After the Justice Cascade:

Rethinking the Human Rights system in times of global crisis and national security

Abstract

The new age of terror characterized by a continuous state of emergency and the reconfiguration of both European and Middle-East borders and extra-state powers represent important and irreversible changes in the new global context.

Five years after the Arab uprisings the "emerging democracy" paradigm is experiencing a massive step back. In particular, the shift of States' priorities from justice to security is undermining human rights implementation in post-authoritarian contexts. In Tunisia for instance the corruption amnesty undermines the transitional justice process, while the antiterrorism law restraints fundamental rights and freedoms in name of the national security.

Moving from the understanding of this undergoing global change, this study aims at exploring the new challenges of human rights conceptual and legal system assessing its limits in fulfilling the justice vacuum especially in times of transition. Adopting an historical and critical perspective of human rights' inner and unresolved ambiguities, and against the monolithic traditional tension "Universal local" approach, this study will identify new points of collision such as the crisis of traditional state actors, the tension between legal vs. global politics' as well as the consequences of the "National Security vs. human rights" agenda.

Introduction

Over the past decade, States around the world have constantly increased the introduction of national security legislation. According to Human Rights Watch, since 9/11 144 countries have passed new counter-terrorism laws.[1] Born as an exceptional measure in a given state of emergency, this legislative *compendium* assumed a permanent character. In fact, under the global terrorist threat, States entered a continuous state of emergency, in which the temporary suspension of fundamental freedoms as well as human rights' restrictions under exceptional circumstances have become standardized under States'

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[1] *In the name of security, Counterterrorism laws worldwide since September 11, June2012,*
https://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf

jurisdiction and practices. This resulted in series of States' practices that undermine fundamental human rights both in their principles and implementation generating a context of permanent human rights insecurity. In fact, with the increasing and radicalization of terrorism on the one side, and the counter-measures adopted by States on the other, human rights are caught in a lethal vice. One might argue that the crystallization of these laws as a normative *ensemble* not only justifies but overall legalizes the violations of human rights in name and defence of national and international security. Moreover, the anti-terrorism strategy adopted since the "War on terror" age has been mostly under or counterproductive in fighting terrorism. As stated in the UNOHCHR Fact- sheet on *Human Rights, Terrorism and Counter-terrorism*: "The measures adopted by States to counter terrorism have themselves often posed serious challenges to human rights and the rule of law. They are also counterproductive to national and international efforts to combat terrorism".[2] Should the protection of the "supreme right" to life of the individuals as a fundamental positive obligation of the States undermine the rule of law, violate human rights principles and international law obligations, as it is currently happening in the contemporary framework?[3] And if so, to what extent?

With States fostering the promotion of democracy, the rule of law and human rights in the international agenda, while implementing the restrictions of those rights on their own soil and violating a number of international norms, it is certainly not surprising that the Human Rights system is in crisis. Besides that, the worsening refugee crisis, the reconsideration of the Schengen area, and the accumulation of international community's failures in facing the current humanitarian crisis raise deeper questions about the relevance of human rights in such a context.

The wave of revolt that swept in through MENA region brought hope for new dawn for human rights and democracy. Sadly, that hope faded soon. If it's too early to forecast the final outcome of the Arab transitions, which remain incomplete and uncertain, it is certainly late enough to question the liberal democratic paradigm which inevitably follows regime change.

In contrast with what happened in Latin American transitions in the 90s, MENA transitioning countries could not count upon the West to lead. Considering the Europe's multidimensional internal crisis and the diminishing role of the US on the global scene, there are grounds to suggest that Western interventions and subsequent approaches undermined the Arab Spring transitions and gave rise to a radicalized Islamic terrorism.

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[2]Human Rights, Terrorism and Counter-terrorism, OHCHR Fact Sheet n. 32, http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf
[3]*Ibid.,*

If the global order is irreversibly changing, human rights is not keeping pace and has not adapted to the new challenging complexities. Or at least, not in a significant way. Would it still be possible for the human rights' community to overcome this *impasse*?

In seeking to answer this question, and moving from the understanding of the current age of ambiguity of human rights' presumption of neutrality against State's geopolitical interests, this paper will proceed in 3 stages. First, while arguing that the present age of ambiguity, is the result of a series of pre-existent inner ambiguities, it will summarize some crucial ambivalences in human rights' history, focussing on the moral, legal and political connections of their relations with States, and particularly in the modern European and the contemporary American contexts. Second, it will look at how the normalization of the post 9/11 counter-terrorism legislations jeopardizes human rights in both consolidated and emerging democracy. Using transitional justice (TJ) in the post Arab Spring as a case study to question the classis democratic paradigm, this study will advance the argument that the current insecurity had an important impact on the trend of the MENA transitions and therefore on the standardized justice mechanisms. Looking more closely at the Tunisian TJ process as the more likely successful transition in the MENA region, the third part of this study will identify new elements which could serve to build a new theoretical framework for approaching the transition's evolutions in the region. In particular, the rise of traditionally illiberal forces in support of liberal processes such as TJ; the challenging of traditional state borders by emerging extremist groups; the return of repressive regimes supported by the security vs. human rights agenda will be considered.

At the start of the new century, international law (…) has been reconceived. No longer the law of nations, it is the law of human rights.[4]

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[4]Paul W. Kahn, *Sacred violence: torture, terror and sovereignty,* quoted in S. Moyn, *The Last utopia*

I

International Law, States Practices and Global politics:
The Human Rights' trilogy of ambiguity

Certainly the post-9/11 and increasingly the current global crisis involving humanitarian, security, political and economic aspects, deeply affected the human rights system in both its theory and practice. Human rights has been eroded by an ambiguous discourse; systematic violations, often pursued in the States' own interests; and exacerbated by the crisis within the EU system together with inconsistent US global policy. It has become time to question the existence of a universal system of human rights norms beyond state borders.

Have we entered an exceptional age of ambiguity in the history of human rights? Looking back at the myriad attempts to achieve justice and accountability, and the few achievements made in recent years, it is certainly not the first time that the aligning of the stars provoked the eclipse of human rights. The idea and ideal of human rights seem to have been eclipsed under the crushing weight of geo-international politics and state wielded power.

In the following section, human rights will be presented as an ideal and a moral imperative. Following a brief historical trajectory this study will suggest that the ideology of a human rights' universalism gradually became subsumed into Western global policy.

Trajectories of human rights: moralities, law and politics from liberal modern Europe to the post-Vietnam US foreign policy

In the ancient Greek philosophy, human rights were conceived as a law of nature. Before being rights, they were part of a natural law, whose violation would therefore be against nature itself. In the 5th Century BCE, Greek philosophers from the Sophist school argued that all human beings are equal by nature. In the second book of the *Republic,* Plato attributes to the human nature a social and political dimension. These dimensions would be then institutionalised in Poleis, or "State-cities" where citizens would live according to the principles of freedom and equality. In defining justice as a "human virtue", Plato introduces the principles of ethics and morality of men. In one the Republic's

debates, Socrates sees this ethics as a result of a harmonic analogy between State's and individual justice. [5]

The transcendental idea and universal aspirations of modern human rights originate from the modern European philosophy inheriting from the Enlightenment's principle of a secular state ruled by the rule of law and a blind trust in the human ratio. In Kant, for example, the respect of humanity is presented as a universal principle. According to the philosopher, the moral law is a truth of reason, and hence all rational creatures are bound by the same moral law, and would act rationally, which is universal. "One should always respect the humanity in others, and only act in accordance with rules that could hold for everyone".[6] One might argue that human rights functioned as a Kantian categorical imperative. In the evolution of the European positive thought, they have been elevated to a universal moral law, made of moral and juridical imperatives (Cassese, 2008). In the Western values' undiscussed superiority, the fundament, accompanied by a new sense of pietism and "bourgeois humanism" which followed the I and II World war, Hopgood sees the fundament of the *secular religiosity* of human rights (Hopgood, 2013). According to Antonio Cassese, in the modern European context, human rights represented a moral compromise to justify the coexistence of war atrocities and enlightened civilization, rooted inequality and sense of rightness, the ideal of a "right world" that actually never existed. In the literature, human rights are presented as a secular doctrine, presented as a daily fight against the inner evil of human nature. (Cassese, 2008). According to this vision, the persistent trend of human rights' legislation and universal acknowledgement against the increasing atrocities of wars. In this continuous effort of the modern and civilized *homo socialis*, the just man, against his pre-condition of barbarous *homo animalis* (Cassese 2008). Wars, torture, genocide and other atrocities are seen as experiences of the evil which originating from the primitive human being *(Cassese, 2011)*. Embedded in the European enlightened culture, human rights played an important role of unification of the European culture and identity, culminating in the jurisprudence of the European Court of Strasbourg. In the wake of the Second World War, the European Convention of Human Rights represents the accomplishment of the cosmopolitan and civilizing project of human rights, promoting a liberal law and society in a common space of democracy and freedom.

However, the European human rights dream had soon to cope with the iron dynamics of the global politics' Cold war. Hopgood identifies an important shift from "human rights" as the European *secular religion* of moral and universal aspiration to "Human Rights" as the institution of a global bureaucratic system promoting liberal democracy all over

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[5] Isabella Adinolfi, *Diritti umani, realtà e utopia,* Roma 2004
[6] Immanuel Kant, *Critica della Ragion pura,* Rizzoli 1994

the world. Politically speaking, this shift would correspond to the decline of the EU and the affirmation of the US as a global leading power (Hopgood, 2013).

This would explain why, despite the ancient origins in the Western and European thought, the spread of a human rights culture is surprisingly recent.[7] Unconventional reconstructions of human rights' history stress *how recently* international lawyers focussed their attention on human rights (Moyn, 2012) and *how fast* they spread as a global system of norms. (Hopgood, 2013).[8] Moyn argues that human rights were not prominent in the international community in the post War World II following the war's atrocities. According to the author, there was *no mention* of human rights in the Dumbarton Oaks nor they have been a central focus of the UN which in its first decades consolidated of the rights to sovereignty (art. 2 UN charter) instead of individual rights (Moyn, 2012, p. 196). On the other hand, the Universal Declaration was signed, and then largely ignored (Keys, 2014). Considering the incredible spread in the 1970s, the irrelevance of human rights is particularly significant in the post-war America. Keys points out that in the 50s and 60s, Americans ignored UN's human rights. As a concept itself, it was considered un-American (Keys, 2014).[9] In an illuminating reconstruction of the spread of Human rights in America in the 70s, Keys argues that it shifted "from problems at home to problems abroad" (Keys, 2014). According to the author, the Human rights promotion in the US resulted as a "social antidote to shame and guilt" in the post-Vietnam. The progressive restoration of the US morality on the global stage consisted in a new level of concern with the lives of people abroad, and especially in the non-Western world. Based upon a *West-knows-best* attitude, the US foreign policy will result in a perfect "symmetry between the American state goals and export of the neoliberal power".[10]

In the literature, different authors have stressed the connections between imperialism and international law, considering how human rights law started to become a civilizing project for non- Western countries (Anghie, 2007; Petras 2012)[11].

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[7] L. Friedman, M. Kirkwood, in *The European Human Rights Culture, a paradox of human rights protection in Europe? Introduction,* Printforce 2013

[8] However the two authors have different views of timing in human rights' origins, see: Hopgood. P. 98

[9] See Keys' Chapter on "The Postwar Marginality of universal Human Rights", p. 28-31, 2014

[10] Hopgood, The Endtimes of Human Rights, p. 142

[11] A. Anghie, *Imperialism, sovereignty and the making of international law,* Cambridge studies in international and comparative law 2007

The cynics of international law point to the realism of how nations act in their ownself interest.
(*Scheffer 2010)*

International law, Justice and States' behaviour: compromising Universalism and nationalism

Together with the international community's attention on human rights, their integration of human rights law in international law only came in a second time. Even lawyers initially demonstrated little enthusiasm for The Universal Declaration of Human Rights, given its non-binding character and the difficulties of implementation. [12] In addition to that, mainly because of its lack of enforceability, its utility has been questioned. [13]

Absorbed in the global bipolar dynamics at the early stages of the Cold War, human rights started to assume a moral value of change in the 1970s, serving as an attempt to give (moral) rules to the *naked arrangements of power*. International lawyers, stuck between "state powers and moral dreams" incorporated human rights in international law.[14]

On the other hand, the so-called Golden age of international law, the Justice cascade and the spread of Transitional Justice were also the years of genocides and mass atrocities. In retrospect, the justice cascade may seem an inevitable reaction to the unprecedented violence of the XX century. (Sikkink, 2011).

The idea of a moral reaction to violence and atrocities permeates the complex relationship between States, politics and Human Rights. Theories involving States' practices and orientation towards international law and human rights law in particular rely on a basic assumption related to States' compliance to international law, according to which international rules are rarely enforced and usually obeyed: "Almost all nations obey almost all principles of international law and almost all its obligations almost all the time".[15]

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[12]Lauterpacht*, An international Bill on the Right of Man*, (NY, 1945) quoted in Moyn, p 184.
[13]Hans Kelsen, *The Law of the UN, a critical analysis of its fundamental problems*, quoted in Moyn, note 18, p. 188
[14] Moyn, *ibid.,* pp. 177-179
[15]Henkin, How nations behave, in Koh, H.H., *Why do States obey international law?,* (1997), Faculty Scholarship Series Paper 2101, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers

The assumption of States' compliance has already been questioned in literature. Hathway identifies a general reluctance of international lawyers to confront with the efficacy of international and particularly in the field of human rights law, legal scholars take as a given the fact that international law would have an impact. (Hathway, 2002).[16]

In defining the blind trust in international law as "too optimist" Cassese promoted an approach leading toward a *realistic utopia,* one that acknowledges the impossibility of a world without wars or violence, but that still leaves a room for human rights' standards improvement (Cassese 2011). The realistic advancement of this utopia acknowledges that States are the major international lawmakers and in particular the US contributed to affirm this model of realpolitik law-making (Cassese, 2012). If this is in contrast with the vision of a neutral law operating against the brutal forces of the, Henkin's definition of law-making as a political process moves toward a synthesis of this contradiction. Pushing politicians towards a sense of human virtue, international law and in particular human rights would add a morality dimension to the development of the political process. The contradiction persists in Cassese's idea of two opposite tendencies which result in an unresolved tension between universal aspiration and unilateral nationalism. On the one side, the tendency to punish human rights violations in an effort of universalism that "seem to realize Kant's ideas". On the other, States' ultimate nationalism in pursuing their own interests and protecting their citizens. [17]

The behaviour of the US during the negotiations for the set-up of the International Criminal Court is a crucial case to look at while exploring arguments related to international law and States' ambiguities. Aimed at establishing a permanent international tribunal to prosecute individuals accused of genocide and other serious international crimes, such as crimes against humanity, war crimes and the recently defined crimes of aggression, the United Nations General Assembly convened a five-week diplomatic conference in Rome in June 1998 "to finalize and adopt a convention on the establishment of an international criminal court". Behaving as an *exceptional nation* during the negotiations of the ICC, the US confirmed its role of *exceptional nation*, leading other countries in the field of international law and justice but rejecting the idea that its own citizens should face international justice (Scheffer, 2010). This approach violates two central principles of international law, namely the principles of reciprocity and equality of nations in international law.[18]

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[16]O.A. Hathway, *Do Human Rights Treaties make a difference?,* Yale Law School Faculty Scholarship, 1-1-2002

[17] Cassese, 2008, p. 124

[18]C.P. A Merasinghe, Principles of institutional law of international organizations (Cambridge University Press)., see note. N. 2 cap 7, Scheffer, 2010

After long negotiations, during which the US kept a firm isolationist position, the treaty was signed in 1998.[19] The Clinton's signature in 2000 came along with the key concern that "The Court Jurisdiction over the US personnel should come only with US ratification of the Treaty", confirming the US personnel's exposure to the party as the negotiations' core concern.[20]

Despite the difficulties, signing though not ratifying the Rome statute in 2000, the Clinton administration's demonstrated a certain extent of commitment to international justice and in general a support of the ICC's mandate.

However, the US' commitment to international justice could not survive President George W. Bush Administration's anti-court campaign. The administration's policy of hostility against the ICC culminated in the suspension of the US' signature, with Bush officially informing the UN Secretary General that the US did not recognize any obligation toward the Rome Statute. [21]

Following the so called "Golden Age" of international law and human rights and in the aftermath of the justice cascade's growing jurisprudence, the US disengagement marks an irreversible change in the history of human rights and particularly of the US' leading role in promoting Human Rights. Scheffer noticed *how* little impact the court-building process in the 1990s had on the Bush strategies. Sikkink raised concern over the US' violation of International law and particularly in cases of torture and enforced disappearance, questioning whether the US would be immune to the Justice cascade.[22]

While Cassese has described what gave rise to the transformation of the US into a "Planetary gendarme", based on a self-anointed legitimacy to intervene outside the parameters of international law (Cassese, 2008), the Bush administration definitively consolidated the

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[19]On 17 July 1998, the Rome Statute of the International Criminal Court (Rome Statute) was adopted by a vote of 120 to 7, with 21 countries abstaining. The seven countries that voted against the treaty were Iraq, Israel, Libya, the People's Republic of China, Qatar, Yemen, and the United States.

[20]3 were the main points of negotiations that isolated the US and its firm positions from that of other governments more supportive of the ICC: 1) Security Council control of referrals to the Court 2) refusal to embrace the crime of aggression 3) opposition to any independent power by the prosecutor to initiate investigations of atrocity situations (see Scheffer, p. 179). And overall the principle of complementarity.

[21] http://www.amicc.org/usicc/bush

[22] *See book's chapter, Are the US immune to the Justice Cascade?* in the Justice cascade, 2011

ratio of "the just war" and the "preventive war". [23]The binomial of war and law resulted in what Scheffer calls *a new cast of war criminals*, fighting in defence of those laws and legitimating interventions in the Gulf and later in Iraq (2003). [24]

Since then, and increasingly with the post 9/11 counter-terrorism strategies, human rights have been systematically violated in the proclaimed cause of saving lives. Is this decline irreversible?
In the next section we will see how the introduction of the counter-terrorism legislation resulted in the "naturalization of exception" of human rights' restrictions for security reasons.

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"The promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the promotion of human rights
are not conflicting goals, but complementary and mutually reinforcing"
United Nations Global Counter-Terrorism Strategy

(General Assembly resolution 60/288, annex)

II

Counter-terrorism, human rights and (expected) emerging democracies

Normalizing exceptions: the effect of counter-terrorism legislation on human rights

Over the past decades, the UN Security Council voted a number of resolutions condemning and criminalizing any act of terrorism as a threat to international peace and security. In the aftermath of 9/11, this trend has constantly increased.
Following the adoption of Security Council resolution 1373 (2001), which obliges all UN member states to sign up international counter-terrorism instruments and to adopt measures in order to prevent

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[23] The author refers to the Clinton's authorized attack in 1996 against terrorists in Sudan and Afghanistan following the attack against the American embassies in Kenya and Tanzania.
[24]David Scheffer, *All the missing souls,* Introduction

terrorism by seeking to identify and address its causes,[25] a Counter-Terrorism Committee was set up to monitor the implementation of anti-terrorism measures.[26]

Since the beginning of the counter-terrorism era, both the General Assembly and the Security Council had emphasized the obligation of States to comply with international law and international humanitarian law in their common fight against terrorism.

Through the adoption of the United Nations Global Counter-terrorism strategy (resolution 60/288)[27] the international community agreed on a strategy of collective prevention, based on the respect of human rights and the rule of law. International cooperation and collective efforts of the international community represented the main counter-terrorism strategy, as stated in the Security Council affirmed in its declaration on the issue of combating terrorism, resolution 1456 (2003). [28]

In 2004, the High-level Panel on Threats, Challenges and Change recognized that "the recruitment by international terrorist groups was aided by grievances nurtured by poverty, foreign occupation, and the absence of human rights and democracy".[29] On the same wave, in 2005 the General Assembly adopted the World Summit Outcome, reiterating the importance of respecting human rights while countering terrorism. Under International law, States have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks.[30]More specifically, this duty is recognized as part of States' obligations to ensure respect for the right to life and the right to security. As part of States' duty to protect individuals within their jurisdiction, all measures taken to combat terrorism must themselves also comply with States' obligations under international law, in particular international human rights, refugee and humanitarian law. Effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction. It has been acknowledged that just as terrorism has

[25]UNSC RES 1373 (2001), 28/11/2001,
http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Natio
ns%20Security%20Council%20Resolution%201373%20%282001%29.pdf
[26]Security Council Counter-terrorism committee,
http://www.un.org/en/sc/ctc/resources/res-sc.html
[27]UN General Assembly's RES/60/288 on the UN Global counter-terrorism
strategy,https://www.un.org/counterterrorism/ctitf/en/un-global-counter-
terrorism-strategy
[28]UNSC resolution 1456 (2003), https://documents-dds-
ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElemen
t
[29]High-level Panel on threats, challenges and change, 2003-2004,
https://www.globalpolicy.org/empire/32369-high-level-panel-on-threats-
challenges-and-change.html
[30]OHCHR Fact-sheet n. 32, *Human Rights, terrorism and Counter terrorism,*
http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf

an impact on human rights and the functioning of a society, but also and counter-terrorism measures. [31]

Legally speaking, counter-terrorism measures are adopted on the basis of ordinary legislation. As provided for by international human rights conventions, there is a number of limitations to the applications of human rights law under exceptional circumstance.[32] The OHCHR refers to it as "the flexibility of human rights law", which allow States' derogation from the respect of certain legal obligations. These limitations must be prescribed by law, and responding to the principles of "necessity "examining more specifically States' obligation to ensure that all counter-terrorism measures themselves comply with human rights standards (sect. A) and the flexibility built into human rights law to deal with exceptional circumstances (sect. B). The legislation of exception has been normalized *in consuetudo,* determining a climate of permanent Human rights insecurity in the post 9/11 and jeopardizing the implementation of international law and human rights law. Despite the strategy's principles of cooperation based on the respect of the rule of law, the Bush unilateral "War on terror" strategy of preventive war went in the opposite direction. The irresistible rise of security and risk and security against rights (Moran, 2013).

For some reasons, justice was not included in the fight against terrorism. It is worth mentioning that, quite ironically, as part of the ICC hostility policy, in 1998 Bush opposed the inclusion of the crimes of terrorism in the Rome Statute. The long decade or more of the US non-compliance with international law, in particular the prohibition of torture and cruel and degrading treatment as well as secret detention of suspects confirmed its exceptionalism and justice immunity. The radicalization of terrorism on the one side and the suspension of human rights' implementation on the other cannot but questioning the devastating and corrosive global effects of this strategy. Whether the US answer to terrorism and the naturalization of its immunity, rather than the counter-terrorism strategy itself had the heaviest impact on the current human rights' situation, still remains a question to answer.

In a continuous state of emergency, the naturalization of the counter-terrorism legacy generated a dangerous cascade effect among States' practices. All over the world, the human rights community soon raised concern over the *shock waves* provoked by States while implementing counter terrorism measures. In 2004, the International Commission of Jurists and other developed a conceptual framework to stress the complementarity of human rights and counter-terrorism. [33] A number

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[31] Ibid.

[32] On derogation in time of public emergency and limits on such derogations see: ICCPR, part II, art. 4 para. 1,2,3

[33] International Commission Of Jurists, *Human Rights Quarterly* 27.1 (2005) 350-356, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/EU-Directive-terrorism-Advocacy-Analysis-Brief-2016-ENG.pdf

of NGOs adopted the Berlin Declaration, demonstrating how HR and the rule of law can and must be respected while countering terrorism.[34] "Yet we have watched with increasing alarm as states, including those that see themselves as promoters of law-based societies, have engaged in a pattern of human rights violations in the name of fighting terrorism".

According to HRW, these laws in their *ensemble* represent a "dangerous expansion of government powers to investigate, arrest, detain, and prosecute individuals at the expense of due process, judicial oversight, and public transparency"[35]. One of the issue related is the "overbroad" powers definitions related to the executive power to restrict the exercise of freedoms to preserve "public order" and the normalizations of such state powers. (i.e. warrantless searches, surveillance and detentions). According to HRW, this form of new legacy role in putting national security concerns ahead of civil liberties.

The internal incoherence of human rights and counterterrorism is at the core of the UNSR's mandate on the promotion and protection of human rights while countering terrorism, appointed for the first time in 2005. [36] Initially assumed by the Human rights council, the mandate was extended for a period of one year, and then renewed for three years. [37] The current SR Mr. Ben Emmerson QC, appointed SR in 2011, investigates systematic human rights violations committed by states while countering terrorism. Mr. Emmerson warns that the activities of the intelligence do not comply with international human rights law. Given the current continuous state of emergency, the intelligence practice resulted in a systematic interference with a number of fundamental right, including for instance the right to respect privacy of communication. According to the UN expert, mass surveillance programs have been implemented without real justification, using "Terrorism" as a broad legitimate aim. Moreover, practices of secret and arbitrary detention have become systematic in the counter-terrorism CIA procedures and strategy, with serious consequences on States' accountability serious issues of accountability in relation to not to mention the implications on human rights and humanitarian law of

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[34]International Commission of Jurists, *Introduction to the Berlin Declaration, Human Rights Quarterly* 27.1 (2005) 350-356, https://muse.jhu.edu/article/178243
[35]HRW report, see note n. 1
[36]The Commission on Human Rights, RES. 2005/80, 2005, on the Appointment of the SR on the protection of human rights while countering terrorism, 2005, http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx
[37]General Assembly resolution 60/251, resolution 15/15 on 30 September 2010; and further extended for another period of three years by resolution 22/8 on 21 March 2013

counterterrorism (i.e. drones attacks).[38] The UNSR defines the post 9/11 as a decade or more of exceptionalism", in which not only human rights have been derogated, but in which and more importantly political philosophy has treated international legal norms and particularly human rights norms have been treated as an impediment to security. [39] Along with the practical challenges, the restrictions of human rights in the aftermath of a counter terrorism attack, underlies a dangerous syllogism, suggesting that human rights and freedoms somehow facilitate terrorism and represent a challenge to national and international security creating a false dichotomy of security versus human rights (Masferrer, Walker, 2013).

The multiplication of unprecedented terroristic attacks in the heart of Europe in 2015 urged the EU to adopt a common anti-terrorism strategy. In December 2015, the European Commission advanced a proposal for a Directive on Combating Terrorism which seeks to address the failure to provide sufficient guarantees of human rights protection in the implementation of the Directive by Member States; [40] the EU raised concern over the broad definition of terrorism, which contains flow and is formulated vaguely. Moreover, the EU recognized the over broad scope and vague delineation of many of the offences to be established under the Directive, in order to prevent interferences with the principle of legality European Commission's December 2015 proposal for a Directive on Combating Terrorism which seeks to address the failure to provide sufficient guarantees of human rights protection in the implementation of the Directive by Member States. [41] However, following the tragic attacks in Paris, France announced its will to suspend the European convention of Human rights.[42]The last attack perpetrated in Bruxelles' airport and the accuses of inefficiency to the Belgium Ministry of Interiors have shown the necessity to discuss the counter-terrorism strategy at the national levels first, making harder for the EU to find a common, effective and credible strategy for fighting terrorism and protecting the EU's pillar of security within the borders. The difficulty to manage the refugee crisis as well as other internal issues (The financial crisis, the EU widening policy,

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[38]See UN SRCT Drone inquiry: http://unsrct-drones.com/report/177

[39] *Drone Wars, Counter-terrorism and Human Rights,* New America Foundations' interview with the UNSR Ben Emmerson QC. Link available at: https://www.youtube.com/watch?v=E2YmUTnoLDA
[40] Decision 2002/475/JHA
[41] *Ibid.*
[42] *Terrorisme et convention européenne des droits de l'homme*, CEDU, http://www.echr.coe.int/Documents/FS_Terrorism_FRA.pdf, see in particular violation of art. 15, on the regulation of human rights' derogation in case of exceptional circumstances. See also, Le monde, *Securité ou liberté publiques, faut-il choisir? http://www.lemonde.fr/attaques-a-paris/article/2015/11/26/securite-ou-libertes-publiques-le-debat-piege_4818143_4809495.html*

etc.) have added further challenges to the already charged EU agenda.

In this framework, and comparing with the golden ages, the once EU and US leading role in promoting human rights and democracy in transitioning country is relatively fading in recent years. In the next section, we will seek to analyse how the impact of the Western crisis on the increasing number of fragile states which resulted from the Arab revolutions.

II. b

Emerging democracies in times of global crisis:
Transitional Justice in the Arab spring

To assume that a common denominator of human rights could be found between the West and the East was to ignore the true structure of the people's democracies.

(Schwarzenberger)

The so-called third wave of democratization has shown that emerging democracies in different countries experienced the same difficulty to answer the question of how can a new society peacefully reintegrate victims with their prosecutors. In particular, the collapse of authoritarian regimes in Latin America during the 80's and 90's interrogated state and non- state actors on the form of legacy to be adopted during the transition in the aftermath of wars or repressive regimes. Moral concerns about justice and social stability accompanied this debate, questioning "Who should be prosecuted and by whom"? but also what could be done by the State to acknowledge its responsibility for victims' losses and damages. The field of transitional justice, from here TJ, started to emerge as an attempt to answer this complex series of questions (Arthur, 2009). Kritz defined TJ as "a set of measures undertaken specifically by "emerging democracies", consisting in a set of mechanisms related to truth, accountability, criminal prosecutions, institutional reforms, reparations for victims of gross human rights violations and guarantees of non-repetition of past abuses.[43]

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[43] Kritz, quoted in P. Arthur, *How transitions reshaped human rights?,* 2009

The unprecedented attention on individual prosecutions and States' accountability resulted in what Sikkink defined a Justice cascade in the field of human rights (Sikkink, 2011). The cascade effect in Latin America, Africa, Central Europe and Asia and the spread of transitional justice's experiences brought new theoretical and practical challenges in the context of fragile political transitions.

The constantly expanding field of transitional justice reached the aftermath of Arab revolutions in 2011. Transitional Justice processes in the region can be used as relevant lenses to look through and analyse specific dimensions of the Arab transitions, while leaving a room for wider consideration of the emerging democracy paradigm 5 years after the first wave of revolution. As a field of academic and practice, transitional justice started to spread after the fall of regimes in the aftermath the Arab spring and particularly in Tunisia where, following a number of TJ *ad hoc* initiatives, a Truth and Dignity Commission has been formally set up in June 2014. However, the spread of the "Arab spring" in 2011 and its mainstream failure in most countries questioned the paradigm of successful democratic transition. Despite the early wave of accountability initiatives and claims, the focus on prosecutions and human rights abuses perpetrated by former dictators has known an important step back. Moved from a popular sincere revolutionary spirit, the expected justice cascade in the Arab region resulted in a widespread worsening of security conditions worsened by the threat of Isis' advancement and the increasing of foreign fighters; the return of repressive regimes, controversial national and international trials, the ongoing civil wars and humanitarian crisis in Syria and Libya contribute to turn the Arab spring in the so called-Arab winter. If it is too early to forecast the final balances of such transitions, it is certainly time to take into account some specific challenges of these regional transitions. There are reasons to argue that the standardized theoretical framework of justice in transition and emerging democracy is failing to capture the complexities of transitions in the MENA region. And consequently, to tackle the practical challenges related to the local contexts' specificities.

If on the one side, the specific internal challenges of the region determined a tortuous path, external influences on the global stage on the other and the general climate of justice disenchantment are likely to have had a negative impact on the trend of those transitions. In particular, I argue that the post 9/11 shift of (Western) States' priorities from justice to security represents a turning point since the 70s and 80s *human rights explosion* and the consequent Justice cascade. If individual prosecutions have been seen in the past as a powerful norm able to influence and change global politics (Sikkink 2011), the expected wave of democratization started with the Arab spring in 2011, poses serious challenges to the capacity of norms to change global politics' directions. In fact, considering the

current global framework, with multilateral agents of powers, the Justice norm, as the whole human rights system, seems quite secondary. It would be actually more correct to argue that global politics are massively influencing global norms. In fact, the historical and key interests in the regions motivated the intervention Libya, influenced the justice process as well as the multilateral geopolitical interests in Syria prevented from intervention.

Debates around international justice's legitimacy and impartiality arose in the post Arab spring justice process, and particularly concerning the ICC's involvement and lack of involvement respectively in Libya and Syria (Fisher, 2014). With the exception of Libya, no other Arab country received attention of the ICC, questioning its selectivity of international cases and impartiality in pursuing investigations.[44]

In Libya, the local stakeholders were reluctant to the international community's intervention and advice. The controversial intervention of the ICC in Libya to prosecute Saif Gheddafi' s son and advisor, respectively Saif al-Islam and Abdullah al-Senussi has been far from provoking a cascade effect in the other countries. The debate around whether to prosecute Saif in Libya or in The Hague brought back to light questions on States' sovereignty and the relativism of ICC complementarity, revealing inner weaknesses if the ICC's role in fragile context and ensuring staff's security in the field (Kirsten, 2014).

In Egypt, early national justice initiatives did not achieve accountability aims. In 2012, Mubarak was sentenced to life in prison for killings committed during the protests of 2011. However, the trial's verdict was overturned following a retrial in 2013. Mubarak was convicted for corruption, but definitively acquitted for the more serious crimes of killings during the revolution. [45]

Fisher and Stewart recognize a unique character and a few common specificities of the Arab transitions, identifying a common issue related to a different political culture which lacks the Washington consensus in adopting the liberal democratic paradigm (Fisher; Stewart, 2014). The societies' divisions and the lack of agreement in choosing a way forward reveal the difficulty of a compromise in adopting a common social and political contract in a culturally divided socio-political contexts. The rise of political moderate Islam considered the only real possible alternative to liberalism, but also

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[44] Since, exception made for Tunisia, none of the Arab spring countries is a member state of the ICC, investigations' must be referred by the UNSC. (See the UNSC Res. 1970 on Libya)

[45] See A. Massagee, *Bulding the future, exhuming the past, TJ in the Arab spring*, 2014; *Egypt's Court to rule in murder retrial ox ex-leader Mubarak,* www.bbcnews.co.uk/news/worldafrica

the evolution of Islamist extremism as an option Therefore, the issues related to security and counterterrorism have been in the Arab transitions. Again, beyond the narrow scope of protecting citizens from terroristic attacks, the overbroad powers of governments and the number of state of emergency determined a change in the transitional agenda, as we will see closer in the Tunisian case. Last but not least the attention of women's role in the transition and the importance of economic issues are also important elements that had an impact in the trend and the demand to transitional justice's deliver. In fact, TJ in Arab Spring countries has been not only a call for justice and accountability, but also a demand to reconstitute the country divisions, renegotiating a national unity after the long-lasting divisions under the authoritarian regimes (Salloukh, 2014). In Libya, Gheddafi concentrated his effort in his hometown, Sirte, while implementing under-developing policies in other eastern regions, left for decades in a condition of political and economic marginalization. The same happened in Tunis, with Ben Ali's effort focussed on the North/ West coast region, equipped with luxury hotel and touristic attractive areas, while leaving the rural region underdeveloped and marginalized from the rest of the country.

Along with the mentioned region's complexities, there's a number of unresolved issues that since the fall of the Ottoman empire made the fragmented realities of the modern Arab world. The nationalism VS Pan-Arabism tensions, the ambivalence and interdependence towards Western countries and particularly former colonies, the heritage of dictatorships, authoritarian regimes and repressive violence, If the Arab spring came as a regional wave, once again states turned into their nationalism and exceptionality. The alternate role of Islamic groups in the political life and the artificial geographical borders inherited from Sykes-Picot all contribute to a deeper understanding of such fragmented Demos.[46] To what extent has TJ agenda been able to embrace the countries transitions' specificity?

Critics around the international actors' interventions include the blind of uniformed and standardized mechanisms that are implemented without keeping into account the specific needs of the context. Habib Nasser identifies a major difference in transitional justice in the MENA region is the "overstandardization" of the proposed solutions of tj and the rigidity with which an ever-growing transitional justice industry in approaching the region's complexities (Nasser, 2014). Furthermore, as the author highlights, differently from other transitional experiences in Latin America, MENA transitions are confronted with an unprecedented "proliferation of international actors" who not only trying to have an impact on the process but also willing to play an

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[46] Pierre Magnan, *Les accords Sykes- Picot: causes des tensions au Moyen-Orient?,* http://geopolis.francetvinfo.fr/les-accord: s-sykes-picot-cause-des-tensions-au-proche-orient-106633

active and influent role in the Tunisian process. Since 2011 an impressive number of international conferences, workshops and training on TJ spread causing a dispersion of activities, initiatives and approaches to the process. The global presence of Transitional Justice, what Thomson calls a global industry of Transitional justice, team of experts and standardized set of data management, based on assumption on "the way how the local level receives". (Thomson, 2009)

According to Van Der Merwe, the MENA contexts ensured both continuities and change in the context of TJ evolution (Van Der Merwe, 2014). Considering the new contexts' challenges and necessities, TJ agenda advanced by international actors should focus on the feasibility of the TJ project, fairly considering what can be done, at the local level, instead of what should be achieved according to the international standardized paradigm.

The above literature review identifies at least three main issues that characterize the MENA transitions. The combination of exogenous and endogenous political factors which undermine the trend of the transition; the existence of a different political culture which lacks an internal consensus on the liberal democratic paradigm; the failure of the international community to implement an agenda designed for the local context. Moreover, we could advance the hypothesis that the global terrorism threat and both the international and national security measures determined and affected the term of those transitions.

In the third section, we will use the TJ process in Tunisia as a relevant case study to explore the mentioned issues and advance some hypothesis concerning the implementation of the TJ agenda in the local context. In particular, the relation between political religious groups and The case study is particularly relevant to identify religious actors as new stakeholders in the TJ process and analyse the influence of political Islam's agenda on traditional liberal mechanisms such as TJ.

III

TJ, politics and religious actors: a case study of Tunisia

The Tunisian transition is a relevant case study to contribute the advancement of knowledge in transitional justice related literature. The particular *enjeux* involving legal, political process and both state and non-state religious actors brings us to wider consideration related to at least three topics previously explored in the existent literature: the traditional opposition between global liberalism and political Islam; the tension between law and politics in transitional justice and the role

of religious actors in transitional justice. The last point is of particular relevance since both moderate and extremist religious groups had a strong impact on the political transition and the implementation of TJ mechanisms. Due to the increasing of terrorist threats the country was stuck in a continuous renewed state of emergency, extending the overbroad power of the executive. We will see how the security VS human rights agenda functioned as a spoiler of the transition, affecting the progress of TJ agenda.

Following a general background, this section will look at the relation between political religious groups and their impact on the TJ process, highlighting how the difference between Islamists and secular groups of both victims and NGOs did play a fundamental role in the trend of this transition.

Background

According to recent studies, Tunisia is "the Arab country with the best chance to consolidate a peaceful transition from dictatorship to democracy in the near term".[47]Tunisia's success or failure is likely to influence the trend of other transitions in the rest of the Arab world with important consequences on the Mediterranean area and European neighbours. Measuring the success of the transition with the rule of law, the Tunisian case is a successful one. Nearly 8 months after the revolution, the country held its first democratic election. After long negotiations within the National Constituent Assembly (ANC), a compromise between secular and Islamist forces was reached and the Constitution was adopted in January 2014. According to Reporters without borders' report, recently the country moved forward 30 positions leading the Arab world in press freedom. [48]

Despite the number of democratic achievements, the root causes of the revolution still remain untackled. One might argue that the initial and persistent attention on the rule of law's improvement and achievement overlooked other important claims of the 2011 revolution. The hopes generated following the dictator's overthrown remain unfulfilled, the

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Market for jihad: radicalization in Tunisia, Carnegie Middle-East Center, October 2015, http://carnegie-mec.org/2015/10/15/market-for-jihad-radicalization-in-tunisia/ij5m?mkt_tok=3RkMMJWWfF9wsRohv6TIZKXonjHpfsX56OosW6S2lMI%2F0ER3fOvrPUfGjI4GTsNqI+SLDwEYGJl v6SgFSrnAMbBwzLgFWhI%3D

[48] Marzouk Zeyneb, *Tunisia leads Arab world in press freedom,* April 2016, http://www.tunisia-live.net/2016/04/20/tunisia-leads-arab-world-in-press-freedom/

economic conditions worsened and the daily lives of Tunisian citizens have become more difficult, with increasing unemployment of young generations. In the rural areas, and in general out of the Capital of the Tunis and the coast regions, a sense of exclusion and marginalization has spread. The 5th anniversary of the revolution was marked by a new wave or riots in the South, that spread throughout the country in January 2016. In the country with more hopes for democratic achievement, more than 5.500 of Tunisians joined Isis to fight in Syria and Libya. According to the UN's working Group on the use of mercenary, the number of Tunisian foreign fighters is one of the highest among those travelling to join Syria and Iraq, but also Libya, Mali and Yemen.[49] Besides poverty and the lack of possibility of integration in the society, other factors can be used to explain why joining Isis has become a valuable alternative for so many young Tunisians, including the absence of moral values during Ben Ali's regime; the spread of corruption at all levels of political and social life; a justice vacuum created by decades of lack of respect for the rule of law and elitist policies; a deep distrust in institutions and police.[50] In addition to that, the forced liberalism of the society and the oppressive rules and decrees for religious groups and people, left a room for the was leaving room for extremist political narratives and recruiters from terrorist groups offering a salary but also a sense of purpose. Ben Ali's monopolization of the religious sphere and neglect of socioeconomic issues opened the door to radicalization, and these factors, combined with the disillusionment of the youth and the mishandling of Salafists after the revolution, have resulted in escalating violence in Tunisia and the export of jihadists to Syria, Iraq, and Libya.

The new wave of anti-government riots in Kasserine that spread across the country in January 2016 and the last terrorist attacks in the southern region of Ben Guarden (March 2016) are warnings of the country's persistent economic and political challenges that must be taken into account.

Case study: TJ process in Tunisia

On 17 December 2010, following the self-immolation of M. Bouazizi in Sidi Bouzid, thousands of people, mostly coming from the poorest areas of Tunisia took the street: this is the beginning of the so-called Arab Spring. The popular clashes were violent and bloody; the police opened fire on demonstrators with live ammunition causing deadly accidents and thousands of injured.

Transitional justice has been the main approach to the Tunisian transition and that the issue of victims' compensation arises since

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[49] *Foreign fighters: Urgent measures needed to spot flow from Tunisia, UN expert group warns, July 2015, www.ohchr.org*

[50] *Why are so many Tunisians joining Isis?, December 2015*
http://www.middleeasteye.net/news/why-are-so-many-tunisians-joining-748811153

the immediate aftermath of conflict. A first Commission to investigate the abuses committed from December 17th was created by the same President Ben Ali, mainly to discharge the government's responsibility. (According to the National Fact –finding Commission on Abuses committed from December 17th hundreds of people were killed and thousands gravely and permanently injured. On 14th January 2011, after one month of uprising and over 20 years of abuses and repression, the regime was overthrown and the former President Ben Alì fled the country. An interim government was shortly after set up to lead the complex phase of post-authoritarian transition. Coherently and according to the scheduled set of rule of law mechanisms. Both the National Commission to investigate Human Rights abuses during the revolution and the Commission to investigate corruption represented a premise on victims' compensation.

Meanwhile, more organized and well-structured network mainly based in Tunis and in the coast region, started a practice of advocacy for TJ culture and practice in the Tunisian transition in partnership with the international organizations and in particular UNDP, ICTJ and OHCHR. The creation of the Ministry of Human Rights and Transitional Justice, the set-up of a technical committee charged of drafting the TJ law and the organization of the National Dialogue on transitional Justice as well as the set-up of a Truth and Dignity Commission (Instance de Verité et Dignité, IVD) represent important achievements in the establishment of a comprehensive mandate. However, the balance of TJ mechanisms' implementation remains uncertain and full of important gaps. Despite the CSO's and international organizations' efforts to include victims' voice in the decision making process, there is still no evidence of effective reparations programs based on victims' needs. Moreover, not only the government's engagement in undertaking serious judicial and institutional reforms has been fairly modest, but the whole process has been extremely instrumentalized, as the use of victims' groups to advance political campaigns and élite programs, which represented a general concern among human rights and victims' defenders.

The legislative and presidential elections held in October-December 2014 contributed in worsening the already compromised relationship between the new ruling party Nidaa Touness and the President of the Truth and Dignity Commission, Mrs. Sihem Ben Sedrine. Already during the electoral campaign, started on 4th October 2014, Transitional Justice agenda has been manipulated by the political parts involved in the process to serve personal and political Tensions progressively increased while polemics started to spread about the progressive transformation of the process in a *règlement des*

comptes between political adversaries.[51] On the one side, Ennahda Islamist party and its affiliated supporting TJ and the right to truth and accountability for past violations of human rights, mainly Islamic victims which were prosecuted by the former regime. On the other side, the secular party Nidaa Tounes, closer to the previous regime's affiliation and hostile to the prosecutions process, promoted instead a *tourner la page* approach and moving forward to national political reconciliation.[52]

During a national speech held in March 2015, the President announced the preparation on a project law giving amnesty for economic and financial crimes and encouraging economic reconciliation in order to relaunch the economy of the country. Despite a promising start to transitional justice processes after Ben Ali's ouster under the previous government, the situation has deteriorated once again. The people's anger is now trained on the new government, at least in part because it has not been able to respond effectively to society's demands for accountability for crimes committed under former regimes.[53]

The new government has made it increasingly clear that pursuing truth and accountability for the serious human rights violations and economic crimes is not one of its priorities. Instead, the government announced to prioritized security measures in response to the recent terrorist attacks. But the logic of a "war on terror", and the political exploitation of the deteriorating economy to push for amnesty for corrupt former government authorities and businessmen, can only weaken the overall transition. If the political will existed to implement the Transitional Justice Law in full, these false dilemmas between security and accountability would be easily dismissed. The complementarity between the fight against terrorism and the respect of human rights has been reaffirmed by a number of national and international NGOs, which launched a campaign "*Non au terrorisme, oui aux droits de l'homme* ».[54] Since the aftermath of the revolution, and progressively in the past 3 years, both nationals

[51] Marwan Chahla, *Tunisie Politique, justice transitionnelle ou règlement des comptes,* http://www.kapitalis.com/politique/21147-tunisie-politique-justice-transitionnelle-ou-reglement-de-comptes.html

[52] Olfa Belhassine, *Tunisie: le Présidente contre la Justice transitionnelle,* August 2015, http://www.justiceinfo.net/fr/component/k2/1729-tunisie-le-vieux-pr%C3%A9sident-contre-la-justice-transitionnelle.html

[53] Rim El Gantri, (former Tunis ICTJ's Head of Office), *In the shadows of the Nobel prize: Impunity still a threat for the Tunisia's transition,* https://www.ictj.org/news/shadows-nobel-prize-impunity-still-threat-tunisia-transition

[54] HRW report *Tunisie, non au terrorisme, oui aux droits de l'homme,* April 2016 https://www.hrw.org/fr/video-photos/video/2016/04/27/tunisie-non-au-terrorisme-oui-aux-droits-de-lhomme

and expats have been the target of several terrorist attacks in Tunisia. In 2013, the famous politicians Chokri Belaid and Mohammed Brahmi, have been both killed by Islamist extremist groups; more recently on 7 mars 2016, in Ben Guerdane, a village close to the Libyan borders, 18 victims, including 8 civilians. On18 March 2015, two armed men attacked the Bardo Museum, next to the Tunisian Parliament, killing 21 foreign tourists and a Tunisian agent of security. On 26th of June, an armed men operated a massacre in the Sousse beach, killing 38 tourists in a famous resort. Last 24 November, a suicide caused the explosion of a bus of the presidential Guard, harmed 20 people, including 4 civilians.

The campaign stresses the importance to guarantee the right to security for both citizens and foreigners in the Tunisian soil. However, all the human rights organizations express concern over the effect of the antiterrorism law of 2015 over the dangerous restrictions of human rights and the overbroad powers of the executive and the police forces. During the campaigns many citizens witnessed abuses perpetrated by police forces and unjustified accuses of participation in terrorist activities. In particular, the campaign addresses the anti-terrorism law of 2015 and antiterrorism laws actually increase the already spread feeling of injustice among common citizens and are likely to increase terrorism's recruitment; this law victimize innocent victims, causing enforced disappearances, violating the right to a fair trial, arbitrary denied visas, cases of torture and other violations of national and international law.

The counter-terrorism law among other severe measures, extends the period of allowed secret detention from 6 to up to 15 days for suspected terrorist. Moreover, the law authorizes to close public audiences and other measures which would be counterproductive in the fight against terrorism.

Liberals and Islamists: old oppositions, new alliances

Pablo De Greiff, the UNSR for the promotion on Truth, Justice, reparation and non-recurrence, expressed concern for the overbroad mandate of the Tunisian IVD.[55] A first controversial issue was related to the period of investigations fixed under the IVD's mandate, which is very extensive. First, the period of because of the length of investigations, fixed at 1956 until 2011. This is for example the controversial issue of timing of IVD investigations. For the Islamists, this should go back to the first Presidency of Habib Borguiba, in the aftermath of National Independency (1956-2011). For the secularists,

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[55] UNSR P. De Greiff, during a speech given at the Tunisian Ministry of Justice in occasion of the launch of the Truth and Dignity Commission on 9th June 2014.

this should only look at the former President Ben Ali's regime, since 1987 to 2011. This controversy is emblematic because it unveils a crucial fragmentation within the Tunisian society and the consequent perception of victimization.

 If for many Tunisians the so called "Bourguibiste" and its subsequent opening to the Western World, and to secularism, the Modern state and constitutionalism, for other as a dictator or as the founder of dictatorship. Since its independence, in the political cultural of the country, modernity has somehow been linked to forms of repression. The discouragement of all forms of manifest religiosity was often violent and repressive. Religious groups, veiled women in public administration and places, have been victims of the forced secularisation, involving enforced disappearances and torture. If most of national seculars dislike or prefer to forget these violations because perpetrated in the name of modernity, have been victims of human rights violations. This explains the Islamic party *Ennahda's* undivided support to Transitional Justice. It is interesting to note how traditional liberal mechanisms of accountability, vetting, reparations have been used by the ruling party to Islamize the Institutions. The former leader of the Ministry of Transitional Justice, Samir Dilou, was a member of the executive bureau of *Ennahda* Party; like him, other key positions within the Ministry and other institutions were occupied by well-known former political activists accused of being Islamists under President Ben Ali's regime.

It is interesting to observe how a liberal framework such as the "transitional justice" one could fit in the political discourse of a traditional "illiberal" force, the Islamic party *Ennahda.* The TJ discourse was used to embrace the political aims and challenge secular adversaries' forces, in relation to the past of abuses of forced secularization perpetrated by the former regime.

In particular, this paper suggests that given the new transitional framework which followed the Arab spring, transitional oppositions between global liberalism and political Islam as alternative normative models should be overcome (Adamson, 2005). Considering the current alliances between Islamist political parties with liberal and secular forces, especially international ones, the Islamist political project supporting a procedural liberal democracy does not seem to be opposed to the liberal democratic framework, since they made themselves part of the democratic political game of power and alliances. Instead, extremist religious groups, should be seen as the real liberal and democratic spoilers, for the way they oppose both the moderate Islamist project and the Western liberal democracy. In other words, the clash between Western VS Eastern ideologies seems to have shifted; if Islamic extremists are against global liberalists, the fight would be conducted first at the national level, in a fragmentation of

internal forces divided into moderate religious, extremist religious and secular forces.

On the other hand, it's interesting to note how in the Tunisian case, the spoilers of transitional justice have been the national liberal forces and particularly the elected ruling party *Nidaa Touness*. Since the beginning, the process has taken the shape of a politicized negotiation of justice. The study of political alliances and bargaining unveils the alternate dynamic of religious and secular political ruling parties, whose oppositions and alliances reflected the trend of transitional justice process and the political support that it has received. Indeed, the formulation of the TJ law, the mandate of the Tc as well as some technical details such as the elections of the commissioners all resulted from a negotiation among the two main political forces. The political reconfiguration within the Parliament in 2015 determined a step back in the transitional justice process. In particular, the alliance between the secular Party, *Nidaa Tounes*, and the Islamic party *Ennahda*, was based on a politic of forgiveness in order to move on with the economic improvement of the nation. During 2015, the process is more and more polarized between the two political forces.[56] The instrumentalization of the transitional justice process in Tunisia in the context of a bipolar political alternation supports the argument that "politics leads and justice follows" (Vinjamuri, Snyder, 2003) and definitively overcomes the presumption of an *apolitical judgement of law* (Vinjamuri, Snyder, 2015).

In this perspective, not only politics did play a predominant role in the TJ decision making process, but also religious state and non-state actors became integrant part of the broad *Justice Menu* (Vinjamuri, Snyder, 2015). In the Tunisian case, the "Islamists VS Seculars" tensions resulted in a new option for Transitional justice, including secular victims' groups against the Islamists ones. This has been particularly the case in Tunisia, where victims' groups clearly aligned one each other, especially women's group claiming different kind of reparations. [57]

A closer look at the dynamics suggests that the inner Islamists VS Seculars tension does not necessarily exclude further alliances or common aims. For example, TJ religious groups worked closely with international liberal NGOs and primarily the ICTJ and with a number of UN agencies. At the same time, they were able to create new alliances and to fix common goals with the national secular forces of the secular party *Nidaa Touness.* The case study seems particular relevant to support the arguments according to which "religious actors adopt a position which make them natural partners of the human rights

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[56] *Tunisie, justice transitionnelle et lutte contre la corruption,* May 2016, http://www.crisisgroup.org/fr/regions/moyen-orient-afrique-du-nord/afrique-du-nord/Tunisia/168-tunisia-transitional-justice-and-the-fight-against-corruption.aspx

[57]C. Lamont, *Negotiating Justice during the Transition: Transitional Justice in Tunisia*, 2014

arena" and that "despite their easy affiliation with particular secular actors religious groups may have a natural advantage over the secular groups in social contexts where religious norms are prevalent" (Vinjamuri, Boesenecker, 2008). If this seems to apply for Tunisia, where secular and religious forces are in a constant balance, this could certainly apply to a number of Arab and Muslim countries in transition.

According to Lamont, existing transitional justice normative framework failed was too narrow to embrace the wider demands of social justice in Tunisia, offering little guidance in the scope of contesting statehood in the state-society bargain (Lamont, Pannwitz, 2016).

The analysis of the MENA transitions brings to the light new elements which could help in reconsidering the evolution of the democratic paradigm in the region. In particular, the multidimensional implications of the TJ processes suggest the need for a new theoretical framework in the region, one which takes into account specific elements such as the raise of political and liberal Islam, religious and extremist stakeholders and popular claims for social justice.

Conclusion

In the first part of this study we gave a brief overlook to the history of human rights' ambiguities, tracing a trajectory from a neutral, aprioristic conception of human rights in modern Europe to the global Human Rights project strongly influenced by the US global policy.

We saw that the origins of human rights' conceptual framework are deeply rooted in the Western ancient and modern philosophy. For example, the ideal of justice as conceived in the Plato's Republic, a "human virtue" involving both an ethical and moral dimension in its relationship with a just State; the first model of Athenian democracy and the affirmation of democracy as the best model of government "to export" in uncivilized, *barbarous*, populations can be seen as the antecedent of the contemporary rhetoric of the just war.

Despite the high ideals of justice and the universality of human rights, such idealism could not survive the new geopolitical *enjeux* of the contemporary global scenario. Still, the values underpinning the old human rights scheme played sustained the rationality of a powerful Western policy, fostering the promotion of democracy and the strengthening of human rights "abroad". following the important shift happened with the raise of the US power in the world politics global, the moral imperative remained.

Having acknowledged the reality of the human rights' conceptual and practical history, efforts should concentrate toward the present and future of human rights. If it's true that even that the last human last utopia is fading, human rights agendas are still ongoing in a number of transitioning countries and emerging democracies. Advancing constructive critiques and challenging old-fashioned assumptions is crucial to tackle the challenges of the MENA transitions. The historical justice vacuum which characterized MENA regimes, made the ISIS threat real and radicalized. For the first time, a non-state actor is challenging traditional states borders, claiming the recognition of the Islamic State and filling the empty spaces left by the traditional states in the past decades. The new transitional framework which followed the Arab spring, traditional oppositions between global liberalism and political Islam as alternative normative models should be overcome. Human rights agenda need to adapt to the realities of these new contexts. Implementing a human rights project closer to humanity and local realities' needs is an urgent goal to achieve in the effort to tackle the present global challenges. Now more than ever, the world needs a strong human rights system. If the human rights system will be able to adapt itself to the new destabilizing global changes, with the support of States and stakeholders, still remain to be seen.

References

Adamson, F., *Global liberalism VS Political Islam,*
http://www.jstor.org/stable/pdf/3699674.pdf?_=1462438818019

Adinolfi I., *Diritti Umani, Realtà e Utopia,* Città Nuova, Roma 2004

Anghie, *Imperialism, sovereignty and the making of international law,* Cambridge studies in international and comparative law 2007

Arthur, **P.,** How *transitions reshaped Human Rights: a conceptual history of Transitional Justice?,* Human Rights Quarterly, 2009

Cassese, **A**., *Il sogno dei diritti umani,* Feltrinelli, 2008

Cassese, **A**., *L'esperienza, del male: Guerra, genocidio, terrorismo alla sbarra,* Il Mulino, 2011

Cassese, A., *Five Masters of International Law,* Hart Publishing Ltd, 2011

Cassese, A., *I diritti umani oggi,* Laterza, 2005

Ferchichi Wahid, *Transitional Justice in Tunisia: the absence of a clear strategy and the predominance of improvisation,* Arab Institute for Human rights, Tunis 2012

Fisher, Kirsten, Stewart Robert, *Transitional Justice and the Arab spring,* Routledge, 2014

Friedman, L., **Kirkwood**, **M**., in *The European Human Rights Culture, a paradox of human rights protection in Europe?* Printforce 2013

Hopgood, Stephen, *The endtimes of human rights,* Cornell University Press

Keys, **Barbara J.,** *Reclaiming American Virtue, the Human Rights Revolution of the 1970s,* Harvard University Press, 2014

Koh, Harold Hongju, "*Why Do Nations Obey International Law*?" (1997), Faculty Scholarship Series Paper 2101, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers

Hathway, **O.A.**, *Do Human Rights Treaties make a difference?* Yale Law School Faculty Scholarship, 1-1-2002

Henkin, **L.,** *How Nations Behave: Law and Foreign Policy (NY, Columbia University press,1979)*

Lauterpacht, *An international Bill on the Right of Man*, (NY, 1945)

Masferrer, **Walker,** C*ounter-terrorism, human rights and the rule of law, crossing legal boundaries in defence of the state*, E. Elgar, 2013

Moyn, Samuel, *The Last Utopia,* Paperback 2012

Mullin, Corinna, *Tunisia's Transition: Between Revolution and globalized National Security,* http://www.pomeas.org/index.php/publications/pomeas-papers/495-tunisia-s-transition-between-revolution-and-globalized-national-security

Padraig McAuliffe, *Transitional Justice's Expanding Empire: Reasserting the value of the paradigmatic transition,* *http://journals.uoc.edu/index.php/journal-of-conflictology/article/view/vol2iss2-mcauliffe/vol2iss2-%20mcauliffe*

Posner, *The perils of global legalism,* University of Chicago Press, 2009

Sharp, **D.N.** *Emancipating Transitional Justice from Paradigmatic Transition*, IJTJ, Vol. 9, Issue 1, March 2015

Sikkink, Kathryn, *The Justice Cascade, How human rights prosecutions are changing the world politics,* W.W. Norton and Company Ltd

Vinjamuri, Boesenecker, *Religious actors and Transitional Justice (*Book chapter), in T. Banchoff, Religious Pluralism, Globalization and World Politics, Oxford University Press, 2008

Vinjamuri, Leslie and Snyder, Jack (2015) 'Law and Politics in Transitional Justice.' *Annual Review of Political Science*, 18
Zanghì, *La tutela internazionale dei diritti dell'Uomo,* Torino, 2006

Reports, Legislations and web resources

Between Peril and Promise, A new framework for Partnership with Tunisia, http://carnegieendowment.org/2016/04/14/between-peril-and-promise-new-framework-for-partnership-with-tunisia/iwrr?mkt_tok=eyJpIjoiWkRCRCa01URXpOMk5qWTJFNCIsInQiOiJzZ2luYjdpVXpRaEs2QlFFQN0FONXNGUm9DaDN3c0xqT0lMNHBcL3ZDbThZSUNhSXVOdng3ZnF5ZzFrZFNHSnZXQnpLdWI3YmV3eWxXSFFwvUFdRbHNrSzVzMnhhoNDNBMXlPN3E3empwWHdPN1owPSJ9

Human Rights Watch Reports, 2012:
In the name of security – Counterterrorism laws worldwide since September 11 https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11, https://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf

ICC/US:

http://www.state.gov/j/gcj/icc/,
http://web.archive.org/web/20120112210935/http://www.state.gov/j/gcj/us_releases/remarks/143178.htm
http://www.amicc.org/usicc/bush

International Covenant of Civil and Political Rights,
http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf

International Commission of Jurists, *Human Rights Quarterly* 27.1
(2005) 350-356, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/EU-Directive-terrorism-Advocacy-Analysis-Brief-2016-ENG.pdf

Office of the High Commissioner for Human Rights, *Human Rights*,
Terrorism and counter-terrorism, Fact Finding Sheet N. 32,
http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf