by Indonesian armed forces, attempted to coerce Timorese through violence and intimidation to support Indonesian rule in an UN-organized referendum.\textsuperscript{122} In response to the failed attempt and the referendum resulting in favor of independence, the pro-Indonesian militias and the Indonesian armed forces committed mass atrocities.\textsuperscript{123} The backlash by the militia and armed forces included murder, torture, assault, rape, arson, looting, and plunder.\textsuperscript{124} Thousands of individuals were killed while thousands more were displaced.\textsuperscript{125}

In September 1999, the UN Security Council authorized the Australian-led International Force for East Timor to intervene and subsequently issued a resolution that established the UN Transitional Administration in East Timor (UNTAET).\textsuperscript{126} UNTAET established panels within the District Court of Dili with exclusive jurisdiction over serious crimes, such as genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture. In addition, the Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste (CAVR) was established to investigate atrocities, promote reconciliation and reintegrate persons accused of having committed less serious crimes between April 25, 1974 and October 25, 1999.\textsuperscript{127} Perpetrators of serious crimes faced prosecution while those of less serious offenses were permitted to apply to the truth commission for a Community Reconciliation Process (CPR) to obtain immunity from prosecution.\textsuperscript{128} Once a perpetrator completed the CPR, he or she was granted immunity from criminal or civil liability for his or her acts.\textsuperscript{129}

A joint Timorese-Indonesian commission, the Commission of Truth and Friendship (CTF), was created in March 2005 with the aim to investigate the violence surrounding the referendum, but not

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
to seek retribution.\textsuperscript{130} It was granted authority to recommend amnesty for those responsible for serious human rights violations that would provide assistance in establishing the truth through admission of their role in the acts.\textsuperscript{131} However, the CTF was ineffective and unsuccessful in persuading perpetrators to come forward.\textsuperscript{132} It issued its report to the presidents of Indonesia and Timor-Leste on July 15, 2008 in which it attributed responsibility to the government and state forces in Indonesia and pro-independence militias in Timor to which both governments issued a joint statement of apology.\textsuperscript{133}

Amnesties in Asia tend to illustrate States’ desires to move beyond the mass atrocities of the past as opposed to seeking truth, prosecuting perpetrators, or offering much in the form of reparations to victims. Despite the concern that amnesty for serious human rights violations perpetuates impunity, suggestions to exclude these perpetrators have been largely ignored. Impunity persists as many of these countries in the region seek to reduce conflict by granting amnesties even to perpetrators of mass atrocities.

V. Contributions of the “Arab Spring” to the Role of Transitional Justice and Amnesty Laws

a. The Transitional Justice Process in Tunisia

\textit{Overview: Ben Ali’s Regime}

Before late 2010 and before the “Arab Spring” began in Tunisia, the country had faced years of oppression under former President Zine el-Abadine Ben Ali. Despite promises of democracy and respect for human rights, there was no leeway to enforce these rights or any type of political freedom or freedom of speech. During Ben Ali’s rule, freedom of expression and assembly were under very strict scrutiny.\textsuperscript{134} Trade and students’ unions, human rights defenders, civil society actors, journalists and political activists were harassed, intimidated, detained, and subject to torture, cruel,

\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
inhuman and degrading treatment.\textsuperscript{135} Despite achieving economic growth, many Tunisians did not benefit from the country’s prosperity while social and economic disparities increased.\textsuperscript{136} To maintain a monopoly on political and economic life, authorities systematically denied Tunisians their economic and social rights as well as their civil and political rights.\textsuperscript{137}

On December 16\textsuperscript{th}, grocery vendor Mohammed Bouizizi, provider for an eight-person family, was arrested and authorities confiscated his produce cart. The following day served as a landmark in Tunisia as he set himself on fire after being ignored by the Tunisian authorities when complaining about police brutality.\textsuperscript{138} After his death was announced on January 4, 2011, over 5,000 protesters engaged in a peaceful demonstration to demand better living conditions and a halt to police brutality and corruption.\textsuperscript{139} However, the brutal and violent response of security forces resulted in numerous clashes between security forces and demonstrators resulting in loss of lives and gross human rights violations.\textsuperscript{140} During the protests, the army exercised a vital function in protecting the demonstrators.\textsuperscript{141} After weeks of demonstrations, Ben Ali resigned and fled to Saudi Arabia.\textsuperscript{142}

\textit{Transitional Justice begins}

Prime Minister Mohammed Ghannouchi was appointed to take over when president Ben Ali fled the country. During his time in office he set up three truth commissions to pursue transitional justice.\textsuperscript{143} However, protests continued, calling for the removal of those officials who were part of Ben Ali’s regime.\textsuperscript{144} The Prime Minister then resigned in February of 2011 and Beji Caid-Essebsi was elected by the interim president to take his place.\textsuperscript{145}

\textsuperscript{135} \textit{Id.}  
\textsuperscript{136} \textit{Id.}  
\textsuperscript{137} \textit{Id. at para 16.}  
\textsuperscript{139} See \textit{id}.  
\textsuperscript{140} See \textit{Report to the OHCHR Assessment Mission to Tunisia}, supra note 134, para. 17.  
\textsuperscript{141} \textit{Id. at para. 18}  
\textsuperscript{142} BCC news, \textit{Tunisia Profile}, available at: \url{http://www.bbc.co.uk/news/world-africa-14107241} (Last visited August 3 2012)  
\textsuperscript{144} See \textit{Report to the OHCHR Assessment Mission to Tunisia}, supra note 134, para. 19.  
\textsuperscript{145} See Kim Willsher, supra note 143.
In the first months of 2011, the Office of the High Commissioner of Human Rights (OHCHR) Assessment Mission found that there were high expectations among Tunisians who hoped that government institutions would transform considerably and fully respect human rights, starting with the interim period.\footnote{See Report of the OHCHR Assessment Mission, supra note 134, para. 21.} In response to public demand, the transitional government made a number of positive decisions with an impact on the enjoyment of human rights, including recognizing all political parties; establishing a commission on political reform and two fact-finding commissions on human rights abuses since December 17, 2010 and on corruption; replacing senior security officials; providing a symbolic one-off payment to victims of the latest events and their families as a gesture of good will.\footnote{See id., para. 23.} Additionally, on February 21 2011, the interim government issued an international arrest warrant seeking the extradition of Ben Ali and family members from Saudi Arabia.\footnote{Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, A/HRC/19/61/Add.1, para. 72.} In September, charges were filed against Ben Ali and other high officials.\footnote{See Human Rights Watch, World Report 2012: Tunisia, January 2012, http://www.hrw.org/world-report-2012/world-report-2012-tunisia (Last visited July, 27 2012).}

The first interim government established a national commission to investigate abuses committed during the protests.\footnote{See id.} The commission identified 240 civilians killed during the uprising in towns and cities around the country, most of them by police gunfire.\footnote{Id.} In addition, it found that 1,464 were injured in the month-long protests while hundreds of inmates perished in prison riots and fires between January 13-16, 2011.\footnote{Id.} The following month, the government promulgated a decree law on the reparation for the victims of the uprising that provides for a monthly allocation, free access to public medical care and free public transport for them and/or their families.\footnote{Id.}

Despite these positive steps, for the successful completion of transitional justice, this will not suffice. Reparations should also be offered to the victims that suffered 23 years of human rights abuses under Ben Ali’s regime. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, recommended that Tunisia ensure adequate legal aid for victims of torture or ill-treatment to enable them to bring complaints and make claims for redress.

\footnotesize{\begin{itemize}
  \item \footnote{See Report of the OHCHR Assessment Mission, supra note 134, para. 21.}
  \item \footnote{See id., para. 23.}
  \item \footnote{Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, A/HRC/19/61/Add.1, para. 72.}
  \item \footnote{See id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
\end{itemize}}
Additionally, he suggested that Tunisia make all evidence concerning acts of torture or ill-treatment available to the victims upon request.\(^{154}\)

**General Amnesty as a form of reparation**

On February 19, 2011, Tunisia’s transitional government adopted a decree law on general amnesty. The decree stipulates that all persons tried or prosecuted before January 14, 2011 by various-degree courts and for different crimes could benefit from the amnesty.\(^{155}\) The crimes in question concerned the interior state security whose files had been submitted to justice by virtue of the law on terrorism, the press code, law on demonstrations, the telecommunications code or other provisions of the Civil Procedure Code and other codes, notably that of military procedure.\(^{156}\) The opposition and human rights groups have long complained that Tunisia's anti-terrorism laws were far too broad, targeting anyone with a strict interpretation of Islam.\(^{157}\) The decree law also provides that all persons prosecuted for common law crimes, in view of their political or union activities, could benefit from this amnesty and that the decree law institutes work reintegration mechanisms and compensation for persons concerned by the general amnesty.\(^{158}\) The secretary highlighted that, “the decree law puts an end to a period of abuse and violations, opens up a new era of reconciliation and provides the objective conditions of this transitional period and preparation for elections under the best conditions possible.”\(^{159}\)

Amnesty laws, which are extended after gross human rights violations, crimes against humanity, extreme violence or civil war applied to individuals who have not yet been prosecuted and sentenced, were not part of the transitional justice process in Tunisia. The general amnesty that was extended to prisoners appears to be a form of restitution for victims that have been under a dictatorship - where they could not exercise their rights to freedom of speech, expression and

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\(^{154}\) See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, para. 100(d), note 148.


\(^{156}\) *Id.*


\(^{159}\) *Id.*
association - rather than a form of elimination of responsibility for those responsible for gross human rights violations. This type of amnesty positively contributes to transitional justice in the sense that it tries to bring justice to those who were convicted under a dictatorship for exercising their human rights. The general amnesty advances the way amnesties are viewed and adds a different dimension to amnesty laws as we know them.

Ben Ali and his regime used laws to violate human rights and suppress democracy. In particular, the laws punished citizens for expressing views critical of the government and for addressing other subjects deemed improper for public debate, with provisions that criminalized “insulting” or “defaming” public officials, harming state interests or public morals, or encouraging others to violate the law. The laws also limited the ability of Tunisians to express and access dissenting viewpoints, form independent associations or political parties, compete meaningfully for political office, and assemble to protest against the government and its policies. Proceedings in Tunisia took place before a judiciary system that was not independent but rather politically driven and, in practice, judging within a framework of repressive laws. As part of the transitional justice process, the general amnesty, in essence, revoked verdicts that were executed by a partial judiciary without due process.

Elections in Tunisia

Before the elections for a new government, Tunisia’s interim government adopted laws to oversee the election of a constituent assembly. A National Constituent Assembly (NCA) was elected on October 23, 2011, following democratic, free and transparent elections witnessed by international observers. Ben Ali’s party was disbanded and members were banned from participating in the elections. According to the Secretary-General of the independent commission that organized the vote, more than 90 percent voted out of the 4.1 million people registered. The High Independent

161 Id.
162 Id.
163 National Report, supra note 155.
Authority supervised the elections.\textsuperscript{166} The drafting of a new Constitution was entrusted to the Constituent Assembly while Tunisia’s 1959 constitution was suspended.\textsuperscript{167} The members of the NCA elected the President of the Republic, who appointed a prime minister tasked with forming a government made up of persons belonging to parties obtaining a majority in the elections for the NCA, in addition to a number of independents.\textsuperscript{168}

\textit{Accountability for past abuses}

One of the most important steps in transitional justice is the accountability for past crimes and human rights abuses. According to the interim government the human rights violations that took place in Tunisia resulted in at least 300 deaths and 700 wounded.\textsuperscript{169} Together, with his wife, on June 20, 2011, Ben Ali was sentenced to 35 years in prison \textit{in absentia} after a one-day trial on corruption charges.\textsuperscript{170} On 35 counts for murder and torture, Ben Ali and his inner circle were referred to a Tunisian military court.\textsuperscript{171} Ben Ali was also sentenced to over 15 years in prison on charges related to the alleged discovery of weapons, archaeological artifacts and illegal drugs.\textsuperscript{172} A Tunisian military court also sentenced Ben Ali \textit{in absentia} for his role in a 1991 case in which 17 servicemen were accused of plotting a coup against his regime.\textsuperscript{173} The trial of Ben Ali and others for killing protesters during Tunisia’s uprising took place before the Le Kef Military Tribunal and concluded on June 13, 2012. The former president was sentenced to life in prison in connection with the killings of 23 demonstrators by police officers during the revolt that sparked the Arab Spring.\textsuperscript{174}

\begin{footnotes}
\item[166] Id.
\item[170] Id.
\end{footnotes}
Tunisian law does not recognize the principle of “command responsibility”,\textsuperscript{175} which was established by the Hague Conventions IV and X of 1907, for the attribution responsibility for war crimes. Under customary international law, the doctrine of superior responsibility requires: 1) a relationship of superior-subordinate, linking the accused and those who committed the underlying offenses at the time of the commission of the crime; 2) the knowledge on the part of the superior that his subordinates have committed or taken a culpable part in the commission of a crime or are about to do so; and 3) a failure on the part of the superior to take necessary and reasonable measures to prevent or to punish those crimes. This doctrine governs the responsibility of superiors for acts committed by those under their command.\textsuperscript{176} In the case of Nicaragua v. the United States,\textsuperscript{177} the International Court of Justice established the “effective control test”, which allows for attribution of responsibility to those under whose commands crimes have been committed.\textsuperscript{178}

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Juan E. Méndez conducted a visit to Tunisia from May 15-22, 2011, at the invitation of the interim government. The purpose of the mission was to look into the violations committed during the Ben Ali regime to assess the abuses committed during and after the revolution (the period of December 17, 2010–May 2011) and identify measures needed to prevent torture and ill-treatment in the future.\textsuperscript{179} The Special Rapporteur expected Tunisia to investigate, prosecute and punish the cases of torture that happened under the Ben Ali regime, including the prosecution of the highest authorities if the evidence warrants it, but he also emphasized that such prosecutions and trials must meet high standards of fairness.\textsuperscript{180} He furthermore insisted that the trial of Ben Ali and of all those connected to the crimes of his dictatorship be in compliance with internationally recognized fair trial


\textsuperscript{177} ICJ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986.

\textsuperscript{178} Id. at paras. 105–115.

\textsuperscript{179} Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, note 148.

\textsuperscript{180} Id. at para. 73.
The fact that the trial took place *in absentia* before a military tribunal complicates matters with regard to international human rights standards. Though trials *in absentia* are not prohibited by international law, it can put into question the right to fair trial. On the basis of Article 10 of the Universal Declaration of Human Rights, everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) also provides that, “[e]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The aim of the right to a fair trial is to ensure the proper administration of justice. Tunisia ratified the ICCPR on March 18, 1969 and thus is bound by its obligations.

Another issue is that the proceedings took place before a military tribunal. There is controversy with regard to the prosecution of civilians before a military tribunal because military tribunals are not considered to be independent and impartial. The trials that took place were criticized for being unorganized and lacking a clear strategy.182 There was no amnesty granted to relieve President Ben Ali from being held accountable for human rights violations that occurred during his 23-year reign. However, the fact that he did not face the charges in person for the human rights abuses does not significantly contribute to the accountability phase of transitional justice. A quick trial that convicts the perpetrator of human rights abuses may seem appealing to the public opinion of those who were under oppression in Tunisia, but a trial with error and not in line with the international standards of fair trial and due process does not contribute to the successful completion of transitional justice.

**What’s next for Tunisia?**

The consolidation of human rights protection in the post-Ben Ali era was hampered by the police resorting to excessive force against continuing protests, delays in adopting decisive reforms toward a more independent judiciary, and challenges to freedom of expression that the interim government did not properly address.183 Notwithstanding the complications following the revolution in Tunisia, reforms have taken place on national and international levels. More than 106 political parties were

181 Id. at para. 74.
legalized in the wake of the uprising and changes were made with regard to Freedom of Expression, Press, and Association through adoption of a new press code and decree laws on political parties and associations.

As part of the transformation process on the international level, Tunisia ratified numerous international conventions, including the Convention on the Rights of Persons with Disabilities and its Optional Protocol; The International Convention for the Protection of All Persons from Enforced Disappearance; The Optional Protocol to the International Covenant on Civil and Political Rights; and The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Tunisia also lifted its reservations to the Convention on the Elimination of All Forms of Discrimination against Women\textsuperscript{184} and ratified the Optional Protocol to the Convention on All Forms of Discrimination against Women. It became the first North African country to ratify the Rome Statute becoming a member of the International Criminal Court (ICC). By ratifying the Rome Statute, Tunisia has set an example for other North African countries. Also by becoming a state party to the Rome Statute, Tunisia contributes to the protection of human rights in the sense that the ICC exercises complementary jurisdiction over persons for the most serious crimes of international concern (Article 1 Rome Statute), including the crime of genocide and crimes against humanity (Article 5 Rome Statute). If a State is unwilling or unable to investigate or prosecute a case, the ICC may assert jurisdiction. With the ratification of the Rome Statute, Tunisia has a framework for its criminal justice system.

The reforms on the international level following the revolution and transition of government show positive progress towards the protection of human rights. But, it does not end there. Tunisia must adjust its domestic system accordingly so it can meet the international standards it has recognized. Transitional justice does not solely entail changes in the letter of the law, but also includes executing the changes that are now in effect through the law, so that in practice, civil and human rights do not remain void of purpose. Transitional justice is an unavoidable process that seeks to uncover the truth about the abuses that have taken place, identify those responsible, bring the guilty to account and make reparation to victims. Additionally, it is a means to provide guarantees that such abuses

\textsuperscript{184} The government maintained “a general declaration” suggesting that it might not implement reforms that conflict with Islam.
will not be repeated by means of a set of institutional and legal reforms aimed at building a state of law and institutions. There is also a role for civil society to contribute to the reform.

The above-mentioned changes that have taken place in Tunisia contribute positively to the way we view transitional justice and amnesty laws. However, time will tell how effective these changes are and to what extent Tunisia will comply with the rule of law and the international obligations it has now accepted. Early on in the transitional justice process, Tunisia has taken steps towards the promotion and protection of human rights. By allowing UN human rights bodies to visit the country while it was yet in such a fragile state, Tunisia contributed transparency to the transitional justice process.

b. The Transitional Justice process in Egypt

Overview: The Mubarak Regime to Present

Muhammad Hosni Sayyid Mubarak was promoted to the presidency in 1981 after the then-President Anwar Sadat was assassinated by Islamist militants. During his entire 30-year term in office, the country was under emergency law, which the government deemed necessary to combat Islamist terrorism. During this time, Egypt saw a period of domestic stability and economic development. However, the state also had sweeping powers to make arrests, particularly of political dissidents, basic freedoms were severely curbed, and corruption significantly increased. When Mubarak and his National Democratic Party finally opened the elections to rivals in 2005, with heavy persuasion from the U.S., there were allegations of suppression of opposition groups.

A couple of days after the resignation of President Zine el-Abidine Ben Ali in Tunisia, demonstrators in Egypt began to call for Mubarak’s resignation. Later, on January 25, 2011,

185 See National Report, supra note 157.
187 See id.
188 Id.
190 Id.
thousands of protesters, organized largely through a Facebook group, participated in a “day of rage”
demanding Mubarak’s resignation and marched to Tahrir Square in Cairo to set up a protest camp.\(^{192}\)

In the wake of the demonstrations, on February 1, 2011, Mubarak announced that he would not
seek reelection in the upcoming presidential elections.\(^{193}\) However, protests and demonstrations
continued as many were not satisfied with Mubarak’s response and demanded an immediate
resignation.\(^{194}\)

On February 2, 2011, pro-Mubarak demonstrators led a raid on Tahrir Square which injured and
killed several demonstrators.\(^{195}\) Finally, on February 11, 2011, after weeks of protests and numerous
injuries and deaths due to the violent clashes between pro-Mubarak and anti-Mubarak
demonstrators, Vice President Omar Suleiman announced Mubarak’s resignation.\(^{196}\) In his
resignation, Mubarak handed authority to the Supreme Council of the Armed Forces (SCAF),
Egypt’s military.\(^{197}\) On February 13, 2011, SCAF dismissed the Parliament, placed the Constitution
on hold, and promised to give power to civilian authorities within six months.\(^{198}\)

**Commissions of Inquiry**

Two national commissions of inquiry were established to help ensure accountability for serious
human rights violations committed during the period of unrest. One was established by the Mubarak
government while the other was established under the auspices of the National Council for Human
Rights (NCHR) and the Arab Organization for Human Rights (AOHR).\(^{199}\) The national commission
of inquiry formed by the NCHR and the AOHR released its findings and recommendations on
March 23, 2011. It concluded that the Ministry of Interior, the National Democratic Party (NDP),
and state media were responsible for the different forms of violence used against protesters during
the period of unrest.\(^{200}\) Additionally, human rights organizations reported numerous human rights

\(^{192}\) See *id*.


\(^{194}\) *Id*.

\(^{195}\) *Id*.

\(^{196}\) *Id*.

\(^{197}\) *Id*.

\(^{198}\) See *OHCHR Egypt Report*, supra note 189.

\(^{199}\) See *id* at p. 9.

\(^{200}\) *Id*. 
abuses, including arbitrary detention, torture, other forms of cruel and inhuman treatment, and military trials for civilians during the period of unrest and even after Mubarak’s resignation.201

The other commission, established by the former government, released its report on April 19, 2011. It reported that approximately 846 people were killed since the beginning of the protests in January.202 It further documented cases of serious human rights violations, including reliance on snipers from the counterterrorism unit of the state security, the use of police vehicles to run over protesters, and the hiring of “thugs” by the NDP to attack peaceful demonstrators, particularly during the February 2nd protest at Tahrir Square.203

The Office of the High Commissioner of Human Rights (OHCHR) also reported in its Mission to Egypt Report that the “system of administrative detention and the emergency powers in place [during the Mubarak regime] led to serious human rights violations, including arbitrary detentions, disappearances, torture, and ill-treatment.”204 Further, several NGOs reported that this type of treatment continued after SCAF took power with demonstrators expressing their disapproval of the military council ruling Egypt.205 Many of these NGOs expressed serious concerns about the human rights situation in Egypt even after Mubarak’s departure.

Elections in Egypt

The Muslim Brotherhood, the Islamist group that was the primary opposition to Mubarak’s rule, won nearly half of the seats in Parliament in the January 2012 elections.206 In March, despite having earlier stated that it would not seek the presidency, it announced Mohamed Morsi as the candidate to represent its newly formed Freedom and Justice Party (FJP).207 In the first round of votes for the president in May 2012, Morsi and Ahmed Shafik, who had been the last prime minister under Mubarak, were declared as the winners.208 A runoff election was to be held in mid-June to determine the final outcome for presidency. After a delay in the announcement of the outcome of the runoff

201 Id.
202 Id.
203 Id.
204 Id. at p. 10.
205 Id.
207 Id.
208 Id.
On June 24, 2012, in the election, Morsi was declared the newly elected president with 51.7% of the votes to Shafik’s 48.3%.

Days before the presidential runoff, the military council dissolved Parliament after the court ruled that the law under which it was elected was partly unconstitutional. The military then assumed legislative powers and limited the authority of the president. Generals issued a charter that gave them control of all laws and the national budget, immunity from oversight and the power to veto a declaration of war. They also took control of the process of writing a permanent constitution.

Mohamed Morsi was sworn in on June 30, 2012 and on July 8th, ordered the return of Parliament until a new one could be elected, which will be held 60 days after a new constitution is approved. However, the constitutional court, which was still made up of Mubarak-era judges, upheld the decision that Parliament should be dissolved. Despite this decision, legislators held a brief session of the dissolved Parliament on July 10th to approve a proposal to refer the matter of the dissolution to the Court of Cassation, a high appeals court. Though Morsi’s election was initially met with enthusiasm and hope for a real change in Egypt, the continued military control and Morsi’s appointment of predominantly Muslim Brotherhood members indicating a lack of inclusion has dimmed expectations of sweeping change.

Amnesty Laws

The Constitutional and Legislative Affairs Committee approved a proposed bill that would grant amnesty to persons suspected or convicted of political charges under the Mubarak regime. The blanket amnesty bill would pardon those convicted between October 6, 1981, when Anwar Sadat...
was assassinated, and February 11, 2011, when Mubarak resigned.\textsuperscript{218} The proposed bill would also apply to those who are awaiting trial or have been accused of aiding or covering up political crimes.\textsuperscript{219} If it were approved by Parliament and the Executive Branch, persons sentenced in absentia, serving prison sentences, or presently detained pending investigations would be eligible for release within 30 days of the announcement.\textsuperscript{220}

The law has been criticized as a “form of political opportunism,” particularly in regards to freeing members of the Muslim Brotherhood who may be “imprisoned for legally just reasons.”\textsuperscript{221} However, many have argued, especially Islamist groups, that dozens of people participating in political activities were detained and convicted by Mubarak officials without a fair trial.\textsuperscript{222} Since the dissolution of Parliament, this amnesty bill has remained as a draft law.

\textit{What’s Next for Egypt?}

Although there has not been an implementation of a formal amnesty law in Egypt, impunity persists particularly concerning human rights violations by the military council. As noted by Amnesty International and Human Rights Watch, victims of prolonged arbitrary treatment, torture, and ill-treatment under Mubarak’s 30-year rule and SCAF’s 16-month rule have yet to see “any semblance of justice, truth, or reparation.”\textsuperscript{223}

Though Mubarak was sentenced to life in prison for ordering the killings of demonstrators, many other actors involved in committing serious human rights violations have not been investigated or prosecuted.\textsuperscript{224} As noted by Amnesty International, police and other members of the security forces charged with or implicated in the killings or wounding of protesters remain in their positions or were transferred to administrative positions with the Ministry of Interior.\textsuperscript{225} Further, it has been reported

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\textsuperscript{218} Id.  
\textsuperscript{219} Id.  
\textsuperscript{220} Id.  
\textsuperscript{221} Id.  
\textsuperscript{222} Id.  
\textsuperscript{224} See \textit{id}.  
\textsuperscript{225} Id.  

that many tried to pressure families and witnesses to withdraw complaints against them.\textsuperscript{226} Essentially, members of the military and police committed serious human rights abuses with impunity.

Allegations of torture and other ill-treatment of detainees persist against police and armed forces, including the death of detainees under suspicious circumstances.\textsuperscript{227} While some of the allegations against the police were investigated, none against the armed forces were adequately investigated or prosecuted.\textsuperscript{228} Human Rights Watch has noted that the “independence necessary to investigate and prosecute military abuses generally does not exist when military authorities investigate human rights violations by military personnel and prosecute them in military courts.”\textsuperscript{229} This has resulted in impunity as many members of the military have been acquitted of any charges related to serious human rights violations.

While the military still has essential control of the state, including the power to arrest, detain, and try civilians, human rights abuses and impunity will persist. Additionally, the rule of law cannot be firmly established. To uphold its international obligations, independent and impartial investigations must be made into allegations of human rights abuses whether committed under the Mubarak regime or since SCAF has controlled Egypt.

President Morsi has been called on to pardon all civilians who have been convicted and sentenced by military courts, including by Human Rights Watch, the Islamic group Jama’a al-Islamiya, and the committee that the president established to review civilian cases tried by the military courts.\textsuperscript{230} According to Human Rights Watch, military courts tried over 12,000 civilians and convicted at least 9,000, including political activists and others for ordinary criminal activity.\textsuperscript{231} Further, at least 54 children had been detained and interrogated by military prosecutors since March 2011, with sentencing of children for up to 15 years.\textsuperscript{232}

\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} See Military Impunity, supra note 223.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
Human Rights Watch has recommended that the Code of Military Justice be amended to limit military trials to military personnel as well as explicitly state that the public prosecutor investigate complaints regarding abuse of civilians by the military.²³³ Additionally, Human Rights Watch has recommended that the Code should allow members of the military to be tried before civilian courts for abuse and ill-treatment.²³⁴ This is to ensure impartial and independent trials and full accountability for serious human rights abuses committed by the military.²³⁵

Though President Morsi seems to be making some strides to establish the rule of law and uphold human rights obligations, he has not been effective in regaining control of the state from the military. The military continues to commit human rights abuses with impunity. Even without a formal amnesty law, it is as if a blanket amnesty was implemented granting immunity to military personnel that committed serious human rights violations during and subsequent to the Mubarak regime. Impunity by the military has and will continue to lead to demonstrations in Egypt, continued violations of human rights, and conflict between the military and the civilian population. This negates the purpose of the uprising and the ousting of Mubarak as the same type of struggles that persisted under the Mubarak regime continue.

c. The Transitional Justice Process in Libya

Overview-The Qaddafi Regime to Present

Muammar Abu Minyar al-Qaddafi came to power in 1969 after staging a coup d’etat that overthrew King Idris of Libya.²³⁶ Qaddafi established the Libyan Arab Jamahiriya, abolishing the monarchy, and became the de facto head of state until February 2011.²³⁷ In a country that possessed significant oil reserves, after gaining power, he made sure to renegotiate the contracts with foreign petroleum countries to ensure that Libya received a majority share of the revenues from its oil production.²³⁸ Though a “revolutionary hero” by many accounts, Qaddafi’s regime was characterized by

²³³ id.
²³⁴ id.
²³⁵ id.
²³⁷ See id.
oppression and authoritarian rule, including imprisonment, forced disappearances, torture, and even death for those who opposed or criticized the regime.\textsuperscript{239}

In February 2011, a few months after Tunisian president Zine el-Abidine Ben Ali and a few days after Egyptian president Hosni Mubarak resigned, Libyan dissidents organized and participated in a “day of revolt” to express their disapproval of Qaddafi and his regime.\textsuperscript{240} In response to the demonstrations, Qaddafi deployed troops and mercenaries with orders to suppress the dissidents and clear the streets of demonstrators.\textsuperscript{241} Soon thereafter, it was reported that protesters were being targeted by helicopter gunships and missiles.\textsuperscript{242} Further, internet access was cut off as coordination of the protests was largely through use of social media.\textsuperscript{243} Qaddafi later delivered a speech stating that he would not leave Libya and vowed to die a martyr as opposed to stepping down and giving up his power.\textsuperscript{244} In the following months, a brutal civil war ensued between dissidents of the Qaddafí regime and pro-Qaddafí forces.

On February 27, 2011, the formation of the National Transitional Council (NTC) was announced as the “only legitimate body representing the people of Libya and the Libyan state.”\textsuperscript{245} Former Minister of Justice, Mustafa Abdul Jalil, serves as the chairman after quitting the government, citing the excessive violence against protesters as the sole responsibility of Qaddafí.\textsuperscript{246} Then, a month after the initial day of protest in Libya, the UN Security Council votes in favor of Resolution 1973 that contains a no-fly zone in Libyan air space to disable Qaddafí’s air-force used to indiscriminately bomb cities and residential areas suspected of harboring rebels.\textsuperscript{247} In spite of the no-fly zone, Qaddafí’s forces continued to attack dissidents and civilians. Between March and October 2011,

\textsuperscript{239} See id.
\textsuperscript{240} See Timeline for the Major Events of the Arab Spring, NPR, \url{http://www.npr.org/2012/01/02/144489844/timeline-the-major-events-of-the-arab-spring}; See also Timeline Arab Spring, \url{http://www.pcr.uu.se/digitalAssets/87/87711_chronologic_timeline_arabian_spring.pdf}.
\textsuperscript{241} See The Muammar Gaddafi Story, supra note 238.
\textsuperscript{242} See Arab Spring Timeline, supra note 240.
\textsuperscript{243} Id.
\textsuperscript{245} Introducing the Council, The Libyan Interim National Council, \url{http://www.ntclibya.org/english/about/}.
\textsuperscript{246} See Libya Crisis: Profile of NTC Chair Mustafa Abdul Jalil, BBC News Africa, 22 August 2011, \url{http://www.bbc.co.uk/news/world-africa-14613679}.
North Atlantic Treaty Organization (NATO) aircrafts performed air-raids, bombing a residential area in Tripoli, Libya and later communication centers, command centers used by Qaddafi to coordinate his armed forces, and other military targets. Ultimately, on October 23, 2011, the NTC declared liberation from Qaddafi’s 42-year rule after the suspicious death of Qaddafi.

International Commission of Inquiry on Libya
On February 25, 2011, the Human Rights Council established the International Commission of Inquiry on Libya (the Commission) in an emergency session. The mandate of the Commission was “to investigate all alleged violations of international human rights law in Libya, to establish the facts and circumstances of such violations and of the crimes perpetrated and, where possible, to identify those responsible, to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable.” The Commission first submitted a report on June 15, 2011 but because of the ongoing conflict and allegations of abuse, the Human Rights Council extended the Commission’s mandate to March 2012.

In its March 2012 report, the Commission concluded that international crimes, specifically crimes against humanity and war crimes, were committed by Qaddafi forces in Libya. The Commission found that Qaddafi forces engaged in an excessive use of force, particularly in the early days of the protests, leading to significant deaths and injuries which indicated an intention to kill. Violations included acts of murder, enforced disappearances, and torture “within the context of a widespread or systematic attack against the civilian population” as well as unlawful killings, individual acts of torture and ill-treatment, attacks on civilians, and rape.

The Commission also found and concluded that the thuwar, anti-Qaddafi forces, committed serious violations, including war crimes, crimes against humanity given the widespread and systematic nature, and breaches of international human rights law. Violations included unlawful killings,

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248 See Arab Spring Timeline, supra note 240.
249 Id.
251 See id.
252 Id.
253 Id.
254 Id.
arbitrary arrest, torture, enforced disappearances, indiscriminate attacks, and pillage.\textsuperscript{255} The Commission found that the thuwar specifically targeted the Tawergha and other communities that they believed to be Qaddafi loyalists.\textsuperscript{256}

The Commission noted the deficiency of accountability mechanisms in Libya, mainly due to Qaddafi’s rule.\textsuperscript{257} It also noted that the Criminal Code does not adequately define international crimes and provides a statutory limitation of ten years for crimes.\textsuperscript{258} Though a 1998 law repealed the statutory limitation provision, it does not have retroactive application.\textsuperscript{259} Thus, under the laws in place at the time, those responsible for human rights violations prior to 1998, during the 42-year Qaddafi rule, can no longer be prosecuted.

\textit{Amnesty Laws}

In December 2011, the National Transitional Council (NTC) established the National Council for Civil Liberties and Human Rights with the authority to receive complaints on violations of human rights and to file cases in court.\textsuperscript{260} Subsequently, the NTC adopted a Transitional Justice Law, which created a National Fact-Finding and Reconciliation Commission.\textsuperscript{261} The purpose of the Fact-Finding Commission is to investigate incidents of human rights violations committed over the past 42 years.\textsuperscript{262} The law also established a victims’ compensation fund.\textsuperscript{263}

However, on May 2, 2012, the NTC passed an amnesty law that grants a blanket amnesty to those who committed crimes if their actions were aimed at “promoting or protecting the revolution” against Qaddafi.\textsuperscript{264} The new law, Law 38, On Some Procedures for the Transitional Period, states that there shall be no penalty for “military, security, or civil actions dictated by the February 17 Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution.”\textsuperscript{265} Law 35, On Granting Amnesty for Some Crimes does exclude certain crimes from

\begin{footnotesize}
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\item \textsuperscript{255} Id.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} Id.
\item \textsuperscript{262} Id.
\item \textsuperscript{263} Id.
\item \textsuperscript{265} Id.
\end{itemize}
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the amnesty, such as torture and rape, but it fails to explicitly exclude other serious crimes that may amount to war crimes or crimes against humanity, such as murder and forced displacement.\textsuperscript{266} In essence, these laws protect and grant immunity to those who fought against the Qaddafi regime but not Qaddafi supporters.

Human Rights Watch and Amnesty International have also reported that mass atrocities and human rights violations were committed by both pro-Qaddafi forces and Qaddafi dissidents during the months that the dissidents sought to overtake Tripoli and oust Qaddafi.\textsuperscript{267} Because of the documented abuses committed by both parties, Human Rights Watch has expressed its concern over an amnesty law granting immunity to some who have committed serious and inexcusable human rights violations. Prior to the passage of this amnesty law, the Commission of Inquiry also expressed its concern that allegations of violations were not treated on an equal basis.\textsuperscript{268} Further, it noted that “[f]ailure to apply criminal law to crimes committed by thuwar during and after the end of the conflict creates a climate of impunity.”\textsuperscript{269}

Blanket amnesties that grant immunity for serious international crimes, including war crimes, crimes against humanity, and torture, have been consistently opposed as contrary to international law. As a State-party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Convention against Torture, Libya has a duty to investigate and prosecute serious violations of human rights regardless of the perpetrator’s aim or purpose.\textsuperscript{270} Joe Stork, deputy Middle East and North Africa director at Human Rights Watch, expressed that “[s]hielding people from justice will encourage future abuse and hinder national reconciliation.”\textsuperscript{271} Human Rights Watch has called on the NTC to amend Law 38 so that all responsible for serious

\textsuperscript{266} Id.


\textsuperscript{269} Id.


international crimes such as murder, torture, sexual violence, and forced displacement are not granted immunity.  

Elections in Libya

The NTC organized and supervised democratic elections for a 200-member General National Assembly. This assembly which will replace the NTC is tasked to choose a prime minister, appoint a transitional government, draft a constitution, and organize the 2013 elections. The elections for the national assembly were held in July 2012 with a reported turnout of approximately 60% of registered voters. Eighty of the 200 seats were reserved for party candidates while the remaining seats are for independent candidates who have yet to declare their allegiance.

In contrast to elections in other Arab Spring countries, voters in Libya chose a more liberal coalition as opposed to Islamist parties as in Egypt and Tunisia. The National Forces Alliance, a coalition of 58 political parties and led by former prime minister of the NTC Mahmoud Jibril, campaigned as a “more liberal, progressive option.” The National Forces Alliance won 39 out of the 80 seats reserved for party candidates. The Muslim Brotherhood, which succeeded in winning elections in other neighboring Arab Spring countries, won 17 of the 80 seats. However, the overall orientation of the assembly is yet unclear at this point since the remaining 120 seats will be filled with independent candidates, though it has been speculated that members of the Muslim Brotherhood’s Justice and Construction Party will fill many of those seats. The organization of the assembly gives an opportunity for all political ideologies to form part of the reestablishment of a new government, as noted by Mahmoud Jibril.

What’s Next for Libya?

International and regional bodies have consistently held that blanket amnesties are against

272 Id.


274 Id.

275 Id.


277 See Libya Election Success, supra note 273.

278 Id.

279 See Call for Unity, supra note 276.
international customary law and perpetuate impunity. As has been demonstrated by other countries undergoing similar transitions, there are three primary focuses of the transition: institutional reform, truth-telling, and prosecution. Many countries emphasize one or two at the expense of the others depending on what seems to be the biggest concern for that particular country, i.e. ensuring that past atrocities are brought to light and that mechanisms are in place to prevent similar occurrences in the future as opposed to ensuring that perpetrators are brought to justice.

Based on the amnesty law enacted by the National Transitional Council, it would seem as if Libya is more concerned with institutional reform and truth-telling as opposed to prosecution of all offenders. It has in place a commission to investigate human rights abuses (the National Fact-Finding and Reconciliation Commission) and a mechanism to receive complaints of abuses through the National Council for Civil Liberties and Human Rights. However, through the enactment of Law 38, it has demonstrated that it is more concerned with ensuring that pro-Qaddafi forces are prosecuted as opposed to all that have committed serious human rights violations.

The International Commission of Inquiry on Libya noted in its report that detainees have been unable to challenge their detention or complain of torture against thuwar.280 Also, the Commission noted that there did not seem to be arrests or detention of thuwar that were known to have attacked, including through unlawful killings, torture, and arbitrary arrests, former government members or suspected supporters.281 This indicates that the new government is unwilling thus far to ensure fair and equal prosecution of all perpetrators of serious human rights violations.

While States have the discretion to use the type of transitional justice that they deem best to facilitate reconciliation within the State, the decision to implement an amnesty law should be made in good faith. The Commission of Inquiry reported numerous incidences of unlawful killings throughout the Libyan conflict by thuwar, including the execution of “a number of Chadian nationals” in February 2011, shooting deaths of “over a dozen Qaddafi soldiers” around February 22-23, and the execution of an estimated 65 to 78 Qaddafi soldiers and suspected loyalists at the Mahari Hotel in Sirte days after Qaddafi’s death and the declaration of liberation was made.282

281 See id., at p. 20.
282 See id., at p. 9.
Additionally, the Commission reported that when thuwar captured cities, they arrested former soldiers, police officers, suspected mercenaries, and others that they perceived to be Qaddafi loyalists.\(^\text{283}\) Once detained, they were held in secret places and many were tortured.\(^\text{284}\) Methods of torture included beating with objects such as electric wires, rubber hoses, and wooden sticks, electric shocks, falaqa (beating of the soles of the feet), and suspension in contorted positions.\(^\text{285}\) Further, the Commission reported that the purpose of the torture seemed to be to extract information or confessions as well as for punishment for alleged crimes.\(^\text{286}\) The Commission documented a pattern of severe torture particularly against Tawerghans by Misratan thuwar, supposedly for committing rapes and other crimes in Misrata.\(^\text{287}\)

Because Misratans believe that Tawerghans are Qaddafi loyalists and responsible for crimes in their community, including rape, the backlash against the Tawerghans has been particularly severe.\(^\text{288}\) When thuwar captured Tripoli, brigades from Misrata entered a Tawergha IDP (internally displaced persons) camp and arrested and beat 85 Tawergha men.\(^\text{289}\) They arrested 40-50 more in September 2011.\(^\text{290}\) Most Tawerghans left Tarwergha yet the Commission reports that houses and public buildings continue to be looted and destroyed by Misratan thuwar.\(^\text{291}\) Also “Tawergha” had been scratched off road signs and replaced with “New Misrata.”\(^\text{292}\) The Commission notes that Misratan thuwar have been open about their views of the Tawerghans, using racist and derogatory terms for them.\(^\text{293}\) The Commission reports that other communities, such as those in Sirte, Zlitan, Al Jufra, Shawarif, Alut and Benghazi, have been targeted in a similar manner because of their suspected Qaddafi loyalty.

Not to minimize the conduct of the Qaddafi forces, which included widespread and systematic attacks against thuwar and civilians alike, but it is important to note the grave human rights violations committed by those protected by the amnesty law. Actions by thuwar signify an excessive

\(^{283}\) Id. at 12.

\(^{284}\) Id.

\(^{285}\) Id.

\(^{286}\) Id.

\(^{287}\) Id.

\(^{288}\) Id. at 13.

\(^{289}\) Id.

\(^{290}\) Id.

\(^{291}\) Id.

\(^{292}\) Id.

\(^{293}\) Id.
use of force, indiscriminate attacks against protected persons, and grave human rights violations outside the scope of the civil war. Though the NTC has put measures in place to ensure that the obligations to investigate, prosecute, and punish are fulfilled, it is only in relation to Qaddafi forces. To avoid impunity, the actions by thuwar cannot be excused as efforts to “promot[e] or protect the revolution.”

As human rights organizations, such as Amnesty International and Human Rights Watch, have noted, militias initially hired by the NTC to fight against Qaddafi forces still have control over thousands of detainees believed to be Qaddafi supporters. These detainees remain in the custody of well-armed militias in spite of the Libyan Defense and Interior Ministries requiring the detainees to have come under their control by July 12, 2012. Human Rights Watch has noted the treatment of those in the militia-controlled detention facilities, including being subject to torture and maltreatment which, sometimes results in death. Further, many of these detainees have not been granted their due process rights as they have not been brought before a judge, formally charged, or had cases heard by a court. Thus, they are being held arbitrarily in violation of international law.

Prosecution without due process would be a step back for Libya as it is transitioning into a new post-Qaddafi era. The thuwar, or militia, continues to overrun the state, including bombing a military intelligence building in Benghazi, raiding a local jail to release murder-suspect Salem al-Obeidi, and kidnapping seven Iranian Red Crescent members who were invited to a conference to discuss coordinating aid efforts. If the transitioning government does not amend the amnesty law to exclude all who have committed serious human rights violations, then impunity will reign in the new Libya. These groups will continue to act untouchable and commit serious atrocities, thwarting efforts to move forward. As expressed by Human Rights Watch Director of Middle East and North Africa Sarah Leah Whitson, “[t]here is no place for detention outside of the rule of law in the new

295 See id., Militia Still Holds Thousands.
296 Id.
297 Id.
Libya…[t]he newly elected National Conference needs to take a stand to end these practices, and to create a justice system that works.”

The new government does not seem committed to ensuring that all perpetrators of serious human rights violations are prosecuted and punished. Thus, prosecutions in Libya will run afoul of international standards leading to unequal justice in the post-Qaddafi transition. This will be an unfortunate and dangerous precedent to set in a country transitioning from an extreme dictatorship and will likely lead to repetition of serious human rights violations.

VI. Conclusion

Transitional justice as we know it today was first initiated through the Nuremberg trials with the purpose of holding the perpetrators of human rights abuses accountable. Now, more than six decades later, transitional justice has evolved into a process that takes a number of obligations in to account to come to a successful completion. Transitional justice does not go without numerous and evident challenges. Bringing to justice years and sometimes decades of human rights abuses is a complicated task. A newly elected government has to offer redress for human rights abuses that occurred under the previous regime while demanding citizens, who have been oppressed for years, cry out for instant change.

One of the greatest challenges following transitional justice is creating a judiciary independent from the government. How does one remove, or even prosecute, the judges who were clearly complicit in human rights abuses? To what extent is it even feasible to remind judges to independently and without bias, judge their former colleagues? These are issues that need to be dealt with, not to mention dealing with the public image of the judiciary. Other challenges concern the removal of oppressive domestic laws, creating structures for accountability, creating equality, such as through fair distribution of wealth and welfare, and re-training law enforcement officials. Above all else, the relationship between the state and its people must be rebuilt and restored.

Transitional justice processes in Europe set the tone and formed the framework for the international community by demanding full accountability for human rights abuses. It showcased that even those acting under relative government control could not elude accountability for their transgressions. Since then, transitional justice has been a tool to promulgate democracy after long periods of
dictatorship granting amnesty to those who long suffered the consequences of dictatorship and its associated limits on freedoms.

The Inter-American system emphasized the importance of States ensuring that its own domestic legislation does not contribute to or perpetuate impunity. In particular, it emphasized the importance of States adhering to its obligations to fully investigate and prosecute serious human rights violations. It introduced the idea that amnesty laws could be “devoid of legal effects” when it allows for the perpetuation of impunity which diminishes victims’ rights.

Transitional justice in South Africa has been lauded as a prime example of truth-seeking as essential to moving forward. By placing emphasis on the truth, it facilitated transition and reconciliation of the state. Though some may argue that the amnesties granted for telling the truth perpetuate impunity, it can also be argued that this was the easiest method to move beyond apartheid South Africa and the best way to learn and acknowledge the truth of that brutal period in the country's history. Africa, as a whole, can be said to use amnesty laws as a tool to halt human rights abuses and move forward.

By granting blanket amnesties to perpetrators of serious human rights violations, many countries in Asia act in direct contravention of international human rights law. Impunity and violations will continue to persist as long as blanket amnesties are given as a measure to reduce conflict without any other measures to assist in the transition, such as truth-telling, punishment, or some real form of reparations.

As we now turn to the Arab Spring, it is evident that transitional justice is also useful to the countries in the Middle East and North Africa. As applied in Tunisia, it does not differ in many ways from the way we already view transitional justice. Despite certain obstacles surrounding accountability, Tunisia has taken many positive steps in the process of transition, including through ratification of major international conventions, showing its commitment to adhere to international obligations and prevent the recurrence of past violations. It has, thus far, contributed positively to the way we view transitional justice.

Conversely, Egypt and Libya have ways to go as both countries are still in the midst of transitions that have not yet completely shifted from the previous regimes. The people of each country have insisted change as evidenced by the continued demonstrations and relative success of the elections.
However, the leaders of neither country have gained control of the country as the military and anti-Qaddafi rebels continue to overrun Egypt and Libya, respectively.

Leaders in Egypt must hold the military accountable for the mass human rights violations committed during the Mubarak era that continue as it is still essentially in control of the country since Mubarak’s resignation. For its part, Libya must ensure that amnesty laws enacted adhere to international obligations, holding accountable all that have committed serious human rights violations and not just those associated with the Qaddafi regime.

The Arab Spring can be used as an illustration of how far the international community has come in regards to transitional justice and amnesty laws but only if it is willing to work with and enhance the normative framework that has been set by other regions. It is an optimal time as these countries transition from their oppressive histories to a more democratic society. However, in light of the brutal demonstrations that continue in Syria in addition to the hurdles that each of these countries are facing, it remains to be seen if the Arab Spring will be a step back for transitional justice and amnesty laws or a step in the right direction.