

Accountability Through the Specialized Criminal Chambers

The Adjudication of Crimes Under Tunisian and International Law

Practical Guide 1



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Table of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACoMHR	African Commission on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DPPED	Declaration on the Protection of All Persons from Enforced Disappearance
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACoMHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICJ	International Court of Justice
IMT	Nuremberg International Military Tribunal
IVD	Instance Vérité et Dignité
SCC	Specialized Criminal Chambers
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties
WGDA	Working Group on Arbitrary Detention
WGEID	Working Group on Enforced and Involuntary Disappearances

Table of treaties and standards¹

Code of Conduct for Law Enforcement Officials, UN Doc. A/RES/34/169, 17 December 1979.

Bangalore Principles on Judicial Conduct, Judicial Integrity Group / UN Office on Drugs and Crime, 2007.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173, 9 December 1988.

Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990.

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 May 2011.

Council of Europe Minimum Rules for the Treatment of Prisoners, 19 January 1973.

Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, 18 December 1992.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/30/3452, 9 December 1975.

Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949.

ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005.

Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 13 March 2008.

International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 10 August 2001.

Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/1989/89, 1989.

Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/55/89, 4 December 2000.

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AComHPR Doc. OS(XXX)247, 2003.

¹ The list includes the instruments that are most cited throughout the Practical Guide.

Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 (corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002).

Rules for the Protection of Juveniles Deprived of their Liberty, United Nations General Assembly Resolution No. 5/113, 14 December 1990.

Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("the Bangkok Rules"), UN Doc. A/RES/65/229, 21 December 2010.

Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), General Assembly resolution No. 40/33, 29 November 1985.

Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Economic and Social Council resolutions No. 663 C (XXIV), 31 July 1957, and No. 2076 (LXII), 13 May 1977.

Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc. A/RES/70/175, 17 December 2015.

The Maputo Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Assembly of the African Union, 11 July 2003.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the High Commissioner for Human Rights, New York/Geneva, 2017.

Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

Human Rights Committee

General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982.

General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), UN Doc. HRI/GEN/1/Rev.9, 10 March 1992.

General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994.

General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000.

General Comment No. 29: Article 4: States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

General Comment No. 31, The Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR/C/GC/32, 23 August 2007.

General Comment No. 35: Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35, 16 December 2014.

General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018.

Committee against Torture

General Comment No. 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008.

CEDAW Committee

General Recommendation No. 19, "Violence against women", UN Doc. A/47/38, 1992.

General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35, 14 July 2017.

Working Group on Arbitrary Detention

Report of the Working Group on Arbitrary Detention, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, UN Doc. A/HRC/22/44, 24 December 2012.

Working Group on Enforced or Involuntary Disappearances

Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010.

Report of the Working Group on Enforced or Involuntary Disappearances, General Comment on Enforced Disappearance as a Continuous Crime, UN Doc. A/HRC/16/48, 26 January 2011.

African Commission on Human and Peoples' Rights

General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 57th Ordinary Session, 4–18 November 2015.

International Criminal Court

International Criminal Court Elements of Crimes, 2002.

International Criminal Court Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3, 2002.

1. Introduction

The present Guide is the first volume in a series of the International Commission of Jurists (ICJ) Practical Guides that aim to assist practitioners to ensure accountability through the Specialized Criminal Chambers (SCC) in Tunisia.

The SCC were formally established by Decree No. 2014-2887 of 8 August 2014 and were set up within the Tribunals of First Instance of thirteen Courts of Appeal across Tunisia.² Under article 42 of the 2013 *Organic Law on Establishing and Organizing Transitional Justice* (the 2013 Law)³ and article 3 of the 2014 *Organic Law Relating to the Provisions Relating to the Transitional Justice and Affairs*,⁴ the SCC exercise jurisdiction over cases involving “gross human rights violations” referred by the Truth and Dignity Commission (“Instance Vérité et Dignité”, IVD). The IVD referred 173 cases to the SCC by 31 December 2018. On 29 May 2018, the first hearing before the SCC was held in the Tribunal of First Instance in Gabès. While the opening of trials before the SCC constitutes a fundamental step in Tunisia’s path toward justice and accountability, a number of legal obstacles may undermine their effective operation, and ultimately the right of victims to judicial remedies, which, in turn, would constitute a violation of international law and standards.⁵

Through an analysis of both the Tunisian legal framework and the relevant international law and standards, the ICJ Practical Guide series on “Accountability Through The Specialized Criminal Chambers” primarily aims to serve as a reference to assist SCC judges to effectively adjudicate cases involving gross human rights violations that constitute crimes under international law and prosecutors and lawyers involved in proceedings before the SCC to ensure respect for the rights to a fair trial and remedy in line with international law and standards. Civil society organizations may also find this series useful for raising awareness of how to implement the existing legal framework on the criminalization, investigation, prosecution, sanctioning of, and redress for serious human rights violations in accordance with international law and standards and, where necessary, advocate for its reform.

In this first Practical Guide, the ICJ addresses the adjudication of crimes under international law before the SCC. The first part of the Guide focuses on the legal basis for the application of international law by the SCC and provides options for interpreting Tunisian law in accordance with international law and standards, in particular in the context of the application of: (i) the principles of legality and non-retroactivity; and (ii) statutory limitations. The second part of the Guide addresses a selected list of gross human rights violations that constitute crimes under international

² See Decree No. 2014-4555 of 29 December 2014 modifying Decree No. 2014-2887 on the creation of the specialized criminal chambers in the field of transitional justice within the tribunals of first instance in the courts of appeals of Tunis, Gafsa, Gabès, Sousse, Le Kef, Bizerte, Kasserine and Sidi Bouzid, further amended by Decree No. 2016-1382 of 19 December 2016 to include additional chambers in Mednine, Monastir, Nabeul and Kairouan.

³ Article 42 of Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organization states that the IVD “shall refer to the Public Prosecution the cases in which commitment of gross human rights violations is proven and shall be notified of all the measures which are subsequently taken by the judiciary.”

⁴ Article 3 of Law No. 17-2014 of 12 June 2014 relating to the provisions relating to the transitional justice and affairs related to the period going from 17 December 2010 to 28 February 2011 provides that “in the event of transmission of the file to the public prosecutor by the authority of truth and dignity, in accordance with article 42 of the organic law n° 2013-53 dated 24 December 2013 relating to the establishment of transitional justice and its organization, the public prosecutor shall automatically send them to the specialized jurisdictional chambers mentioned in article 8 of the same organic law. Upon their sending to the specialized chambers by the public prosecutor, these files have priority regardless of the stage of the procedure.”

⁵ In previous publications, the ICJ addressed the substantive and procedural legal challenges that might impede the SCC work and ability to adequately address the legacy of gross human rights violations in Tunisia. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, May 2016; *Tunisia: The Specialized Criminal Chambers in Light of International Standards*, November 2016; and *Tunisia: Procedures of the Specialized Criminal Chambers in Light of International Standards*, July 2017.

law over which the SCC have jurisdiction, particularly in relation to their criminalization at the domestic level vis-à-vis their definition and proscription in international law.

This Practical Guide will be followed by three additional guides. Practical Guide No. 2 will discuss modes of liability under international law and their application before the SCC. Practical Guide No. 3 will discuss the investigation, prosecution and adjudication of gross human rights violations, including the obligation to investigate and prosecute, the conduct of investigations, and the law and standards governing the right to a fair trial and the rights of victims to participate in criminal proceedings. Practical Guide No. 4 will discuss the principles and best practices in the collection, admission and assessment of evidence during the investigation, prosecution and adjudication of gross human rights violations.

Each guide should be applied in the context of international law and standards governing the rights of the accused and the rights of victims in criminal proceedings. With respect to this guide in particular, particular regard should be had to the accused's rights set out in Practical Guide No. 3, including the right to be informed of the charges against them.

2. Application of International Law by the Specialized Criminal Chambers

Article 8 of the 2013 Law states that the SCC are entrusted with adjudicating “cases related to gross violations of human rights, as defined in international conventions ratified by Tunisia and in the provisions of the 2013 Law,”⁶ committed between 1 July 1955 and the issuance of the Law.⁷ According to the same article, such violations include, but are not limited to, “murder, rape and other forms of sexual violence, torture, enforced disappearances, and death penalty without fair trial guarantees” as well as cases referred by the IVD concerning “election fraud, financial corruption, misappropriation of public funds, and coercion to migrate⁸ for political reasons.”⁹ Pursuant to article 3 of the 2013 Law, for the purposes of SCC jurisdiction, violations mean crimes committed by “organs of the State” or “groups or individuals who acted on its behalf or under its protection, even if they did not possess the quality or the authority to act,” and by any “organized groups.”¹⁰

The absence of a specific definition of the term “gross human rights violations” in the 2013 Law does not necessarily constitute an obstacle for the SCC to exercise their jurisdiction over crimes not explicitly listed in the Law. The reference to international conventions is a clear indication that the SCC are required to apply international law together with domestic law.¹¹ Furthermore, as discussed below, SCC judges might rely upon other sources of international law, in particular customary international law, whenever necessary. The absence of definitions of some gross human rights violations under domestic law and the existing discrepancies between Tunisian law and international law and standards in relation to other gross human rights violations could otherwise curtail the ability of the SCC to ensure that victims can exercise their right to an effective judicial remedy and reparation; that perpetrators of crimes under international law are held accountable; and that anyone suspected of a criminal offence receive a fair trial according to international law and standards.

Other obstacles, however, may undermine the SCC’s ability to adjudicate cases involving gross human rights violations. Indeed, while Tunisia is party to many international treaties, its domestic legislation does not criminalize all the gross human rights violations of a criminal character in line with the definitions of those offences under international law, or at all.¹²

Against this background, this chapter examines the legal basis for the application of international law by the SCC and provides options for interpreting Tunisian law in accordance with international law and standards. To that end, particular attention is given to three crucial concerns that the SCC might need to address in the adjudication of gross human rights violations amounting to crimes under international law: (i) the need to reconcile domestic law with relevant international law and standards; (ii) the application of the principles of legality and non-retroactivity, particularly in the absence of domestic legislation criminalizing conduct at the time it occurred, but which was considered a crime under international law; and (iii) the application of statutory limitations to crimes under international law.

⁶ Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organization.

⁷ Article 8 (referral of cases by the IVD to the SCC) read in conjunction with article 17 (temporal jurisdiction of IVD) of Law No. 53-2013.

⁸ In the French text, this is “la contrainte à migration forcée pour des raisons politiques.”

⁹ Article 8, paras. 2 and 3, of Law No. 53-2013.

¹⁰ Although article 3 of the Law refers to “systematic infringement of human rights,” this must be understood as only referring to human rights violations that constitute crimes, given the SCC is, by its nature, a criminal court.

¹¹ See ICJ, *Tunisia: The Specialized Criminal Chambers in Light of International Standards*, July 2016, p. 9.

¹² ICJ, *Tunisia: The Specialized Criminal Chambers in Light of International Standards*, July 2016, pp. 9 and 10 where it was noted that the absence of adequate and accurate definitions of gross human rights violations in the domestic legislation resulted up till now in a number of inconsistencies and flaws within Tunisian domestic practice.

a. Application of international law in domestic systems

i. Application of international law in Tunisia

Tunisia is party to numerous international human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR); the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); the *International Convention for the Protection of All Persons from Enforced Disappearances* (ICPPED); the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); the *African Charter on Human and People's Rights* (ACHPR); the *Convention on the Rights of the Child* (CRC); and the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (Maputo Protocol).¹³ In June 2011, Tunisia also acceded to the *Rome Statute of the International Criminal Court* (ICC).¹⁴

The 2014 Constitution¹⁵ dedicates a limited number of provisions to the application of international law vis-à-vis the domestic legal order. In terms of the relationship between binding international law and domestic law, article 20 of the Constitution provides that ratified treaties¹⁶ are superior to national legislation but inferior to the Constitution. However, the Constitution is silent on whether treaties ratified by Tunisia can be applied directly in national courts, leaving the issue to be determined by domestic institutions. Furthermore, the status of other sources of international law, such as customary international law and general principles of law,¹⁷ is not explicitly mentioned in the Constitution.

Tunisian authorities have confirmed that domestic courts are obligated to apply treaties directly as domestic law. In the context of Tunisia's fifth periodic report on its compliance with the ICCPR, the United Nations Human Rights Committee (HRC) asked how article 20 of the Constitution has been applied and invoked by Courts. Tunisia responded that "[o]nce an international treaty has entered into force by means of an approving act and a ratifying decree, it becomes part of the national legal system and a binding higher source of law," and that "[e]veryone, including the courts" had to abide by this rule. Consequently, the courts "are obliged to take account of treaties and apply them as soon as they form an integral part of current legislation." In addition, all courts must "ensure that the rights embodied in international conventions are respected."¹⁸ Tunisia went on to state that the "traditional approach," whereby treaties only create obligations for States parties and cannot be invoked directly before courts, has gradually been abandoned in favour of direct application.¹⁹

¹³ Tunisia ratified the ICCPR on 18 March 1969; the CAT on 23 September 1988; the CEDAW on 20 September 1985; the ICPPED on 29 June 2011; the ACHPR on 16 March 1983; the CRC on 30 January 1992; and the Maputo Protocol on 23 August 2018. It also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) on 13 January 1967; the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 18 March 1969; the Convention on the Rights of Persons with Disabilities (CRPD) on 2 April 2008. It has also accepted individual complaint procedures for the CAT, the ICCPR, CEDAW and the CRPD. It has signed but not yet ratified the 2004 Arab Charter on Human Rights.

¹⁴ See Law Decree No. 549-2011 of 14 May 2011, on the ratification of the ICC Statute. Tunisia deposited its instrument of accession of the Rome Statute on 24 June 2011.

¹⁵ Following the fall of the Ben Ali regime in January 2011, on 23 October of the same year, Tunisians elected the National Constituent Assembly in their first democratic elections. In January 2014, after a 27-month long process, it approved a new Tunisian Constitution.

¹⁶ Article 67 of the Constitution states that treaties enter into force once they have been ratified.

¹⁷ As commonly understood, international law is built on four principal sources: (i) treaties, (ii) international custom, as evidence of a general practice accepted as law, (iii) general principles of law recognized by civilized nations; and (iv) judicial decisions and the writings of "the most highly qualified publicists". See article 38(1) of the Statute of the International Court of Justice.

¹⁸ HRC, Replies of the Tunisian Government to the list of issues (UN Doc. CCPR/C/TUN/Q/5) to be taken up in connection with the consideration of the fifth periodic report of TUNISIA (UN Doc. CCPR/C/TUN/5), UN Doc. CCPR/C/TUN/Q/5/Add.1, 25 February 2008, Reply to question 1. See also United Nations Committee against Torture (Committee against Torture), Consideration of reports submitted by States parties under article 19 of the Convention. Third periodic report of States parties due in 1997. Tunisia, UN Doc. CAT/C/TUN/3, 18 August 2010, paras. 143, 186, 189.

¹⁹ *Ibid.*

In the common core document submitted to Office of the High Commissioner for Human Rights (OHCHR) in 2016, Tunisian authorities stated that “Tunisian law ... recognizes ratified international conventions, including those relating to human rights, and has incorporated them into the domestic legal system, granting them a status superior to that of domestic laws, although inferior to that of the Constitution. This means that, in the event of conflict between domestic law and a ratified international convention relating to human rights, the courts may apply the latter directly, except in the case of conventions requiring the formulation of a national legal framework relating to crime and punishment.”²⁰ The Common core document goes on to note that article 8 of the 2013 Law affirms that the SCC shall consider “cases of serious human rights violations, as defined in international conventions ratified by Tunisia and the [Law] itself [which] is in explicit reference to the substance of international conventions.”²¹ These statements taken together indicate that the Tunisian authorities consider that the 2013 Law and other existing national laws provide the necessary national criminal law framework in relation to such international conventions.

As highlighted in the ICJ’s 2016 publication – *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia* (“Illusory Justice”)²² – and despite the Tunisian authorities’ response to the HRC that the traditional approach has been gradually abandoned, Tunisian Courts have applied article 20 of the Constitution inconsistently. In the context of criminal cases involving gross human rights violations, judges have seemed reluctant to use international treaties or customary international law as a secondary source of guidance when interpreting domestic legislation.²³ The view that international instruments, including human rights instruments, may be directly invoked by litigants has been upheld in only a small number of cases by the Tunisian Administrative Court and ordinary courts ruling on family law.²⁴ In other cases involving gross human rights violations, and torture in particular, Tunisian courts omitted reference to international law entirely, or failed to apply it after making general reference to international treaties and standards. In the *Barraket Essahel* case, the Court convicted the perpetrators of torture of lesser offences under the Tunisian Criminal Code on the basis that the torture took place in 1991, prior to the introduction of the crime of torture in the Criminal Code in 1999. No reference was made to the CAT, notwithstanding the fact that Tunisia had ratified the Convention in 1988, or to the prohibition of torture as a rule of customary international law.²⁵ In another case, the Court stated that “in comparative and international law” inaction over crimes would suffice to engage the responsibility of “High Commanders of the country, including the President” without referring to any specific international standards or jurisprudence on superior responsibility; the Court later referred to international standards, including the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, but did not actually apply them when examining the liability of the accused.²⁶

²⁰ Common core document forming part of the reports of States parties, Tunisia, UN Doc. HRI/CORE/TUN/2016, 17 January 2016, para. 21. Tunisian authorities clarified that “litigants may plead the provisions of such international conventions before national bodies, including judicial bodies.”

²¹ *Ibid.*, para. 22.

²² See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016.

²³ *Ibid.*, pp. 72-73.

²⁴ See: Judgment in Case No. 34, 179 of 27 June 2000 in the Tunis Court of First Instance; Judgment in Case No. 7, 602 of 18 May 2000 in the Tunis Court of First Instance; Decision No. 7286 of 2 March 2001 of the Court of Cassation; Judgment in Case No. 53/16, 189 of 2 December 2003 in the Court of First Instance of La Manouba; Judgment in Case No. 120 of 6 January 2004, in the Tunis Court of Appeal. See also the following cases before the Administrative Court: Judgment in Case No. 2, 193 of 1 June 1994 at first instance; Judgment in Case No. 18, 600 of 14 April 2001 at first instance; Judgment in Case No. 3, 643 of 21 May 1996 at first instance; Judgment in Case No. 13, 918 of 13 May 2003 at first instance; and Judgment in Case No. 16, 919 of 18 December 1999 at first instance.

²⁵ See Judgment in Case No. 74937 – *Barraket Essahel* of 29 November 2011 in the Permanent First Instance Military Court of Tunis.

²⁶ See also Judgment in Case No. 71191 (year unknown) in the Permanent First Instance Military Court of Tunis, pp. 900-901.

ii. International legal framework

a) National law and judicial institutions and international law

Every State has international legal obligations under the universal and regional treaties by which it is bound, as well as under customary international law.²⁷ Non-binding instruments, such as declarations, guidelines and recommendations by international or regional bodies, provide additional guidance on the interpretation and application of the State's international legal obligations.

Under international law, States cannot invoke their internal law or policies to excuse violations of their international legal obligations. The Vienna Convention on the Law of Treaties (VCLT), acceded to by Tunisia in 1971,²⁸ provides under article 26 that "every treaty in force is binding upon the parties to it and must be performed by them in good faith," and under article 27 that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²⁹

Traditionally, two main approaches to the relationship between international and national law have been distinguished: the monist approach (monism) and the dualist approach (dualism). Monism is based on the idea that international law and national law are two components of one and the same legal system. Treaties, as well as customary rules and general principles of law, may therefore form part of the domestic legal order, without a need to enact domestic legislation to give effect to them. Dualism considers national law and international law as two separate legal systems, albeit that they may deal with similar or identical issues. Under dualism, international treaties as sources of international law do not apply directly within the domestic legal order such that, for their provisions to have effect domestically, they need to be enacted in national law by means of a statute or other source of national law. Customary law may still be applied directly without statutory enactments. The choice of the model is for the States themselves to make in defining their national constitutional and legal structure. The State however remains bound by its international legal obligations, and internationally responsible for any breach thereof, whatever model it chooses.³⁰

²⁷ Customary international law is composed of rules that generally bind all States, regardless of whether the State is party to any particular treaty. The existence of such a rule is established through (i) state practice and (ii) *opinio juris* (a sense of legal obligation). See: International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion (1951) ICJ Reports, p. 23 ("principles which are recognized by civilized nations as binding on States, even without any conventional obligation"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ 14 ("Nicaragua Case"), 92, paras. 172-182; *Prosecutor v. Tadic*, ICTY, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98 ("The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law"). See also article 38(1)(b) of the Statute of International Court of Justice, which provides that the Court shall apply customary international law as well as treaty law. A state which is a "persistent objector" to the formation of a rule of customary international law is not bound. See *Anglo-Norwegian Fisheries (U.K. v. Norway)*, 1951, ICJ, 116, pp. 138-139. Some rules of customary international law constitute *jus cogens* (peremptory) norms from which no derogation is permitted: see article 53 of the Vienna Convention on the Law of Treaties (VCLT); *Nicaragua Case*, at 100, para. 190; *Prosecutor v. Furundžija*, ICTY, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para. 153. See also International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 10 August 2001, article 40. *Jus cogens* norms can only be modified by subsequent norms of general international law having the same character.

²⁸ VCLT, 1155 UNTS 331, acceded to by Tunisia on 23 June 1971.

²⁹ These provisions are generally considered to reflect customary international law applicable to all States whether or not they have ratified the VCLT.

³⁰ A State may never justify its non-respect of international law by the fact that this law does not as such form part of its domestic legal order; or that it contradicts a norm of its national legal order. See also European Commission For Democracy Through Law (Venice Commission), *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*, 8 December 2014, CDL-AD(2014)036, paras. 16-23.

Obligations under international law apply to the State as a whole, including all of its organs and agents. As set out in article 4 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the conduct of any State organ is attributable to the State under international law.³¹ The reference to a “State organ” covers all the individual or collective entities that make up the organization of the State and act on its behalf, whether they exercise “legislative, executive, judicial or any other functions.”³²

Similarly, the HRC, in its General Comment No. 31 on the nature of the obligations imposed on States by the ICCPR, stated that “the obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole.”³³ Furthermore, it affirmed that “all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.”³⁴ Similarly, the United Nations Committee Against Torture, in its General Comment No. 2 on the implementation of article 2 by State parties, stated that under the CAT “States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.”³⁵

Like other institutions of the State, then, under both general international law and specific human rights treaties, a national court can cause the State to violate its international legal obligations. In particular, the adoption by a national court of a decision that is inconsistent with the State’s international legal obligations will constitute a violation of the State’s international legal obligations. Furthermore, the failure of a national court to produce a decision or measure required of the State by international law, in relation to a decision or measure which national law gives exclusive competence to that court to do or which has not already been fulfilled by action by another competent institution of the State, will also cause the State to be in violation of its international legal obligations.

b) *The role of domestic courts and judges*

International human rights law imposes two broad categories of obligations on the State: (i) the obligation to respect human rights and (ii) the obligation to guarantee these rights. The former refers to the duty of the State to abstain from violating human rights by action or omission, as well as the obligation to ensure the effective enjoyment of these rights through the adoption of necessary measures. The latter denotes the States’ obligations to prevent human rights violations, investigate them, prosecute and punish the perpetrators and repair the victims for the damage caused.³⁶

In this context, States must ensure that their domestic legal order is compatible with their obligations to respect and guarantee internationally recognized human rights. This obligation is not limited to

³¹ International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 10 August 2001, article 4 (taken note of by and annexed to General Assembly res. 56/83 (2001). See also General Assembly res. 71/133 (2016).

³² See the commentary to article 4, para. 1, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, at 87 (para. 62), 88 (the *Cumaraswamy* Advisory Opinion); *La Grand* (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p. 9; Judgment, ICJ Reports 2001, p. 466; *Avena and Other Mexican Nationals* (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, p. 77; *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, ICJ Reports 2004, p. 12.

³³ HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 4.

³⁴ *Ibid.*

³⁵ Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/GC/C/2, 24 January 2008, para. 15.

³⁶ See ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), p. 89.

the formal adoption of legislative, administrative or judicial measures, but it also requires States to act – in practice – in accordance with this duty.

In relation to the crimes over which the SCC has jurisdiction, Tunisia has an obligation under international law, including treaties to which it is party, to criminalize, investigate and, where there is sufficient evidence, prosecute gross human rights violations.³⁷ Such violations include torture, enforced disappearances, extrajudicial, arbitrary or summary executions, rape and other acts of sexual assault by State actors and crimes against humanity. It also includes rape and other acts of sexual assault by state actors as autonomous crimes.³⁸

Domestic courts, as State organs, play a crucial role in giving effect to such obligations. Many international and regional instruments highlight this. For instance, as the *Bangalore Principles on the Domestic Application of International Human Rights Norms* recognize, domestic courts should be able to draw on international human rights law where domestic law is uncertain or incomplete.³⁹ The Commentary to the Bangalore Principles on Judicial Conduct, which also include a requirement for judges to remain informed about international human rights instruments, provides that “the powers entrusted to a judge must be exercised not only in accordance with domestic law but also, to the full extent that domestic law permits, in a way consistent with the principles of international law recognized in modern democratic societies.”⁴⁰

³⁷ CAT, article 12; CRPD, article 16; ICPPED, articles 3, 10; *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992 (DPED), article 13(1); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89, 1989, principle 9; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, principle 2; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva Convention IV), 12 August 1949, 75 UNTS 287, article 146(1–2); ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, rule 158; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

³⁸ For more detail on the obligation relating to each of these crimes, see ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Practitioners Guide No. 2 (Revised Edition, 2018), pp. 217-239. See also CAT, article 12; Maputo Protocol, articles 2(a), 3(4), 4(2), 11(3), 12(1)(c)(d); 13(c), 14(2)(c), 22(b), 23(b) of the Maputo Protocol (ratified by Tunisia on 23 August 2018); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, principle 2; Geneva Convention IV, article 146(1–2); ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005 rule 158; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18. See also Committee Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 15; United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, paras. 21-22; CEDAW Committee, General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 38(a) and (b); CEDAW Committee, General Recommendation No. 19, “Violence against women”, UN Doc. A/47/38, 1992, para. 24(b); Report of the Special Rapporteur on violence against women (Yakin Ertürk), “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women – The Due Diligence Standards as a Tool for The Elimination of Violence Against Women”, UN Doc. E/CN.4/2006/61, 20 January 2006, para. 19. See also Chapter 3 of this Guide.

³⁹ Commonwealth Secretariat, Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India, 1988, reprinted ‘The Bangalore Principles on the Domestic Application of International Human Rights Norms’, 1988 Commonwealth Law Bulletin 14, p. 1196.

⁴⁰ *Bangalore Principles on Judicial Conduct*, principle 6.4 and commentary (Judicial Integrity Group / UN Office on Drugs and Crime, 2007), p. 137. See ECOSOC resolutions 2006/23, 2007/22. See also principle 40 of the

The Conclusions and Recommendations of the Seminar on the National Implementation of the ACHPR also highlight that national courts should “have regard to international obligations which a country undertakes whether or not they have been incorporated in domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions and laws written or unwritten.”⁴¹ Moreover, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted by the African Commission on Human and Peoples’ Rights (ACoMHRP), provide that “[S]tates shall ensure that judicial officials have appropriate education and training and should be made aware of ... human rights and fundamental freedoms recognized by national and international law,” and that everyone has the right to seek a remedy for violations of the African Charter before competent national courts.

International jurisprudence has also consistently upheld the view that domestic courts, as any other State organ, are under the obligation to act consistently with international human rights law. For example, the ACoMHRP affirmed that “the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.”⁴²

Similarly, jurisprudence highlights the crucial role played by domestic courts while implementing human rights treaties. The European Court of Human Rights (ECtHR) has underlined that the European Convention on Human Rights (ECHR) “does not merely oblige the higher authorities of the Contracting States themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels.”⁴³

Notably, the Inter-American Court of Human Rights (IACtHR) has gone one step further, finding that the general provisions of the American Convention on Human Rights (ACHR) effectively impose a duty directly on domestic courts to ensure the enforcement of Convention rights within the domestic legal system.⁴⁴ Accordingly, the Court stated “every judge must ensure the *effet utile* of international instruments so that they are not reduced or annulled by the application of domestic laws and practices contrary to the object and purpose of the international instrument or standard for the protection of human rights.”⁴⁵

Singhvi Declaration (*Draft Universal Declaration on the Independence of Justice*), which provides that “[j]udges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws”.

⁴¹ Conclusion and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples’ Rights in the Internal Legal Systems in Africa, organised in October 1992 in Banjul, The Gambia by the African Commission on Human and Peoples’ Rights, together with the Raoul Wallenberg Institute on Human Rights and Humanitarian Law, Sweden, October 1992. Reprinted in the Sixth Annual Activity Report of the African Commission 1992-1993, ACHPR/RPT/6th, para. 1 (b).

⁴² *Civil Liberties Organisation in respect of the Nigerian Bar Association v. Nigeria*, ACoMHRP, Communication No. 101/93, 22 March 1995, para. 16. See also *Sir Dawda K Jawara v. The Gambia*, ACoMHRP, Communication No. 147/95 and 149/96, 11 May 2000, paras. 59 and 68. This finding has been reiterated and further elaborated on in subsequent cases before the ACoMHRP, including in one case where the Commission expressed “a general principle that...Governments should avoid restricting rights, and take special care with regard those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counterproductive.” See, for instance, *Constitutional Rights Project v. Nigeria*, ACoMHRP, Communication No. 102/93, 31 October 1998, paras. 57-58.

⁴³ *Ireland v. the United Kingdom*, ECtHR, Application No. 5310/71, Judgment of 18 January 1978, para. 239.

⁴⁴ See International Responsibility for the Issuance and Application of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), IACtHR, Advisory Opinion OC-14/94, 9 December 1994, Series A No. 14, para. 35.

⁴⁵ *Judgment of 26 September 2006*, IACtHR, Almonacid-Arellano et al v. Chile, Series C No. 154, para. 124. See also: *Judgment of 20 November 2007*, IACtHR, Boyce et al. v. Barbados, Series C No. 169, para. 113; *Judgment of 12 August 2008*, IACtHR, Heliodoro Portugal v. Panama, Series C No. 186, para. 180; *Judgment of 1 September 2010*, IACtHR, Ibsen Cárdenas e Ibsen Peña v. Bolivia, Series C No. 217, para. 202; *Judgment of 24 November 2010*, IACtHR, Gomes Lund y otros (“Guerrilha do Araguaia”) v. Brasil, Series C No. 219, para. 176.

Although international law is clear that domestic courts, as organs of the State, have a mandate to comply with States' international human rights obligations, judges may face a number of challenges, particularly when they are confronted with apparent conflicts between domestic and international law. In that context, the use of judicial means and techniques or discretion – including interpretative techniques and constitutional doctrines, remedies or references – is crucial.

Interpretation is a central feature in adjudication of any sort, and certainly of judicial review of domestic law in light of international law and standards. In the event of apparent conflict between domestic and international law, judges, as organs of the State, should interpret domestic law in such a way as to bring it into conformity with applicable international human rights law and provide victims of gross human rights violations with effective remedies.⁴⁶ To that end, it is fundamental that judges refer to all sources of applicable international law, including customary international law and *jus cogens* norms. Furthermore, soft law instruments and comparative law may provide additional guidance to judges in ensuring the interpretation of domestic law in line with international law.

In line with the above, individual judges should do everything possible within their domestic legal and ethical frameworks to avoid taking action (or failing to take action) that would violate international human rights law.⁴⁷ Where a judge nevertheless concludes that the Constitution and other national laws provide absolutely no way to avoid the judge's action or inaction resulting in the judge being responsible for or complicit in a crime under international law, the judge should refuse to act (or desist from the omission) and state their reasons for so doing.⁴⁸ Where the judge considers that national laws demand that they take a judicial decision which would result in an action (or inaction) that would constitute or contribute to a violation of international human rights not constituting a crime under international law, the judge, if they do not refuse to act (or omit to act), should at a minimum explicitly state in the judgment, order or decision that they believe the act or inaction to be in violation of State's international human rights obligations, but that they were nevertheless unavoidably compelled by domestic law to make such a ruling. In such circumstances, a judge should rely on any power they have to suspend the operation of the judgment, order or decision so as to preserve the situation of the affected parties pending appeals to domestic or international bodies.⁴⁹

The Commentary to the Bangalore Principles of Judicial Conduct, for instance, states that while judges are generally under an ethical and professional duty to demonstrate "scrupulous respect for the law," at the same time, "[t]his rule cannot be stated in absolute terms," citing as examples that "[a] judge in Nazi Germany might not offend the principles of the judiciary by mollifying the application of the Nuremberg Law on racial discrimination" and, "[l]ikewise, the judge in apartheid

⁴⁶ For instance, many domestic courts use harmonizing techniques to interpret domestic constitutional law in line with international law. See, e.g., Constitutional Court of Peru, *Peru's President of the Lima Bar Association v. Ministry of Defence*, Exp. No. 0012-2006-PI/TC, ILDC 671 (2006) where the Constitutional Court stated that Peruvian courts must interpret constitutional provisions pertaining to rights and liberties in a manner that is consistent with decisions of the IACTHR. See also Constitutional Court of Germany, *German Consular Notification Case*, F v. T, 2 BvR 2115/01, ILDC 668 (2006) where the Court stated that said that the German constitutional order is open towards international law, and that constitutional provisions should be interpreted in light of international law to avoid conflicts with Germany's international obligations.

⁴⁷ As described above, for purposes of international law, the acts of judicial officials constitute an act of the State just as for any other State official. It is true of any conduct by the judicial official that is carried out in the person's judicial capacity, even if the wrongful act exceeded the person's authority. Judges are therefore as capable as any other kind of public official of perpetrating or being complicit in violations of international human rights, including crimes under international law. Furthermore, the State is responsible for all judicially perpetrated or judicially complicit human rights violations, and this is true even if the judge's conduct was "lawful" under the State's domestic law. See ICJ, *Judicial Accountability*, Practitioners Guide No. 13 (2016), pp. 8-11.

⁴⁸ See ICJ, *Principles on the Role of Judges and Lawyers in Relation to Refugees and Migrants*, May 2017, p. 23. The principles are complemented by a set of recommendations for the judiciary to address potential conflicts between domestic law and international law. While these recommendations were developed in relation to the international legal framework on refugees and migrants, they should be understood as recommendations of general application.

⁴⁹ *Ibid.*

South Africa.⁵⁰ Indeed the Commentary further states that “[s]ometimes a judge may, depending on the nature of the judge’s office, be confronted by the duty to enforce laws that are contrary to basic human rights and human dignity. If so confronted, the judge may be duty bound to resign the judicial office rather than compromise the judicial duty to enforce the law.”⁵¹

b. Principles of legality and non-retroactivity

i. Principles of legality and non-retroactivity under Tunisian law

As in many other national legal systems, Tunisia recognizes the principles of legality and non-retroactivity in its legislation. Article 28 of the 2014 Constitution states that “[p]unishments are individual and are not to be imposed unless by virtue of a legal provision issued prior to the occurrence of the punishable act, except in the case of a provision more favourable to the defendant.”⁵² Notably, a similar provision was enshrined in the 1959 Constitution.⁵³ Article 1 of the Criminal Code reads: “[n]o one may be punished except by virtue of a provision of a previously existing law. If, after the fact but before the final judgment, provision is made by law for the imposition of a more lenient penalty, this law only shall apply.”

While the principles of legality and non-retroactivity, as enshrined in the above provisions, apply to any criminal offences in Tunisia, article 148(9) of the 2014 Constitution prohibits reliance on, among other claims, the “invocation of the non-retroactivity of laws” to prevent the prosecution of individuals for violations in the context of the “transitional justice system.” The scope of cases that fall in this exception is not specified in the Constitution, nor is any specific provision on non-retroactivity included in the 2013 Law. Some have taken the position that this exception may apply to crimes falling within the jurisdiction of the SCC, which has an explicit transitional justice mandate, with jurisdiction over “gross human rights violations” including “deliberate killings, torture, rape and all forms of sexual violence, enforced disappearance and executions without fair trial guarantees.”⁵⁴

As noted in *Illusory Justice*,⁵⁵ Tunisian courts have applied article 1 of the Criminal Code to cases involving gross human rights violations requiring criminal prosecution under international treaties ratified by Tunisia to limit accountability to lesser offences because the treaties have not been implemented in domestic legislation. This is particularly the case in relation to torture, which was not criminalized until 1999, despite that Tunisia ratified the CAT in 1988. Judges’ reluctance to refer to or apply international law in domestic cases⁵⁶ has meant that, for acts of torture committed prior to 1999, perpetrators have been prosecuted and convicted only under the lesser offences in force at the time, such as articles 101 or 103 of the Tunisian Criminal Code, which provide for a maximum prison sentence of five years.⁵⁷ Requests by lawyers to consider the acts under the offence of “torture” enacted in 1999 were rejected on the basis that it would breach the principles of legality and non-retroactivity.⁵⁸

⁵⁰ Bangalore Principles of Judicial Conduct, Commentary (Judicial Integrity Group / UN Office on Drugs and Crime, 2007), p. 82.

⁵¹ Bangalore Principles of Judicial Conduct, Commentary (Judicial Integrity Group / UN Office on Drugs and Crime, 2007), p. 82. See also Justice Michael Kirby, “International law – the Impact on National Constitutions”, in *Proceedings of the Annual Meeting of the American Society of International Law*, Volume 99, 2005, pp. 1-21.

⁵² 2014 Constitution, article 28.

⁵³ 1959 Constitution, article 13.

⁵⁴ See articles 8 and 42 of the 2013 Law.

⁵⁵ See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016.

⁵⁶ See above section 2.a.i and footnotes 24 and 25.

⁵⁷ For a more detailed analysis of the offence of torture under Tunisian law and international law, see section 3.d of this volume.

⁵⁸ See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, pp. 79-80. See in particular Case No. 74937 – Barraket Essahel of 29

ii. Principles of legality and non-retroactivity under international law

The principle of legality (*nullum crimen, nulla poena sine lege*) is enshrined as a fundamental right in numerous international human rights instruments.⁵⁹ Given its importance, the principle is expressly characterized as non-derogable, and it applies at all times, including during armed conflict and states of emergency.⁶⁰

The principle of legality has two aspects: (i) clarity of the law and (ii) non-retroactivity of offences and penalties.⁶¹ Pursuant to this principle, a person may only be prosecuted and convicted for a criminal offence where the conduct in question was prohibited by law at the time it occurred. Furthermore, in order to criminalize behaviour as a penal offence, the specific conduct that is sought to be punished must be precisely and unambiguously defined by law as a crime and subject to individual criminal penalties.⁶²

a) *Retroactive application of national criminal law to crimes under international law*

International law provides that the retroactive application of national criminal law to conduct (whether by act or omission)⁶³ that was not prescribed as an offence under national law at the time it was committed, but constituted a crime under international law at that time, does not violate the principles of legality and non-retroactive application of criminal law.⁶⁴

Article 15 of the ICCPR states that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

November 2011 in the Permanent First Instance Military Court of Tunis and Case No. 334 of 7 April 2012 in the Military Appeals Court where judges reached that conclusion by referring to the principles of legality and non-retroactivity set out in article 1 of the Criminal Code.

⁵⁹ ICCPR, article 15; ACHPR, article 7(2); ECHR, article 7; ACHR, article 9, Arab Charter on Human Rights, article 15. Likewise, the principle of legality is established under international humanitarian law and international criminal law. See article 99 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949; article 67 of the Geneva Convention (IV); article 75 (4)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3, 8 June 1977; and article 6(2)(c) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 UNTS 609, 8 June 1977. See also article 22 of the Rome Statute of the ICC. The Permanent Court of International Justice (PCIJ) was the first international court addressing the principle of legality; see PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 1935, Series A/B, No. 65, 3 at 514.

⁶⁰ HRC, General Comment 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 7.

⁶¹ See generally Kenneth Gallant, *The Principle of Legality in International and Comparative Law* (2009).

⁶² The principle of legality is an essential safeguard under both domestic and international law. See ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 392-399.

⁶³ Although this guide is primarily concerned with the definitions of crimes under domestic and international law, the principles of legality and non-retroactivity apply equally to modes of liability, such as superior responsibility. See section 2(b)(ii)(b) of this Guide. Modes of liability will be covered in the ICJ's *Practical Guide No. 2*, which will succeed this guide.

⁶⁴ ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 399-400.

2. Nothing in this article shall prejudice the trial or punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.⁶⁵

Generally, article 15(1) of the ICCPR prevents a court from applying ordinary crimes under national law retrospectively to hold a person criminally liable for conduct completed before the law was adopted.⁶⁶ A court may otherwise rely upon national law that contemporaneously criminalized conduct at the time that conduct occurred, to convict a person following amendment of that law.⁶⁷ Accordingly, for example, national courts may only prosecute and convict accused of corruption or other economic or electoral crimes, where they were criminalized under national law at the time they were committed.

Although article 15(1) itself makes clear that international law can provide the basis for criminalization of conduct even where national law did not, article 15(2) eliminates any doubt about whether national law may be applied retrospectively to relieve someone of criminal liability for conduct that constituted a crime under international law at the time it was committed. Consequently, the principle of non-retroactivity does not prevent a court from applying the definitions of crimes that applied under international law at the time when conduct occurred, even if national law did not at that time criminalize the conduct, or did not do so consistently with international law. Article 15(2) applies exclusively to conduct that constituted a crime under international law (such as torture, enforced disappearance, or crimes against humanity) and has no bearing on conduct that did not qualify as a crime under international law at the relevant time (as is potentially the case for corruption or other economic or electoral crimes) at the relevant time. For all conduct that was neither criminalized by international law nor national law at the time it occurred, article 15(1) requires that national courts abide by the principle of non-retroactivity.

The view that the retroactive application of national law to crimes under international law, or convictions by national courts relying on international law in the absence of national laws at the time of the conduct or conviction, do not in themselves amount to a violation of the principle of non-retroactivity has been repeatedly upheld by international and regional authorities.

For instance, the HRC affirmed that “[t]he specific nature of any violation of article 15, paragraph 1, of the Covenant requires it [i.e., the Committee] to review whether the interpretation and application

⁶⁵ The references to “international law” and “general principles of law recognised by the community of nations” in article 15 of the ICCPR was expressly included with the view to preventing impunity for the perpetrators of crimes under international law when these illegal acts were not defined and incorporated as crimes in a State’s national criminal laws. See Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (2005) pp. 360, 367-368. Along the same lines, the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the UN International Law Commission in 1950, stipulates in principle I that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”; according to principle II, “[t]he 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.” Furthermore, the Code of Crimes against Peace and Security of Mankind establish at article 1 that “crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.” Further, article 13 stipulates that “1. No one shall be convicted under the present Code for acts committed before its entry into force. 2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.”

⁶⁶ Accordingly, in a number of cases, the HRC found that the principle of non-retroactivity was breached where convictions were based on a law that did not exist at the time of the conduct. See, for example, *Weinberger Weisz v. Uruguay*, HRC Communication No. 28/78, Views of 29 October 1980, para. 16; and *Sobhraj v. Nepal*, HRC Communication No. 1870/2009, Views of 27 July 2010, para. 7.6. See also Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (2005) p. 361.

⁶⁷ The HRC found that article 15(1) only prohibits retroactive changes to the substantive criminal law and not retroactive procedural alterations that operated to the defendants’ detriment. See, for example, *Nicholas v. Australia*, HRC Communication No. 1080/02, Views of 19 March 2004, paras. 7.3 to 7.7; and *Westerman v. the Netherlands*, HRC Communication No. 682/1996, Views of 13 December 1999, para. 9.2. With respect to penalties, however, under article 15(1) of the ICCPR, accused persons must benefit from amendments which impose a lighter penalty for the same crime.

of the relevant criminal law by domestic courts in a specific case appear to disclose a violation of the prohibition of retroactive punishment or punishment otherwise not based on law.”⁶⁸ Accordingly, the HRC affirmed that while doing so, it is necessary to assess whether the concerned acts “at the material time of commission, constituted sufficiently defined criminal offences” under national criminal law or under international law.⁶⁹

In a similar vein, the IACtHR found that the State may not invoke the non-retroactivity of criminal law, among others, to decline its duty to investigate and punish those responsible for crimes under international law.⁷⁰

The ECtHR has similarly held that the necessary legal basis at the time of the material facts may, with or without a specific domestic legal provision, be found under international law, including customary international law.⁷¹ In reaching this conclusion, the Court was applying article 7(2) of the ECHR, the equivalent of article 15(2) of the ICCPR, which states that article 7(1) requiring application of the principle of legality “shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

National courts in different regions of the world have also concluded and reaffirmed that, in light of international law and the obligations arising from it, a conviction for conduct that, at the time of commission, constituted a crime under international law, whether treaty-based or customary, does not violate the principles of legality and non-retroactivity of criminal law.⁷²

In some cases, national courts relied upon international law and the obligations arising from it when concluding that the principles of legality and non-retroactivity were not breached when convicting persons for crimes under international law, even in the absence of national law criminalizing the conduct in question at the time it occurred.

For example, in Hungary, the Constitutional Court, when reviewing the constitutionality of the law on “Procedures Concerning Certain Crimes Committed During the 1956 Revolution,” which did not define crimes, held that article 15(2) of the ICCPR and article 7(2) of the ECHR make “possible the prosecution of ... sui generis criminal offences defined by international law even by those member states whose domestic system of law does not recognize the definition or does not punish that action or omission.” Accordingly, the Court found that “such acts must be prosecuted and punished in accordance with the conditions and requirements imposed by international law. The second section of both ... Conventions evidently break through the penal law guarantees of domestic law.”⁷³

The Indonesian Ad Hoc Human Rights Tribunal likewise affirmed that “the legality principle is not absolutely valid and there may be exceptions to this principle,” such as in the case of crimes against

⁶⁸ See *Klaus Dieter Baumgarten v. Germany*, HRC Communication No. 960/2000, Views of 31 July 2003, para. 9.3.

⁶⁹ *Ibid.*, para. 9.4.

⁷⁰ See *Judgment of 26 September 2006*, IACtHR, *Almonacid Arellano et al v. Chile*, Series C No. 154, para. 151. See also *Judgment of 24 February 2011*, IACtHR, *Gelman v. Uruguay*, Series C No. 221, para. 254.

⁷¹ See e.g. *Kononov v. Latvia*, ECtHR (Grand Chamber), Application No. 36376/04, Judgment of 17 May 2010, paras. 196, 208, 196-227; *Vasiliauskas v. Lithuania*, ECtHR (Grand Chamber), Application No. 35343/05, Judgment of 20 October 2015, paras. 154, 158, 166, 168, 171-178. It should be noted that the ECtHR has on the other hand given a specifically restricted interpretation, based on its particular historical and regional context, to article 7(2) of the ECHR, which the HRC for instance has not applied to article 15(2) of the ICCPR: see e.g. *Vasiliauskas v. Lithuania*, ECtHR (Grand Chamber), Application No. 35343/05, Judgment of 20 October 2015, paras. 188 to 189.

⁷² See ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 419-427; and Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 224-230.

⁷³ Hungary, Constitutional Court, *Decision No. 53/1993, On War Crimes and Crimes against Humanity*, 13 October 1993, English translation in Sólyom/Brunner 2000, pp. 273-283, at p. 279. See also Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 76-81.

humanity.⁷⁴ A similar approach has also been adopted by national courts in Argentina,⁷⁵ and France; as a result, in both instances, national prosecutions of crimes against humanity took place on the basis of international law definitions of these crimes.⁷⁶

Other domestic courts found that national law criminalizing offences under international law could be applied retroactively provided the offence was criminalized under international law at the time the conduct occurred and remained so.

In Colombia, for example, following the adoption of laws criminalizing genocide, torture, enforced disappearance and various war crimes in the year 2000, the Supreme Court of Justice and national courts ruled on numerous occasions on their retroactive application to conduct that constituted crimes under international law at the time of commission.⁷⁷ The Supreme Court set precedents on the matter with two decisions in 2009. In its first decision, the Court stated that the prohibition on the non-retroactive application of criminal law under its Constitution should be interpreted in line with article 15 of the ICCPR.⁷⁸ In a later decision in 2009, the Supreme Court of Justice held that,

⁷⁴ Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, *Abilio Soares*, 14 August 2002, p. 67. The Tribunal also stated that "crime against humanity has become part of general legal principles recognized by a community of nations, [so] that violence by commission or omission may be charged retroactively" (p. 61); and concluded that "[T]herefore the retroactive principle may also be valid to examine and try serious human rights violations cases in the prescribed periods, in particular as in the Penjelasan Undang-undang it is clearly stated that: "in other words the retroactive principle may be applied to protect human rights itself under Article 28 jo verse (2) Undang-undang Dasar 1945 [i.e. the 1945 Constitution] (p.68).

⁷⁵ See, e.g., Argentina, Federal Court of La Plata, *Extradition Josef Josef Franz Leo Schwammberger*, 30 August 1989, per Judge Leopoldo Schiffrin, para. 50, where the court held that the Constitution recognized the primacy of international law also in criminal matters, and that the principle of legality does not apply in a strict sense to crimes under international law. The Argentinean Supreme Court subsequently confirmed this judgment. See Argentina, Supreme Court, *Extradition Josef Franz Leo Schwammberger*, 20 March 1990, 313 Fallos de la Corte Suprema de Justicia de la Nacion, p. 256. See also Argentina, Federal Court of Buenos Aires, *Videla*, Ruling on Pre-trial Detention, 9 September 1999, cited in Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 71-76. In this decision regarding the pre-trial detention of the former head of the junta Jorge Videla, a federal court explicitly addressed the import of the principle of legality, including Argentina's reservation to article 15(2) ICCPR for the prosecution of crimes against humanity. The federal court stated that crimes against humanity are not subject to statutes of limitations, regardless of any national provisions to the contrary. The federal court pointed out that the principle of legality as laid down in article 15 of the ICCPR was binding on Argentina also on the basis of other international sources, such as the ACHR. Therefore, the federal court found, it could not disregard laws established by the international legal system which take precedence over internal laws, "even if this implies assigning a significance to the principle of legality distinct from that which has traditionally been accorded it by internal courts and by the Argentine government, whose reserves in the matter can in no way modify the international regulations and the weight of the obligations arising from the other sources of international legal norms." Moreover, the federal court asserted that "[t]he constitutional mandate of article 118, ... establishing a kind of universal jurisdiction for the prosecution of crimes against international law and fully empowering the Argentine courts to carry out such trials would not be coherent if at the same time a sort of deconstructed law were allowed to be applied to every case which implied restrictions or exceptions to the normative framework which would be applicable at the international level." See Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 71-76 and other Argentinian judgments of federal courts that contain similar or identical holdings cited therein.

⁷⁶ France, Court of Cassation, Criminal Chamber, *Barbie* (No. 2), 26 January 1984. The Court rejected appeals based on the principle of legality by referring to article 7(2) of the ECHR, article 15(2) of the ICCPR and article 55 of the Constitution, finding that under French law, convictions for crimes against humanity were valid. Notably, the court found that the rule of reference in the 1964 law, which provided that there are no statutes of limitations for crimes against humanity, "limited itself to confirming the integration into French law of both the *criminality* of such acts and the fact that they are not subject to statutory limitation." Therefore, the contested judgment "merely confirmed something which was already established under municipal law by the effect of the international agreements ... to which France had acceded." In the judgment contested before the Court of Cassation, the Court of Appeals had found more specifically that the Nuremberg Charter, being annexed to 1945 London Agreement, had "itself been integrated into the municipal legal order." Thus, the reference to crimes against humanity in the Nuremberg Charter in the 1964 law was found to be declarative rather than constitutive. See Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 61-66.

⁷⁷ See, e.g., Colombia, Constitutional Court, Sala Plena, *Sentencia C-578 (in re Corte Penal Internacional)*, 30 July 2002. The Court, while addressing the constitutionality of the ICC Statute, stated that the standards for the principle of legality are not identical for international and national criminal law. See also ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 424-425.

⁷⁸ Colombia, Supreme Court, Criminal Chamber, *Decision of 31 July 2009, Proceedings against Wilson Salazar Carrascal*, Case file 32.539. The Court stated in particular that "is not contrary to "the trial and punishment of a

given their nature as *jus cogens* norms, war crimes and crimes against humanity are part of the domestic legal order, independent of whether the Colombian State has ratified or adhered to the corresponding international instruments.⁷⁹ Therefore, the Court held that “it is an obligation of the Colombian State to ensure that the serious violations of international humanitarian law are punished for what they are, that is, as attacks that do not only affect the life, physical integrity, dignity and liberty of the people, among other relevant rights, but that also undermine fundamental values recognized by all of humanity and compiled in the set of norms that make up what is known as international humanitarian law.” Moreover, the Court held that “the lack of incorporation of a rule that strictly defines crimes against humanity into domestic law does not preclude its recognition at the national level.”

In applying a similar reasoning, in Uruguay a court found that, based on article 15 of the ICCPR and article 9 of the ACHR, the crime of enforced disappearance, which was penalized in the Criminal Code in 2006, was applicable to conduct committed in 1976 because it constituted a crime under international law at the time the crime occurred.⁸⁰ Furthermore, in a subsequent case, another Uruguayan court held that the absence of criminalization of crimes against humanity in domestic law at the time the crimes were committed did not preclude their recognition at the national level.⁸¹

In Bosnia-Herzegovina (BiH), the Court of BiH determined that amendments to the Criminal Code penalizing war crimes could be applied retroactively. The Court stated that the current Criminal Code applied as “the criminal offences for which the convicted person was found guilty are criminal under customary international law, therefore, they fall within the ‘general principles of international law’ as stipulated by Article 4a of the Law on Amendments to the [Criminal Code] of BiH and the ‘general principles of law recognized by civilized nations,’ as stipulated by Article 7(2) of the European Convention.”⁸²

person for actions or omissions that, at the time they were committed, were crimes according the general principles of law recognized by the international community.”

⁷⁹ Colombia, Supreme Court, *Judgment of 21 September de 2009, Proceedings against Gian Carlo Gutiérrez Suárez*, Case File No. 32022.

⁸⁰ Uruguay, Criminal Tribunal No. 19 (Montevideo), *Judgment No 036 of 26 March 2009, Case José Niño Gavazzo Pereira et al. (Plan Condor)*. See also ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 426-427.

⁸¹ Uruguay, Criminal Court of First Instance (Juzgado de Primera instancia en lo Penal de 7º turno), Judgment of 9 February 2010. In these proceedings against Juan María Bordaberry for murder and enforced disappearance of opposition members during the military regime, the Court ruled that it was irrelevant whether murder and enforced disappearance were criminalized under domestic law at the time of their commission because they constituted crimes against humanity which were criminalized under international law at the time. See also ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 426-427.

⁸² Court of Bosnia and Herzegovina, Section I for War Crimes, Prosecutor v. Branimir Glavaš, *Judgment of 20 September 2010*, No. SU-10- 431/10 (Sarajevo), p. 9. The Court also stated: “Furthermore, the fact that the criminal actions listed under Article 173 of the CC of BiH may also be found in the law that was in force at the relevant time – the time of the commission of the offences, specifically, in Article 142 of the CC of SFRY, implies that those criminal offences were also punishable under the then applicable criminal law, which supports the Court’s inference on the principle of legality.” The Court decided however to apply the current Criminal Code as the former code of the Socialist Federal Republic of Yugoslavia (SFRY) applied more lenient sentences. Accordingly, it held that “the principle of mandatory application of a more lenient law is eliminated when trying the criminal offences in relation to which it was absolutely predictable and generally known at the time of their commission that they were in contravention of the rules of international law. In this specific case, it is deemed to be found that the convicted person must have known that during the state of war the application of international rules has priority and that the violation of internationally protected values entails serious consequences. The analysis of Article 173 of the CC of BiH clearly indicates that the essential elements of this criminal offence include, inter alia, the elements of violation of international law. This makes these criminal offences special, because it is not sufficient to only commit such criminal offences through a physical act, but it is necessary to have the knowledge that the commission thereof will result in breaching the international rules and the assumption that the convicted person must be aware that the time of war or conflicts or hostilities is a particularly sensitive time which is specially protected by the universally recognised international rules and, as such, the criminal offence becomes even more important and its commission entails even more consequences that in the case of a criminal offence committed at some other time. Thus, the criminal offences of war crimes against civilians should, by all means, be subsumed under the ‘general principles of international law’ as referred to in Articles 3 and 4a of the CC of BiH. Therefore, whether considered from the aspect of customary international

The East Timor's Special Panel for Serious Crimes held that "a person may be convicted and punished for an act or omission which at the time when it was committed, was criminal according to general principles of law recognized by the community of nations."⁸³ Accordingly, the Special Panel stated that "under customary international law crimes against humanity are criminal under general principles of law recognized by the community of nations, and thus constitute an exception to the principle of retroactivity."⁸⁴ The law establishing the Special Panel for Serious Crimes, *UNTAET Regulation 2000/15*, gave the Panel jurisdiction over genocide, crimes against humanity, war crimes, murder, sexual offences and torture based on universal jurisdiction, and defined the crimes.

There has, however, been some contrary practice.⁸⁵ In these cases, in their interpretation of domestic law, the courts in effect failed to implement the principle of legality in accordance with article 15(2) of the ICCPR.

For example, in the Netherlands, a monist State, the Dutch Supreme Court found that the principle of legality as formulated in the Dutch Constitution constituted an "unreserved prohibition" of prosecutions for torture that were criminalized under Dutch law after the conduct giving rise to the charges was committed.⁸⁶ The Military Court of Appeal in Switzerland, also a monist State, found that it could not convict a person accused of committing genocide in Rwanda in 1994 because genocide was not criminalized in national law, and the Military Penal Code required the existence of a ratified convention but Switzerland was not party to the Genocide Convention at the time the crime was committed as well as at the time of trial.⁸⁷ In Senegal, a monist State, the Court of Appeal of Dakar found in 2000 that, in the absence of the criminalization of crimes against humanity in national

law, international treaty law or 'principles of international law,' it is indisputable that the war crimes against civilians constituted the criminal offence at the critical time, that is, the principle of legality was also satisfied in terms of both *nullum crimen sine lege and nulla poena sine lege*." See also Court of Bosnia and Herzegovina, Section I for War Crimes, *Prosecutor v. Branimir Glavaš*, *Appeal Judgment of 29 November 2010*, No. SU-10-431/10 (Sarajevo). See also *Judgment of 29 October 2009, Prosecutor v. Zoran Marić*, Case No. X-KR-05/96-3; *Judgment of 3 July 2009, Prosecutor v. Momir Savic*, Case No. X-KR-07/478; and *Judgment of 29 September 2008, Prosecutor v. Sreten Lazarević et al.*, Case No. X-KR-06/243; all cited in ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), p. 419.

⁸³ East-Timor, Special Panel for Serious Crimes, *Domingos Mendonca*, *Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment*, 24 July 2003, para. 18.

⁸⁴ *Ibid.*, para. 20.

⁸⁵ Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006) pp. 224-230. In addition to the cases set out below, in Australia, a dualist State, a majority of the Australian Federal Court concluded that a defendant could not be convicted of genocide in the absence of a relevant statute at that time. Australia, Federal Court, *Nulyarimma v. Thompson*, 1 September 1999, [1999] FCA 1. The Court ruled with a 2-1 majority that genocide was not prosecutable under Australian law in the absence of a relevant statute. The decision turned on the question whether customary crime of genocide was applicable in the Australian legal order through the common law but two of the three justices answered that question in the negative. See also Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 41-43, noting that this case has received broad criticism from commentators as an unclear decision that should be overturned.

⁸⁶ Netherlands, Supreme Court, *In re Bouterse*, 18 September 2001, English translation in the Netherlands Yearbook of International Law, Volume XXXII, 2001, pp. 97-118, cited in Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 66-70. The Supreme Court of the Netherlands ruled that Bouterse could not be prosecuted in the Netherlands for the so-called "December murders" in Suriname because *inter alia* the crimes were committed in December 1982, while the CAT came into force in 1987 and the Torture Convention Implementation Act in 1989. The application of the CAT to acts committed before its adoption would violate the principle of legality established by article 16 of the Dutch Constitution (para. 4.3.1). As to the argument that customary international law criminalised torture at the time, the Court held that while binding treaties could prevail over domestic law pursuant to article 94 of the Dutch Constitution, unwritten international law, such as customary international law, does not have the same status (paras. 4.4-4.6). The Supreme Court adopted the same line of reasoning in a subsequent case: see Netherlands, Amsterdam Court of Appeals, *In re Zorreguieta et al*, 25 April 2002, para. 5.5, cited in Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 66-70. In 2003, the Netherlands enacted the International Crimes Act, which not only codified into Dutch law the crimes provided for by the ICC Statute, but also brought together all of the international law from varying international instruments in one legislative body. Accordingly, subject matter jurisdiction over the core crimes is now established within the domestic law of the Netherlands.

⁸⁷ Switzerland, Military Court of Appeal, *In re M*, 26 May 2000, Part III, Chapter 1. See also Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006) pp. 40-41. Notably, Switzerland acceded to the Convention on the Prevention and Punishment of Genocide shortly after this case, on 7 September 2000.

law at the time they were committed or at the time of trial, the principle of legality in the Penal Code precluded the prosecution of those crimes in Senegalese courts.⁸⁸ Despite this ruling, the Extraordinary African Chambers (EAC) were subsequently established to prosecute crimes committed from 1992 to 1990, including crimes against humanity. Hissène Habré was convicted of committing crimes against humanity, war crimes and torture in 2016.⁸⁹

In summary, while there has been some contrary State practice, international law clearly establishes that States cannot invoke their internal law or policies to excuse violations of their international legal obligations. The situations applied in the contrary practice – where domestic interpretations of the principle of legality were applied to prevent the retrospective application of domestic law to convict persons for conduct that constituted a crime under international law at the time that conduct occurred – do not apply in the Tunisian context, where the law explicitly provides that the principle of non-retroactivity does not apply to “gross human rights violations.” Thus, while some national courts opted for a reading of the principle of legality under their respective national law, which was inconsistent with international law, it remains for the Tunisian courts to decide the extent to which current Tunisian law permits prosecution for conduct that constituted crimes under international law (but not necessarily Tunisian law) at the relevant time.⁹⁰ Tunisian courts will also need to determine whether the particular offences of which individuals in given cases before the SCC have been accused did or did not constitute crimes under international law or national law at the relevant time (and if neither, will need to consider how to give effect to article 15(1) of the ICCPR).

(1) The requirements of foreseeability and accessibility

The principle of legality also requires clarity of law. In determining whether a crime is defined with sufficient clarity, courts and tribunals have had regard to two factors: (i) whether it was foreseeable to the perpetrator that his or her conduct was unlawful and that punishment would be imposed and (ii) whether the law was accessible.⁹¹

According to the ECtHR, the foreseeability requirement:

depends to a considerable degree on the context of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a

⁸⁸ Senegal, Court of Appeals of Dakar, Chambre d'accusation, *Ministère Public et Francois Diouf Contre Hissène Habré*, Arrêt n°135, 4 July 2000, para. 3 (On the competence of Senegalese jurisdiction): “Considérant que le droit positif sénégalais ne renferme à l'heure actuelle aucune incrimination de crimes contre l'humanité, qu'en vertu du principe de la légalité des délits et des peines affirmé à l'article 4 du Code Pénal, les juridictions sénégalaise ne peuvent matériellement connaître de ces faits.”

⁸⁹ In September 2005, after four years of investigation, a Belgian judge indicted Habré and Belgium requested his extradition. Senegal refused to send Habré to Belgium, and stalled on a request from the African Union (AU) to prosecute Habré for three years. Belgium then filed a case against Senegal at the International Court of Justice. On 20 July 2012, the International Court of Justice ordered Senegal to prosecute Habré “without further delay” or extradite him: see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ, Judgment, ICJ Reports 2012, p. 422. In April 2012, Senegal and the African Union agreed on a plan to create the Extraordinary African Chambers (EAC) to conduct the trial within the Senegalese judicial system. On 30 May 2016, the EAC convicted Habré of crimes against humanity, war crimes and torture: see *Ministère Public c. Hissène Habré*, EAC, Judgment, 30 May 2016. The judgment was upheld by the Appeals Chamber of the EAC: see *Ministère Public c. Hissène Habré*, EAC, Appeal Judgment, 27 April 2017.

⁹⁰ See Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 230-232.

⁹¹ See, e.g., *K.-H.W. v. Germany*, ECtHR (Grand Chamber), Application no. 37201/97, Judgment of 22 March 2001, paras. 68-91; *Kononov v. Latvia*, ECtHR (Grand Chamber), Application No. 36376/04, Judgment of 17 May 2010, paras. 234-239; and *Kafkaris v. Cyprus*, ECtHR (Grand Chamber), Application No. 21906/04, Judgment of 12 February 2008, para. 140. See also Council of Europe and ECtHR, Guide on Article 7 of the European Convention on Human Rights, No punishment without law: the principle that only the law can define a crime and prescribe a penalty, updated 31 August 2018, pp. 11-13.

professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails.⁹²

The ECtHR determined that a State practice of impunity for crimes did not in itself mean an accused who is eventually prosecuted could not have foreseen that possibility:

Where the law gives an offender the *formal* possibility of foreseeing the criminal and punishable nature of his acts or omissions, irrespective of his everyday reliance on the prevalent and established "State practice" of impunity, the rule of law will sanction subsequent criminal liability. To maintain otherwise would make the criminal actor a legislator in *casu proprio* ... Conversely, excessive reliance upon the subjective criteria of *accessibility* and *foreseeability* would facilitate the applicants' defence based on the principle of legality. They could maintain that they had in fact relied upon the official, accessible and foreseeable interpretation of the law at the time, and upon "the GDR's State practice, which was superimposed on the rules of written law at the material time" ... The applicants could then also maintain that their reliance on State practice, only later proved to be mistaken in the light of a strict interpretation of positive criminal law, was at the time nevertheless consistent with the official, constant and foreseeable State practice. Such an argument would then introduce the defence of an excusable mistake of law (*error juris*).⁹³

The requirement of accessibility implies verifying whether the relevant law was sufficiently accessible to the accused, that is to say whether it was effectively secret or its existence insufficiently certain.⁹⁴

In determining relevant factors for assessing the foreseeability and accessibility of the law, the International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that it is the conduct of the perpetrator not its characterisation as a particular crime that is the relevant focus:

[I]t is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather on the specific description of the offence in substantive criminal law, is of primary relevance. ... In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.⁹⁵

The ICTY clarified that such conduct may be prescribed by customary international law without being codified in international or national law:

⁹² *Vasiliauskas v. Lithuania*, ECtHR (Grand Chamber) Application No. 35343/05, Judgment of 20 October 2015, para. 157; *Pessino v. France*, ECtHR, Application No. 40403/02, Judgment of 10 October 2006, para. 33; *Cantoni v. France*, ECtHR, Application no. 17862/91, Judgment of 15 November 1996, para. 35: "The import of the principle of legality has to do with objective, rigorous semantic and logical legal restrictions (*lex certa*) on the State's power to punish."

⁹³ *Streletz, Kessler and Krenz v. Germany*, ECtHR (Grand Chamber), Applications Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, Concurring Opinion of Judge Loucaides, pp. 43-44.

⁹⁴ Accordingly, where a conviction is exclusively based on international law, it must be verified whether the international source was accessible at the material time. See *Korbely v. Hungary*, ECtHR, Application No. 9174/02, Judgment of 19 September 2008, paras. 74-75 (accessibility of treaties); *G. v. France*, ECtHR, Application No. 15312/89, Judgment of 27 September 1995, para. 25 (accessibility of treaties); *Kokkinkakis v. Greece*, ECtHR, Application No. 14307/88, Judgment of 25 May 1993, paras. 40 (accessibility of case law); *Vasiliauskas v. Lithuania*, ECtHR (Grand Chamber), Application No. 35343/05, Judgment of 20 October 2015, paras. 167-168 (accessibility of customary international law); *Custers, Deveaux and Turk v. Denmark*, ECtHR, Application Nos. 11843/03, 11847/03 and 11849/03, Partial Decision as to Admissibility, 9 May 2006, para. 82.

⁹⁵ See *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, ICTY, IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 62.

[R]ules of customary law may provide sufficient guidance as to the standard the violation of which could entail criminal liability. In the present case, and even if such a domestic provision had not existed, there is a long and consistent stream of judicial decisions, international instruments and domestic legislation which would have permitted any individual to regulate his conduct accordingly and would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility.⁹⁶

The Special Tribunal for Lebanon (STL) reached the same conclusion:

[W]hen determining the question of 'foreseeability' of a criminal offence, ... non-codified international customary law could give an individual "reasonable notice" of conduct that could entail criminal liability. This facet of the *nullum crimen* principle should not be surprising: international crimes are those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules. Individuals are therefore required and expected to know that, as soon as national authorities take all the necessary legislative (or judicial) measures necessary to punish those crimes at the national level, they may be brought to trial even if their breach is prior to national legislation (or judicial pronouncements).⁹⁷

The requirements of foreseeability and accessibility still leave considerable room for judicial interpretation when determining whether conduct is criminal. In the *S.W.* case, for example, the ECtHR stated:

[H]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation ... the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.⁹⁸

Applying this principle in the *Streletz et al.* case, the ECtHR stated "[a]dmittedly, that concept applies in principle to the gradual development of case-law in a given State subject to the rule of law and under a democratic regime, factors which constitute the cornerstones of the Convention, ... but it remains wholly valid where ... one State has succeeded another."⁹⁹

b) Application of the principles of legality and non-retroactivity to modes of liability

The principle of legality applies equally to modes of liability under international law. As for the qualification of conduct as a crime under international law, the mode of liability must have been

⁹⁶ *Prosecutor v. Milutinović et al.*, ICTY, IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, para. 41; see also paras. 38-40. This conclusion was also applied in *Prosecutor v. Sam Hinga Norman*, Special Court for Sierra Leone (SCSL), SCSL-2003-14-AR72 (E), Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child recruitment), 31 May 2004, paras. 25 and 38: "A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law."

⁹⁷ See Interlocutory Decision on the Applicable Law of 16 February 2011, STL, STL- I I-OI/I, paras. 132, 133, 134 and 136.

⁹⁸ *S.W. v. The United Kingdom*, ECtHR, Application No. 20166/92, Judgment of 22 November 1995, paras. 34-36. See also *CR v. The United Kingdom*, ECtHR, Application No. 20190/92, Judgment of 22 November 1995, paras. 32-34. This principle was reaffirmed in *Vasiliauskas v. Lithuania*, ECtHR (Grand Chamber), Application No. 35343/05, Judgment of 20 October 2015, para 155.

⁹⁹ *Streletz, Kessler and Krenz v. Germany*, ECtHR (Grand Chamber), Applications Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, paras. 50-51; see also 82.

established by either national law or international treaty or customary law, and sufficiently foreseeable and accessible, at the time the conduct occurred.

In applying this principle, the ECtHR examined whether, for example, acting under superior orders gave rise to individual criminal responsibility at the relevant time;¹⁰⁰ or whether superior responsibility constituted a mode of liability by reference to customary international law at the relevant time and, as a consequence, whether it was foreseeable for the accused that he would have been held liable for the commission of war crimes.¹⁰¹ Likewise, the Indonesian Ad Hoc Human Rights Tribunal examined the existence of the notion of superior responsibility in light of the international law applicable at the relevant time, before asserting the individual criminal responsibility of the accused in relation to crimes against humanity.¹⁰²

The ICTY, in addition to requiring that the mode of liability be provided for in its Statute, found that for a mode to come within its jurisdiction *ratione personae*, three other preconditions must be satisfied:

... (2) it must have existed under customary international law at the relevant time; (3) the law providing for that form of liability must have been sufficiently accessible at the relevant

¹⁰⁰ See *K.-H.W. v. Germany*, ECtHR (Grand Chamber), Application no. 37201/97, Judgment of 22 March 2001, paras. 92-105, where the Court stated that the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by, inter alia, a requirement to comply with international fundamental human rights instruments, which instruments did not, of themselves, give rise to individual criminal responsibility and one of which had not been ratified by the relevant State at the material time. The Court considered that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life (para. 75).

¹⁰¹ See *Kononov v. Latvia*, ECtHR (Grand Chamber), Application No. 36376/04, Judgment of 17 May 2010, para. 211: "The Court understands individual command responsibility to be a mode of criminal liability for dereliction of a superior's duty to control, rather than one based on vicarious liability for the acts of others. The notion of criminal responsibility for the acts of subordinates is drawn from two long-established customary rules: a combatant, in the first place, must be commanded by a superior and, secondly, must obey the laws and customs of war Individual criminal responsibility for the actions of subordinates was retained in certain trials prior to the Second World War, in codifying instruments and State declarations during and immediately after that war, and it was retained in (national and international) trials of crimes committed during the Second World War. It has since been confirmed as a principle of customary international law and is a standard provision in the constitutional documents of international tribunals"; and para. 213, where the Court held that "Accordingly, the Court considers that by May 1944 war crimes were defined as acts contrary to the laws and customs of war and that international law had defined the basic principles underlying, and an extensive range of acts constituting, those crimes. States were at least permitted (if not required) to take steps to punish individuals for such crimes, including on the basis of command responsibility. Consequently, during and after the Second World War, international and national tribunals prosecuted soldiers for war crimes committed during the Second World War." See also para. 227. Accordingly, the Court examined the concepts of accessibility and foreseeability in the context of a commanding officer and the laws and customs of war (para. 235): it thus held that "international laws and customs of war in 1944 were sufficient, of themselves, to found individual criminal responsibility" (para. 237) and that "in 1944 those laws constituted detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially, commanders. The present applicant was a sergeant in the Soviet Army assigned to the reserve regiment of the Latvian Division: at the material time, he was a member of a commando unit and in command of a platoon whose primary activities were military sabotage and propaganda. Given his position as a commanding military officer, the Court is of the view that he could have been reasonably expected to take such special care in assessing the risks that the operation in Mazie Bati entailed. The Court considers that, having regard to the flagrantly unlawful nature of the ill-treatment and killing of the nine villagers in the established circumstances of the operation on 27 May 1944 (see paragraphs 15-20 above), even the most cursory reflection by the applicant would have indicated that, at the very least, the impugned acts risked being counter to the laws and customs of war as understood at that time and, notably, risked constituting war crimes for which, as commander, he could be held individually and criminally accountable" (para. 238). On this basis, the Court deemed "it reasonable to find that the applicant could have foreseen in 1944 that the impugned acts could be qualified as war crimes" (para. 239).

¹⁰² Indonesia, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, *Abilio Soares*, 14 August 2002, pp. 69-78, 82-84.

time to anyone who acted in such a way; and (4) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.¹⁰³

Several chambers of the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) examined whether joint criminal enterprise (JCE), in particular, constituted part of customary international law at the time and therefore could be applied to conduct at the time it was committed and was therefore foreseeable and accessible to the accused.¹⁰⁴

c) *Application of the principles of legality and non-retroactivity to penalties*

The principle of legality applies not only to whether national or international law defined the conduct as criminal (*nullum crimen sine lege*), but also to whether national or international law provided for a penalty for such conduct (*nulla poena sine lege*). These aspects are treated as overlapping but distinct inquiries.

International law clearly prohibits the imposition of a heavier punishment than the one applicable at the time of the commission of the crime.¹⁰⁵ However, international law does not itself generally provide specific sentencing ranges or other penalties for crimes under international law, and most international human rights instruments do not set up specific penalty requirements. This in turn raises the question of what national courts should do if conduct was clearly criminal under international law but neither international law nor national law set out specific penalties for that particular crime.

While relevant international and comparative practice is limited, several main approaches can be identified.¹⁰⁶

A first approach requires that, in the absence of a specific tariff of penalties in international law, the penalties for the actual crime must be based on national law. For example, Rwanda's law on the prosecution of offences constituting the crime of genocide or crimes against humanity required prosecutions to be based on the national Penal Code because the relevant international conventions lacked a specific tariff of penalties.¹⁰⁷ It is important to note however that Rwanda's law was based

¹⁰³ See *Prosecutor v. Milutinovic et al*, ICTY, IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, para. 21.

¹⁰⁴ See: *Prosecutor v. Tadic*, ICTY, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 220; *Prosecutor v. Prlic et al*, ICTY, IT-04-74-A, Appeals Chamber, Judgment, 29 November 2017, para. 591; *Prosecutor v. Karemera*, ICTR, ICTR-98-44-T, Trial Chamber, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba, and Mathieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, paras. 39-45; *Case File/Dossier No 002/19-09-2007-ECCC/SC*, ECCC, 23 November 2016, paras. 1093-1095.

¹⁰⁵ See article 15(1) of the ICCPR, article 7(1) of the ECHR, and article 9 of the ACHR. See also article 7 of the ACHPR: "No penalty may be inflicted for an offence for which no provision was made at the time it was committed."

¹⁰⁶ See Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 248-256.

¹⁰⁷ See Organic Law No. 40/2000 of 26 January 2001 setting up "Gacaca Jurisdictions" and organising prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between 1 October 1990 and 31 December 1994, Preamble: "Given that the acts committed are offenses provided for and punished by the Penal Code as well as the crime of genocide or crimes against humanity; Given that the December 9, 1948 Convention on the Prevention and Suppression of the Crime of Genocide, the August 12, 1949 Geneva Convention, relative to the Protection of Civilian Persons in Time of War and its additional protocols, and the November 26, 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Given that Rwanda has ratified those three conventions and published them in the Official Gazette of the Republic of Rwanda without having provided penalties for these crimes; Whereas, consequently, prosecutions must be based on the Penal Code." See also Organic Law No. 08/96 of 30 August 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, preamble.

on the constitutional provision that requires penalties to “be prescribed by law before [the crime] was committed.”¹⁰⁸ The ECtHR has held that, as a general rule, penalties must be defined by national law.¹⁰⁹ In *Coëme and others v. Belgium*, the Court held that it “must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.”¹¹⁰ These cases are concerned, however, with the imposition of penalties for crimes which do not constitute crimes under international law.

Other national courts have adopted the position that, under the principle of legality, not only the crime but also the applicable penalties require definition in law.¹¹¹

The second approach provides that, where international law does not provide for a specific tariff, the penalties can be determined by reference to the penalties that applied at the relevant time to ordinary crimes regulating the corresponding *conduct* in national law. By way of example, according to this approach, in the case of killing amounting to a crime against humanity, the penalty should be determined on the basis of the applicable penalty for murder under national law that was applicable at the relevant time. This approach was, for instance, reflected in the ICTY and ICTR statutes: accordingly, both statutes did not set forth authorized penalties for each crime falling under their jurisdiction and instead required the Tribunals, while determining terms of imprisonment, to have “recourse to the general practice regarding prison sentences” in the courts of the countries concerned.¹¹²

It is worth noting, however, that while both tribunals did refer to domestic sentencing practices, both also held in their respective jurisprudence that they were not strictly bound by the relevant national practices. The Trial Chamber of the ICTY stated that:

[I]t might be argued that the reference to the general practice regarding prison sentences is required by the principle *nullum crimen nulla poena sine lege*. Justifying the reference to this practice by that principle, however, would mean not recognising the criminal nature universally attached to crimes against humanity or, at best, would render such a reference superfluous. The Trial Chamber has, in fact, demonstrated that crimes against humanity are a well established part of the international legal order and have incurred the severest penalties. It would therefore be a mistake to interpret this reference by the principle of legality.¹¹³

¹⁰⁸ The Preamble of the Organic Law No. 40/2000 indeed refers to article 12 of the Rwanda Constitution of 1991, which reads: “(2) The liberty of the human being shall be inviolable; no one may be prosecuted, arrested, imprisoned, or convicted other than in the cases prescribed by the law in effect at the time of the perpetrated act and within the forms prescribed by that law. (3) No infraction may be punished by penalties which were not prescribed by law before it was committed.”

¹⁰⁹ See Council of Europe and ECtHR, Guide on Article 7 of the European Convention on Human Rights, No punishment without law: the principle that only the law can define a crime and prescribe a penalty, updated 31 August 2018, p. 11.

¹¹⁰ *Coëme and Others v. Belgium*, ECtHR, Judgment of 22 June 2000, para. 145. See also *C.R. v. the United Kingdom*, ECtHR, Application No. 20190/92, Judgment of 22 November 1995, para. 33: “only the law can define a crime and prescribe a penalty.”

¹¹¹ See e.g. U.S., *Cook v. Commonwealth*, 1995, 20 Va. App. 510 (defendant could not be convicted for second-degree murder because legislator had proscribed conduct but by oversight omitted a corresponding penalty); U.S., Court of Appeal, *State v. La Master*, 1991, 811 S.W.2d 837. See also South-Africa, Transvaal Provincial Division, *S v. Theledi*, 7 October 1991, [1993] 2 SA 402, cited in Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 248-256.

¹¹² See article 24(1) of the ICTY Statute, article 23(1) of the ICTR Statute, and article 22 of the International Residual Mechanism for Criminal Tribunals (IRMCT) Statute.

¹¹³ *Prosecutor v. Drazen Erdemovic*, ICTY, IT-96-22-T, Trial Chamber, Sentencing Judgment, 29 November 1996, para. 38.

Accordingly, both tribunals repeatedly held that recourse to national practice on sentencing is not required *per se* by the principle of legality, but constituted only a non-binding guidance.¹¹⁴

Some national courts also asserted that recourse to penalties under national law that were applicable to similar conduct at the relevant time is in line with the principle of legality.¹¹⁵

Arguably, a slight but very nuanced indication towards this approach may be traced in a more recent judgment of the ECtHR. Indeed, in one case, as part of its reasoning, the court noted that, when international law “did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having finding an accused guilty, fix the punishment on the basis of domestic criminal law.”¹¹⁶

The third approach, which is effectively a nuanced version of the second, is that specific penalties for each offence based on their gravity need not be prescribed by law (whether national or international), so long as there was a broad indication that such conduct would attract severe punishment. This approach implies that judges have the discretion to determine penalties through recourse to the tariff of penalties under national law, while applying the principle that crimes under international law should attract (up to) the highest available penalties available.

Various courts and tribunals have applied this approach. For example, the Appeals Chamber of the ICTY found that the principle of legality

... does not require that the law prescribes a precise penalty for each offence depending on the degree of gravity. Be it a common law system or a civil law system, it is not the case that national legislation anticipates every possible offence with a prescribed sentence. On the contrary, it is a fact that a penal code frequently prescribes a range for sentencing with regard to an offence; that is, it often sets out both the maximum and minimum sentences. Within the range, judges have the discretion to determine the exact terms of a sentence,

¹¹⁴ See *Prosecutor v. Popovic et al*, ICTY, IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 2087: “although both the Statute as well as the Rules provide that a Chamber shall take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, trial chambers are not bound by such national practice. The Tribunal is thus not prevented from imposing a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia”; and other cases quoted in footnote 5888. See also, e.g., *Prosecutor v. Jokic*, ICTY, IT-01-42/1-A, Appeals Chamber, Judgment on Sentencing Appeal, 30 August 2005, para. 38; *Prosecutor v. Kupreskic et al*, ICTY, IT-95-16-A, Appeals Chamber, Judgment, 23 October 2001, para. 418; *Prosecutor v. Prlic et al*, ICTY, IT-04-74-A, Appeals Chamber, Judgment, 29 November 2017, para. 3354. It is worth mentioning that in the latter case the Appeals Chamber held that some guidance may be found in sentencing practices other than those of the former Yugoslavia when determining the appropriate sentence, but such practices should not be given undue weight. See para. 3346. See also *Omar Serushago v. the Prosecutor*, ICTR, ICTR-98-39-A, Appeal Chamber, Judgment, 6 April 2000, para. 30, where the Tribunal held that “[i]t is the settled jurisprudence of the ICTR that the requirement that the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.” In a number of cases, the ICTY Appeals Chamber stated that a sentence imposed in excess of the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed does not necessarily violate the principles of legality and *nulla poena sine lege*. See, e.g., *Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo and Zejnil Delalic* (Čelebići Case), ICTY, IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, paras. 816-817.

¹¹⁵ See, e.g., Belgium, Tribunal of First Instance (District of Brussels), *In re Pinochet Ugarte*, 6 November 1998. In this case, Judge Vandermeersch reasoned that the principle of legality in Belgian law would be satisfied by applying the penalties for relevant ordinary crimes under Belgian law in force at the time the alleged acts were committed. See also Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 248-256.

¹¹⁶ *Kononov v. Latvia*, ECtHR (Grand Chamber), Application No. 36376/04, Judgment of 17 May 2010, para. 212, citing The Lieber Code 1863 (Article 47); the Oxford Manual 1880 (Article 84); Hersch Lauterpacht, “The Law of Nations and the Punishment of War Crimes”, in *British Yearbook of International Law*, Volume 21, 1944, p. 62; and Manfred Lachs, *War Crimes – An Attempt to Define the Issues* (1945), pp. 63 et seq.

subject, of course, to prescribed factors which they have to consider in the exercise of that discretion.¹¹⁷

Under this approach, the gravity of the crime under international law is an important factor in the determination of penalties.¹¹⁸ International courts and tribunals have consistently held that crimes under international law, such as crimes against humanity, should attract the most severe penalties, commensurate with the gravity of the crime and conduct of the accused. The ICTY, for example, stated that, “[i]n sentencing, a Trial Chamber must start from the position that “the gravity of the offence is the primary consideration in imposing sentence”;¹¹⁹ and that “the “gravity of the offence” takes into consideration the crimes for which each accused has been convicted, the underlying criminal conduct generally, the specific role played by the accused in the commission of the crime, and the impact of the crimes on the victims.”¹²⁰ The Special Court for Sierra Leone (SCSL) held that “variations in domestic law, applicable to domestic crimes” do not establish “contrary state practice relevant to sentencing for international crimes”¹²¹ and that “accused persons are presumed to be aware that under customary international law, the most serious violations of international humanitarian law are punishable by the most severe of penalties, with sentences determined on the basis of the gravity of the offence and the totality of their culpable conduct, without regard to the provisions of domestic law or established sentencing tariffs.”¹²²

¹¹⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 372.

¹¹⁸ See Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 248-256. See also *Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo and Zejnil Delalic (Čelebići Case)*, ICTY, IT-96-21-A, Appeal Chamber, Judgment, 20 February 2001, para. 817.

¹¹⁹ See: *Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo and Zejnil Delalic (Čelebići Case)*, IT-96-21-A, Appeal Chamber Judgment, 20 February 2001, para. 731; *Prosecutor v. Kupreskic et al*, IT-95-16-A, Appeal Chamber, Judgment, 23 October 2001, para. 442.

¹²⁰ *Prosecutor v. Blagojevic & Jokic*, ICTY, IT-02-60-T, Trial Chamber, Judgment, 17 January 2005, para. 833. See also *Prosecutor v. Mrksic & Sljivancanin*, ICTY, IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 400, where the Tribunal stated that “factors to be considered when assessing the gravity of the offence include, inter alia, the legal nature of the offence committed; the discriminatory nature of the crime where this is not considered as an element of the crime for the purposes of a conviction; the scale and brutality of the crime; the vulnerability of the victims and the consequences, effect or impact of the crime upon the victims and their relatives. ... [A] sentence must reflect the inherent gravity or the totality of the criminal conduct of an accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused.” The same approach has been upheld by the ICTR. See *Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo and Zejnil Delalic (Čelebići Case)*, ICTY, IT-96-21-A, Appeal Chamber, Judgment, 20 February 2001, para. 817 (“any sentence up to this, does not violate the principle of *nulla poena sine lege*. ... There can be no doubt that the accused must have been aware of the fact that the crimes for which they were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties”). See also *Musema v. Prosecutor*, ICTR, ICTR-96-13-A, Appeals Chamber, Judgment, 16 November 2001, para. 382; *Kamuhanda v. Prosecutor*, ICTR, ICTR-99-54A-A, Appeals Chamber, Judgment, 19 September 2005, para. 357; *Prosecutor v. Serugendo*, ICTR, ICTR-05-84-I, Judgment and Sentence, 12 June 2006, para. 39.

¹²¹ See *Prosecutor v. Charles Ghankay Taylor*, SCSL, SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 669. See also *Prosecutor v. Blaškić*, ICTY, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 682 (“The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia”). See also *Prosecutor v. Kunarac, Kovac and Vukovic*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 402 (addressing the differences in the gravity of a crime committed on a national level and on an international level and the different sentencing practices that result because of these differences): “The severity of rape as a crime falling under the jurisdiction of the Tribunal is decidedly greater than that of its national counterpart. This is shown by the difference between the maximum sentences imposed respectively by the Statute and, for instance, the 1977 Penal Code of the Socialist Republic of Bosnia and Herzegovina, upon the offence of rape.”

¹²² See *Prosecutor v. Charles Ghankay Taylor*, SCSL, SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 669. In reaching this conclusion, the Appeals Chamber made reference in particular to *Prosecutor v. Kunarac, Kovac and Vukovic*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 372-374; and *Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo and Zejnil Delalic (Čelebići Case)*, ICTY, IT-96-21-A, Appeal Chamber, Judgment, 20 February 2001, para. 817. Arguably, this view finds support also in the Preamble of the ICC Statute, whereby “unimaginable atrocities that deeply shock the conscience of humanity must not go unpunished,” read in conjunction with article 77(1)(b) of the Statute, where it is provided that a

This third approach is also partly reflected in State practice. Traditionally, various States accepted a minimal indication of penalties, or even a lack thereof, for all crimes. Indeed, common law systems have long accepted the power of the courts to determine the applicable penalties where the law was silent.¹²³

The fourth approach is based on the notion that international law more generally recognizes that a penalty of life imprisonment is potentially available for the most serious crimes under international law, and by implication when dealing with such crimes, so long as proportionality and other factors are taken into account in setting a prison sentence, any sentence of imprisonment short of life imprisonment must also be compatible with the principle of *nulla poena sine lege*. The appeal to a general principle of the heaviest penalties for the gravest crimes can be traced back to post-WWII jurisprudence.¹²⁴ For example, already in 1946, the Supreme Court in Norway stated that "war crimes can be punished by the most severe penalties, including death penalty. In other words, the criminal character of the acts dealt with in the present case as well as the degree of punishment are already laid down in International Law in the rules relating to the laws and customs of war."¹²⁵ International criminal tribunals, such as the ICTY, also relied on "the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity."¹²⁶

Finally, it is worth noting that the Statutes of some hybrid criminal tribunals allow judges to have recourse not only to national but also international practice regarding prison sentences.¹²⁷ The considerable jurisprudence that has been built up in recent decades in sentencing for serious crimes

maximum term of life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person" may be imposed.

¹²³ See, e.g., U.S., Court of Oyer and Terminer, at Philadelphia, *Republica v. De Longchamps*, October Sessions, 1784, 1 Dall. 111 at 116: "Punishments ... must be such as the laws expressly prescribe; or where no stated or fixed judgment is directed, according to the legal direction of the court." See also Zambia, High Court, *Thomas James v. State*, 18 April 1974, in 8 *The comparative and international law journal of Southern Africa* 152 at 1544 (finding that a legal provision can amount to a criminalization in the absence of a penalty and that the breach of a prohibition in unambiguous and imperative terms regulating a matter of "public grievance" must be held an offence unless the contrary intention is manifest); U.S., Court of Appeal, *Nunley v. State*, 2001, 26 P.3d 1113, cited in Ward N. Ferdinandusse, *Direct application of international criminal law in national courts* (2006), pp. 248-256.

¹²⁴ See United Nations War Crimes Commission 1947, volume 15, p. 200, citing several national prosecutions where the death penalty was imposed for non-homicidal crimes, such as torture and rape, and concluding that: "international law lays down that a war criminal may be punished with death whatever crime he may have committed."

¹²⁵ See Norway, Supreme Court, *Klinge*, 27 February 1946, Annual Digest 1946, p. 262, at p. 263.

¹²⁶ *Prosecutor v. Erdemovic*, ICTY, IT-96-22-T, Trial Chamber Sentencing Judgment, 29 November 1996, para. 40.

¹²⁷ Article 24(1) of the Statute of the STL states that the "Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon." Article 19 (1) of the SCSL Statute states that the "Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone." Article 24(a) and (e) of the Statute of the Iraq Special Tribunal for Human Rights which requires that "[t]he penalties that shall be imposed by the Tribunal shall be those prescribed by Iraqi law" but also that "[t]he penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents." See also article 44(2) of the Law on the Kosovo Specialist Chambers and the Specialist Prosecutor's Office which reads: "In considering the punishment to be imposed on a person adjudged guilty of an international crime under this Law, the Specialist Chambers shall take into account, a. the sentencing range for the crime provided under Kosovo Law at the time of commission, b. any subsequent more lenient sentencing range for the crime provided in Kosovo Law, and c. Article 7(2) of the European Convention for Human Rights and Fundamental Freedoms and Article 15(2) of International Covenant for Civil and Political Rights as incorporated and protected by Articles 22(2), 22(3) and 33(1) of the Constitution of the Republic of Kosovo, and the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2(a) and (b)."

under international law by international and hybrid tribunals represents another potential source of practice to help guide national courts in determining the appropriate sentence for given conduct.

c. Statutory limitations

i. Statutory limitations under Tunisian law

Article 5(1) of the Tunisian Code of Criminal Procedure states that a prosecution must be commenced within 10 years for all serious offences defined as “crimes” and three years for all lesser offences defined as “*délits*.” Notably, a number of offences, including violence against a person or ill-treatment by a public official and acts of violence (unless it causes disability by more than 20%),¹²⁸ fall within the category of “*délits*” and are therefore subject to the 3-year limitation period.

According to article 8 of the Code of Criminal Procedure, the limitation period for civil lawsuits runs parallel to the corresponding criminal lawsuit.¹²⁹ Consequently, victims wishing to claim reparation in civil proceedings must file their claim within the 10 or 3-year period.

Under article 5(2) of the Code of Criminal Procedure, the limitation period is suspended “by any legal or material obstacle, which prevents the criminal action being pursued, except where this results only from the lack of will of the accused.”¹³⁰ What amounts to a “legal or material obstacle” is not defined in the Code of Criminal Procedure or other legislation. The Military Court of Appeal, affirming the findings of the Permanent First Instance Military Court of Tunis, found that a “material obstacle” is any obstacle that exists in effect or in reality, and stated that the legislators left it to the Courts to interpret the notion further.¹³¹ The Court determined that the statutory limitation period for acts of torture did not commence until 14 January 2011, the date of former President Ben Ali’s “escape” from Tunisia, since Ali’s regime prevented individuals from seeking remedies to violations committed by security agencies because of the controls exercised by the regime and President Ali over the prosecution service and Military Court.¹³²

Following the 2011 uprising, the application of the statute of limitations has been restricted. In 2011, the limitation period for torture increased from 10 to 15 years under Law-Decree No. 2011-106¹³³ and was removed entirely under the 2014 Constitution.¹³⁴ Article 148(9) of the Constitution also precludes the application of statutory limitations for violations prosecuted under the “transitional justice system.”¹³⁵ In a similar vein, article 9 of the 2013 Law, the transitional justice law, states that “legal actions in relation to violations falling within article 8 of the same law are imprescriptible,”¹³⁶ namely “gross human rights violations” including “deliberate killings, torture, rape and all forms of sexual violence, enforced disappearance and executions without fair trial guarantees.”

ii. Statutory limitations under international law

Statutory limitations are legal norms providing for a maximum timeframe within which criminal proceedings can be instituted or sentences enforced. Accordingly, if an action is not commenced in

¹²⁸ Articles 101, 103 and 218-219 of the Criminal Code respectively.

¹²⁹ Article 8 of the Code of Criminal Procedure.

¹³⁰ Article 5(2) of the Code of Criminal Procedure.

¹³¹ Judgment in Case No. 334 – Barraket Essahel of 7 April 2012 in the Military Appeals Court, p. 48. The Court also found that, while civil law can act as a reference point for understanding criminal law concepts, the notion of *force majeure* in civil law was more restrictive than the notion of “material or legal obstacles.” See p. 49.

¹³² *Ibid*, pp. 50-51. For further detail, see *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, p. 85.

¹³³ Law-Decree No. 2011-106, article 3.

¹³⁴ Article 23 of the 2014 Constitution.

¹³⁵ Article 148(9) of the 2014 Constitution.

¹³⁶ Article 9 of the 2013 Law.

a timely manner, statutory limitations can result in a bar to prosecution or the enforcement of a sentence, even if the accused is culpable.¹³⁷

While many States have enacted statutory limitation periods for common offences, international law prohibits the application of statutory limitations to certain crimes under international, such as crimes against humanity, war crimes and genocide.¹³⁸ In addition, there is an emerging trend in international law to extend this prohibition to other gross human rights violations, such as torture, enforced disappearance and extra-judicial killings.¹³⁹ Various international instruments provide for the exclusion of limitation periods, including the *UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*,¹⁴⁰ the *Rome Statute* of the ICC,¹⁴¹ the *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*,¹⁴² and the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*.¹⁴³

The HRC has also stated that, under international law, crimes against humanity are not subject to statutes of limitations.¹⁴⁴ Moreover, on several occasions, the HRC has urged States to not apply statutory limitations to gross human rights violations, so that the violations are investigated and that those responsible are held accountable and punished in proportion to the seriousness of the offences.¹⁴⁵

The IACoMHR has taken the position that the principle of non-applicability of statutory limitations to crimes against humanity is a *jus cogens* norm.¹⁴⁶ Notably, the IACtHR has extended the principle to certain other criminal violations of human rights, finding that “provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”¹⁴⁷

The ECtHR has also, in several cases, stressed that limitations periods are not applicable to core crimes, such as war crimes and crimes against humanity, regardless of the date on which they were

¹³⁷ See generally Ruth Kok, *Statutory Limitations in International Criminal Law* (2007).

¹³⁸ See ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 363-372.

¹³⁹ *Ibid.*, pp. 378-384.

¹⁴⁰ UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968. Tunisia deposited its instrument of accession on 15 June 1972.

¹⁴¹ Article 29 of the ICC Statute.

¹⁴² See United Nations General Assembly Resolution 60/147, 16 December 2005. Principle 6 states that “[w]here so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.” Further, under principle 7, “[d]omestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.”

¹⁴³ The Set of Principles, which are the first international instrument specifically about impunity, were adopted in 1997 by the UN Sub-commission for Prevention of Discrimination and Protection of Minorities, see UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, annex II. In 2004, the former UN Commission on Human Rights decided that the draft Set of Principles should be updated, in accordance with the latest developments recorded in international law since 1998. In 2005, the updated version was presented to the Commission, which accepted the new text and recommended that States implement it in their efforts against impunity. See UN Doc. E/CN.4/2005/102/Add.1.

¹⁴⁴ See e.g., HRC, *Concluding Observations of the Human Rights Committee: Spain*, UN Doc. CCPR/C/ESP/CO/5, 5 January 2009, para. 9.

¹⁴⁵ See e.g., HRC, *Concluding Observations of the Human Rights Committee: Argentina*, UN Doc. CCPR/CO/70/ARG, 15 November 2000, para. 11; *Concluding Observations of the Human Rights Committee: El Salvador*, UN Doc. CCPR/C/SLV/6, 18 November 2010, para. 6; *Concluding Observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3, 17 April 2008, para. 7.

¹⁴⁶ IACoMHR, Statement on the Duty of the Haitian State to Investigate Gross Violations of Human Rights Committed during the Regime of Jean Claude Duvalier, 17 May 2011, paras. 10-14.

¹⁴⁷ *Judgment of 14 March 2001*, IACtHR, *Barrios Altos v. Peru*, Series C No. 75, para. 41. This statement was reiterated in subsequent decisions.

committed.¹⁴⁸ Moreover, the Court held that for the purposes of an “effective remedy,” criminal proceedings and sentencing relating to crimes such as torture should not be time barred.¹⁴⁹

Finally, it is important to note that various national courts have upheld the principle of non-applicability of statutory limitations in relation to gross human rights violations, often invoking its nature as a rule of customary international law.¹⁵⁰ At the same time, different legal systems have adopted legislation excluding the applicability of statutes of limitations to crimes under international law, or serious criminal offences.¹⁵¹

¹⁴⁸ See e.g., *Kononov v. Latvia*, ECtHR (Grand Chamber), Application No. 36376/04, Judgment of 17 May 2010, paras. 231-233. See also: *Kolk and Kislyiy v. Estonia*, ECtHR, Decision of Inadmissibility of 17 January 2006, Communications No. 23052/04 and 24018/04; *Maurice Papon v. France*, ECtHR, Decision of Inadmissibility of 15 November 2001, Communication No. 54210/00.

¹⁴⁹ *Abdülşamet Yaman v. Turkey*, ECtHR, Application No. 32446/96, Judgment of 2 November 2004, para. 55.

¹⁵⁰ See, e.g., France, Supreme Court (Criminal Law Chamber), *The Prosecutor v. Klaus Barbie*, Decision of 26 January 1984, where the Court concluded that statutory limitations do not apply to crimes against humanity; Italy, in relation to crimes against humanity, Supreme Court of Cassation, *Public Prosecutor v. Karl Hass and Erich Priebke*, Judgment of 16 November 1998; Argentina, Federal Chamber of Appeals of La Plata, Chamber II, in a case of torture, Resolution of 17 July 2014, FLP 259/2003/17 /CA3; Colombia, Constitutional Court, in case of enforced disappearance, Judgment C-580/02 of 31 July 2002, Case LAT-218. See also ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 374-378, 382-384.

¹⁵¹ ICJ, *International Law and the Fight Against Impunity*, Practitioners Guide No. 7 (2015), pp. 374, 382-383. See also Ruth Kok, *Statutory Limitations in International Criminal Law* (2007).

3. Offences within the Specialized Criminal Chambers' jurisdiction

This chapter examines a select list of gross human rights violations amounting to crimes under international law over which the SCC have jurisdiction, in particular: (i) arbitrary deprivations of life; (ii) arbitrary deprivations of liberty; (iii) torture and other cruel, inhuman and degrading treatment and punishment; (iv) enforced disappearance; (v) rape and other forms of sexual assault; and (vi) crimes against humanity.¹⁵²

After setting out definitions of the crimes under international and then Tunisian law, the chapter examines the extent to which the domestic definitions meet international standards.

a. Arbitrary deprivation of life

No derogation is permitted from the right not to be arbitrarily deprived of one's life, even in situations of armed conflict and other public emergencies which threaten the life of the nation. The right to life is protected under customary international law, and several international instruments, including the ICCPR and ACHPR, to which Tunisia is a party. Extrajudicial, arbitrary or summary executions are terms commonly used to refer to forms of arbitrary deprivation of life that may be attributed to State agents, either *de jure* or *de facto*, and which must be criminalized. However, for the purposes of human rights law it often makes more sense to speak of "unlawful deprivation of life" more generally, with the requirement that any deprivation of life be lawful under both national and international law in order not to violate the right to life.

While Tunisia's domestic law criminalizes homicide and otherwise regulates the circumstances under which a person may be legitimately deprived of his or her life by state authorities, the law does not always meet international law and standards. In particular, it leaves broad scope for state actors and persons acting on their behalf to kill persons arbitrarily, including in the defence of property or in the course of law enforcement operations, and does not prohibit the imposition of the death penalty, including in circumstances where an absolute prohibition applies under international law.

i. The right to life in international law

International law provides that everyone is entitled to the right to life and that no one shall be arbitrarily deprived of his or her life.¹⁵³ The right to life is applicable at all times and in all circumstances, including during armed conflict or other public emergency.¹⁵⁴ Exceptions to the right to life apply only in limited circumstances, such as during armed conflict, where a State's armed forces have the right to target combatants not *hors de combat*.¹⁵⁵ The right to life is recognized as part of customary international law, the general principles of law and as a *jus cogens* norm, universally binding at all times, which Tunisia has an obligation to criminalize, investigate, prosecute and remedy.¹⁵⁶

¹⁵² The offences analysed in this section were selected on the basis of the cases currently pending before the SCC and the list of charges transferred by the IVD to the SCC. While not relevant to the SCC context, the crimes discussed in this guide (with the exception of crimes against humanity) can also constitute war crimes.

¹⁵³ See article 3 of the UDHR, article 6 of the ICCPR, article 6 of the CRC, article 3 of the CEDAW, article 2 of the ECHR and article 4 ACHPR.

¹⁵⁴ ICCPR, article 4. See also HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 2.

¹⁵⁵ Additional Protocol I, articles 48, 51(2), and 52(2); Additional Protocol II, article 13(2); *Prosecutor v. Blaškić*, ICTY, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 109. The right to life in the context of the death penalty is discussed below.

¹⁵⁶ See HRC, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 4. See also AComHPR, General Comment

Violations of the right to life cover a wide spectrum of acts and practices.¹⁵⁷ Extrajudicial, arbitrary or summary executions are terms used to refer to forms of arbitrary deprivation of life that may be attributed to State agents, either *de jure* or *de facto*. States must criminalize extrajudicial and arbitrary executions and some forms of summary executions, bring the perpetrators to justice and provide adequate penalties for such crimes.¹⁵⁸ Accordingly, a range of possible justifications are excluded in relation to arbitrary deprivations of life and in no circumstances shall blanket immunity from prosecution be granted to any person allegedly involved in such acts.¹⁵⁹

In certain circumstances an arbitrary deprivation of life can be prosecuted as a crime against humanity, for example, where murder is committed in the context of a widespread or systematic attack against a civilian population (discussed in section f below).¹⁶⁰

a) Extrajudicial executions

“Extrajudicial execution” usually corresponds to typical domestic law crimes of “murder” or “homicide” and can include deaths caused intentionally by attacks or killings by State security forces or paramilitary groups, death squads or other private forces cooperating with the State or tolerated

No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), para. 5. See also *Report No. 52/97 of 18 February 1998*, IAComHR, Case No. 11.218, Arges Sequeira Manga (Nicaragua), para. 145; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89, January 1991, principle 9; Geneva Convention IV, article 146(1–2); ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, rule 158.

¹⁵⁷ HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 12.

¹⁵⁸ HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, paras. 18–20; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; AComHPR, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), paras. 7, 10; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, principles 1, 18 and 19. The HRC has similarly held that article 2 of the ICCPR requires States to ensure that all those responsible for acts of summary or arbitrary killing in violation of article 6 of the ICCPR are brought to justice through criminal investigations and prosecutions, which in turn, implies criminalization of all such acts. See also *Judgment of 4 July 2007*, IACtHR, Zambrano Vélez et al. v. Ecuador, Series C No. 166, para. 79; *Judgment of 3 April 2009*, IACtHR, Kawas Fernández v. Honduras, Series C No. 196, para. 74; and *Judgment of 25 November 2006*, IACtHR, Miguel Castro-Castro Prison v. Peru, Series C No. 160, para. 237.

¹⁵⁹ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, principle 19.

¹⁶⁰ Article 7(e) of the ICC Statute includes “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law” as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” See also *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, UN Doc. A/HRC/13/42, 20 May 2010, para. 30. Arbitrary detention during an armed conflict may also constitute a war crime, including as torture. See article 8 of the Rome Statute of the ICC.

by it.¹⁶¹ Extrajudicial executions also constitute the deliberate and intentional killings of civilians or combatants considered *hors de combat*.¹⁶²

b) *Arbitrary executions*

International law characterises an “arbitrary execution” as any use of force and firearms by law enforcement officials that is not in accordance with international law and standards. International standards are set out in the *Code of Conduct for Law Enforcement Officials*, adopted in 1989,¹⁶³ and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Basic Principles on the Use of Force), adopted in 1990,¹⁶⁴ which are considered reflective of customary international law rules. The HRC uses these instruments in interpreting state obligations under the ICCPR, as does the AComHR in interpreting state obligations under the ACHPR. Both the ECtHR and the IACtHR have cited these instruments as authoritative statements of international rules regulating the use of force by law enforcement officials.

Under international law, force may only be used as a last resort. As stipulated in the Code of Conduct for Law Enforcement Officials, any use of force by law enforcement officials must be conducted in accordance with the principles of necessity, proportionality and precaution.¹⁶⁵ The governing principle is that any use of force by law enforcement officials is only permissible “when strictly necessary and to the extent required for the performance of their duty.”¹⁶⁶ As stated in the Basic Principles on the Use of Force:

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) Minimize damage and injury, and respect and preserve human life;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.¹⁶⁷

According to the same Principles, the use of firearms against persons must be strictly limited “except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent

¹⁶¹ See ICJ, *Enforced Disappearances and Extrajudicial Executions: Investigation and Sanction*, Practitioners Guide No. 9 (2015), pp. 66-67. The IACtHR has emphasized that extrajudicial executions take on a particular significance when committed against certain groups, including political opponents, human rights defenders and judicial officers, which may result in the violation of other rights such as the right to freedom of expression and association, have an intimidating effect on others and serve to conceal the commission of other human rights violations. See e.g. *Judgment of 36 May 2010*, Manuel Cepeda Vargas v. Colombia, Series C No. 213, paras. 177-178; *Judgment of 27 November 2008*, Valle Jaramillo et al. v. Colombia, Series C No. 192, para. 96; *Judgment of 11 May 2007*, The Rochela Massacre v. Colombia, Series C No. 163, para. 103. See also ICJ, *Enforced Disappearances and Extrajudicial Executions: Investigation and Sanction*, Practitioners Guide No. 9 (2015), pp. 67-70.

¹⁶² See ICJ, *Enforced Disappearances and Extrajudicial Executions: Investigation and Sanction*, Practitioners Guide No. 9 (2015), p. 67. See also IAComHR, Report No. 26/97, Case No. 11.142, Arturo Ribón Avila (Colombia), 30 September 1997, para. 140.

¹⁶³ *The Code of Conduct for Law Enforcement Officials* was adopted by the General Assembly in its resolution 34/169 (1979). See also *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, E.S.C Res. 1989/65, 24 May 1989.

¹⁶⁴ *The Basic Principles on the Use of Force were adopted by the General Assembly’s Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Cuba, 1990.

¹⁶⁵ Code of Conduct for Law Enforcement Officials, Principle 3; Basic Principles on the Use of Force, principle 4. See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN Doc. A/HRC/26/36, 1 April 2014, paras. 59-73.

¹⁶⁶ Code of Conduct for Law Enforcement Officials, principle 3. The Basic Principles on the Use of Force include a similar provision in principle 4.

¹⁶⁷ Basic Principles on the Use of Force, principle 5.

the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.”¹⁶⁸ The intentional lethal use of force by law enforcement officials is prohibited unless it is “strictly unavoidable in order to protect life.”¹⁶⁹

In a similar vein, international law regulates the use of force in the context of protests and demonstrations. According to the Basic Principles on the Use of Force, “in the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”¹⁷⁰ Likewise, in the dispersal of violent gatherings, the Principles establish that law enforcement officials may use firearms “only when less dangerous means are not practicable and only to the minimum extent necessary.”¹⁷¹

Any use of force against persons held in custody or detention is subjected to the same international standards,¹⁷² along with all the other international law principles applicable in case of detention.¹⁷³ In particular, any use of force by law enforcement officials in relation to persons held in custody or detention is prohibited, except “when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.” Moreover, law enforcement officials shall not use firearms, except in “self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention.”¹⁷⁴

International and regional authorities have concluded that deaths caused as a result of lethal force in violation of international standards on the use of force and firearms constitute arbitrary executions.

The ECtHR stated that any use of force must be no more than “absolutely necessary” for the achievement of one of the purposes set out in article 2 of the ECHR which protects the right to life,¹⁷⁵ stating that a balance must be struck between the aim pursued and the means employed to achieve it.¹⁷⁶ The Court has found that the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity, and that there can be no such necessity where it is known that the person to be arrested poses no threat to life and is not suspected of

¹⁶⁸ Basic Principles on the Use of Force, principle 9. See also Code of Conduct for Law Enforcement Officials, para. (c) of the Commentary to principle 3.

¹⁶⁹ Basic Principles on the Use of Force, principle 9. See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on police oversight mechanisms, UN Doc. A/HRC/14/24/Add.8, 28 May 2010, para. 8.

¹⁷⁰ Basic Principles on the Use of Force, principle 13.

¹⁷¹ Ibid., principle 14.

¹⁷² Ibid., principles 15 and 16.

¹⁷³ Ibid., principle 17. See also *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), UN Doc. A/RES/70/175, 17 December 2015, rules 27 to 34; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988, principles 6, 7, 21 and 30; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, United Nations General Assembly Resolution No. 5/113, 14 December 1990, rules 63 to 71; *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, “the Bangkok Rules”, UN Doc. A/RES/65/229, 21 December 2010, rules 7, 19, 20, 22, 24 and 25.

¹⁷⁴ Basic Principles on the Use of Force, principles 15 and 16. See also the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 28 July 2016, guideline 25.

¹⁷⁵ In particular, (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. See *McCann and Others v. the United Kingdom*, ECtHR (Grand Chamber), Application no. 18984/91, Judgment of 27 September 1995, para. 148. See also *Yüksel Erdoğan and Others v. Turkey*, ECtHR, Application no. 57049/00, Judgment of 15 May 2007, para. 86; *Ramsahai and Others v. the Netherlands*, ECtHR (Grand Chamber), Application no. 52391/99, Judgment of 15 May 2007, para. 286; *Giuliani and Gaggio v. Italy*, ECtHR (Grand Chamber), Application no. 23458/02, Judgment of 24 March 2011, para. 17. See also Council of Europe and ECtHR, Guide on Article 2 of the European Convention on Human Rights, Right to life, updated 30 April 2019.

¹⁷⁶ *Güleç v. Turkey*, ECtHR, Application no. 54/1997/838/1044, Judgment of 27 July 1998, para. 71.

having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the individual concerned being lost.¹⁷⁷ In examining situations where deliberate lethal force is used, the Court took into account the actions of the State agents administering force and the surrounding circumstances, including the planning and control of the actions under examination.¹⁷⁸

The IACtHR relied extensively on applicable international standards, including the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force, in assessing cases involved the use of force. In the *Zambrano Vélez* case, the IACtHR stated:

[T]he use of force by law enforcement officials must be defined by exceptionality and must be planned and proportionally limited by the authorities. As such ... force or coercive means can only be used once all other methods of control have been exhausted and have failed.

The use of lethal force and firearms against individuals by law enforcement officials – which must be forbidden as a general rule – is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all circumstances and never exceed the use which is "absolutely necessary" in relation to the force or threat to be repealed. When excessive force is used, any resulting deprivation of life is arbitrary.

The use of force must be limited by the principles of proportionality, necessity and humanity ... The principle of necessity justifies only those measures of military violence which are not forbidden by international law and which are relevant and proportionate to ensure the prompt subjugation of the enemy with the least possible cost of human and economic resources. The principle of humanity complements and inherently limits the principle of necessity by forbidding those measures of violence which are not necessary (i.e. relevant and proportionate) to the achievement of a definitive military advantage. In peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former.¹⁷⁹

In a similar vein, the IAComHR stated that:

in situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate. ... Unless such exigencies exist, however, the use of lethal force may constitute an arbitrary deprivation of life or a summary execution; that is to say, the use of lethal force must be necessary as having been justified by a state's right to protect the security of all.¹⁸⁰

¹⁷⁷ See *Nachova and Others v. Bulgaria*, ECtHR (Grand Chamber), Applications nos. 43577/98 and 43579/98, Judgment of 6 July 2005, para. 95; and *Kakoulli v. Turkey*, ECtHR, Application no. 38595/97, Judgment of 22 February 2006, para. 108.

¹⁷⁸ See *McCann and Others v. the United Kingdom*, ECtHR (Grand Chamber), Application no. 18984/91, Judgment of 27 September 1995, para. 150. See also *Ergi v. Turkey*, ECtHR, Application no. 66/1997/850/1057, Judgment of 28 July 1988, para. 79.

¹⁷⁹ *Judgment of 4 July 2007*, IACtHR, *Zambrano Vélez et al. v. Ecuador*, Series C No. 166, paras. 83-85. See also *Judgment of 24 November 2011*, IACtHR, *Barrios Family v. Venezuela*, Series C No. 237, para. 49; *Judgment of 5 July 2006*, IACtHR, *Montero Aranguren et al. (Retén de Catia) v. Bolivarian Republic of Venezuela*, Series C No. 150, paras. 67-68.

¹⁸⁰ IAComHR *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, paras. 87-88.

c) *Summary executions*

The imposition of the death penalty, *per se*, is not yet absolutely prohibited by international law; however, a norm proscribing the imposition of the death penalty in any circumstances as a violation of the right to life is arguably developing.¹⁸¹ The Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa has been mandated to “develop a strategic plan(s) including a practical and legal framework” for its abolition.¹⁸²

For States that retain the death penalty, international law allows its imposition, at most, under very stringent conditions. Carrying out the death penalty would be regarded today as constituting an arbitrary deprivation of life, for instance, when imposed in the following circumstances:

1. As a result of a trial that did not fully comply with the international standards for a fair trial under article 14 of the ICCPR, including the right to appeal;¹⁸³
2. For crimes that are not considered among “the most serious” offenses,¹⁸⁴ i.e. crimes of extreme gravity involving intentional killing;¹⁸⁵
3. Against conduct whose criminalization is prohibited under international law;¹⁸⁶
4. Where courts had “no discretion whether to designate the offence as a crime entailing the death penalty, and on whether or not to issue the death sentence in the particular circumstances of the offender;”¹⁸⁷

¹⁸¹ HRC General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, paras. 50-51. This is further evidenced by: (i) the adoption of the Second Optional Protocol to the ICCPR, which requires ratifying states to cease executions and abolish the death penalty, now ratified by 86 states (Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, article 1); (ii) the repeated resolutions by an overwhelming majority of UN General Assembly votes calling on States to declare an immediate moratorium on the death penalty with a view to abolition (UN General Assembly Resolution 73/175, UN Doc. A/RES/73/175, 17 December 2018); and (iii) statements by international authorities (e.g. the Kigali Framework Document on the Abolition of the Death Penalty in Africa, adopted by the Adopted by the First Sub-Regional Conference for Central, Eastern and Southern Africa on the Question of the Death Penalty in Africa (2009); Cotonou Framework Document Towards the Abolition of the Death Penalty in Africa, Adopted by the Second Regional Conference for North and West Africa on the Question of the Death Penalty in Africa (2010); and the Study on the Question of the Death Penalty in Africa, adopted by the AComHPR at its 50th Ordinary Session (2011)).

¹⁸² AComHPR, Resolution 79, adopted at its 38th Ordinary Session (2005).

¹⁸³ ICCPR, articles 6(4), 14; HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 41. See also HRC, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, paras 6, 51; Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by the Economic and Social Council in its resolution 1984/50 of 25 May 1984;

¹⁸⁴ See ICCPR, article 6(2); HRC General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 35. See also the Safeguards guaranteeing protection of the rights of those facing the death penalty; Arab Charter on Human Rights, article 6; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, principle N(9)(b).

¹⁸⁵ *Chisanga v. Zambia*, AComHPR, Communication No. 1132/2002, 18 October 2005, para. 7.4 (finding that the mandatory imposition of the death penalty for aggravated robbery with use of firearms violated article 6, paragraph 2 of the Covenant); HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 35 (this excludes crimes “not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences” [citations omitted]). See also ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (“intentional crimes with lethal or other extremely grave consequences”); Report of Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/67/275, 9 August 2012, paras. 37-38.

¹⁸⁶ HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 36, citations omitted. The HRC cites as examples, among other things, “establishing political opposition groups or offending a head of state” [citations omitted].

¹⁸⁷ HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 37. See also *Dexter Eddie Johnson v. Ghana*, HRC

5. If it was not provided by law for the offence at the time of its commission;¹⁸⁸
6. As a result of serious procedural flaws not constituting a violation of fair trial rights, such as “a failure to promptly inform detained foreign nationals of their right to consular notification ... resulting in the imposition of the death penalty, and failure to afford individuals about to be deported to a country in which their lives are claimed to be at real risk [for example, where they face the death penalty] with the opportunity to avail themselves of available appeal procedures;”¹⁸⁹
7. Where applied in a discriminatory manner;¹⁹⁰
8. Where there is no possibility for sentenced persons to seek pardon or commutation;¹⁹¹
9. With regard to people who should not be subject to the death penalty, including minors, the mentally challenged, pregnant women, and women who have just given birth.¹⁹²

In relation to the imposition of the death penalty following a violation of fair trial rights, in the *Kurbanov* case, the HRC stated that “the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant.” The sentence of death was passed by a military tribunal against a civilian in violation of the right to a fair trial as set out in article 14 of the ICCPR, and thus also in breach of article 6.¹⁹³ Having signed the Second Optional Protocol on the ICCPR, aimed at the abolition of the death penalty, Tajikistan was under an obligation to prevent the imposition of the death penalty and provide remedies for related violations.

Imposing the death penalty following a violation of fair trial rights (or other conditions) may also violate the prohibition on inhuman treatment where there is a real possibility the death sentence will be carried out. In the case of *Larranga v. The Philippines*, the HRC found that the imposition of a death sentence on an accused following fair trial rights violations constituted inhuman treatment under article 7 of the ICCPR, stating that “[i]n circumstances where there is a real possibility that the sentence will be enforced, [fear that he will be executed] must give rise to considerable anguish” which “cannot be dissociated from the unfairness of the proceedings underlying the sentence.”¹⁹⁴ In *Öcalan v. Turkey*, the ECtHR similarly found that Turkey violated the prohibition on inhuman treatment under article 3 of the ECHR for sentencing Öcalan to death following violation of his fair

Communication No 2177/2012, Views of 27 March 2014, para. 7.3; *Judgment of 21 June 2002*, IACtHR, Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Series C No. 94, paras. 103, 104, 105, 108; *Report No. 38/00*, IAComHR, Baptiste v. Grenada, Case 11.743, 13 April 2000, paras. 69-132.

¹⁸⁸ HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 38.

¹⁸⁹ *Ibid.*, para. 42.

¹⁹⁰ *Ibid.*, para. 44 (citations omitted).

¹⁹¹ *Ibid.*, para. 47.

¹⁹² ICCPR, article 6(5); CRC, article 37(a); Safeguards guaranteeing protection of the rights of those facing the death penalty, article 3; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), General Assembly resolution No. 40/33, 29 November 1985, rule 17(2); ACHR, article 4(5); Arab Charter on Human Rights, article 7; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, principle N(9)(c). See also HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, paras. 48-49.

¹⁹³ *Kurbanov v. Tajikistan*, HRC Communication No. 1096/2002, Views of 6 November 2003, para. 7.7. See also *Conroy Levy v. Jamaica*, HRC Communication No. 719/1996, Views of 25 November 1998, paras. 7.3, 6, 8-9; *Clarence Marshall v. Jamaica*, HRC, Communication No. 730/1996, Views of 25 November 1998, paras. 6.1-6.2, 6.6, 7-8. For guidance on fair trial rights, see ICJ, *International Principles on the independence and accountability of judges, lawyers and prosecutors*, Practitioners Guide No. 1 (2006); ICJ, *Trial Observation Manual for Criminal Proceedings*, Practitioners Guide No. 5 (2009); and Amnesty International, *Fair Trial Manual*, (2nd Edition, 2014).

¹⁹⁴ *Larranga v. The Philippines*, HRC Communication No. 1421/2005, Views of 24 July 2006, para. 7.11.

trial rights,¹⁹⁵ stating that the anguish felt by a person sentenced to death as a result of fear that they will be executed "in circumstances where there exists a real possibility that the sentence will be enforced...cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention."¹⁹⁶

The above sources address the question whether the imposition of the death penalty constitutes a violation of international law that gives rise to the responsibility of the State. Additional considerations would be required for a court to determine whether a particular act to impose or carry out the death penalty constituted a crime giving rise to individual criminal responsibility, including the question of the *mens rea* of the individuals involved and the situation of international and domestic law at the relevant time the acts were committed. With the exception of one case in Iraq, the only jurisprudence the ICJ has been able to identify that considered whether to hold individuals criminally liable for imposing the death penalty is from the post-WWII context.

In the 1947-1948 *Latza* case in Norway, the Lagmannsrett (Court of Appeal) considered whether German judges who imposed the death sentence against Norwegian civilians for offences including distributing anti-German propaganda, providing financial assistance to patriotic underground organisations, listening to news from London and transporting weapons for illegal purposes were criminally responsible under two domestic law prohibitions: (i) article 110 of the Civil Code which "provides punishment for a judge, member of a jury or a judicial surveyor who in this capacity acts against his better judgment, which provision increases the punishment if, as a result of the offence, a death sentence has been executed," and (ii) article 233 of the Civil Code which "applies punishment for he who unlawfully causes another person's death."¹⁹⁷ After dismissing the charges under article 110, the Court considered whether the judges had acted intentionally with the full understanding that by their conduct they had caused another person's death. On a second appeal to the Supreme Court, the Court said the decisive legal issue was "whether the procedure before the Tribunal met with minimum demands which form the prerequisites for proper court proceedings – in the first instance whether the Tribunal as an independent court took its decision after a fair investigation of the question of guilt, or whether the outcome of the trial was predetermined by directives given to

¹⁹⁵ *Öcalan v. Turkey*, ECtHR (Grand Chamber), Application No. 43221/99, Judgment of 12 May 2005, paras. 173-175. See also *Gurban v. Turkey*, ECtHR, Application No. 4947/04, Judgment of 15 March 2016; *Kaytan v. Turkey*, ECtHR, Application No. 27422/05, Judgment of 15 December 2015.

¹⁹⁶ *Öcalan v. Turkey*, ECtHR (Grand Chamber), Application No. 43221/99, Judgment of 12 May 2005, para. 169. Both of these decisions were subject to dissenting opinions. The first expressed the view that the prohibition on inhuman treatment under the ICCPR should not be used to "chastise" states that have not abolished the death penalty which does not constitute a violation in and of itself. See *Larranga v. The Philippines*, HRC Communication No. 1421/2005, Individual Opinion by Committee Member Ruth Wedgwood, Views of 24 July 2006: "[F]inally, the Committee has taken this occasion to pronounce an innovative doctrine that any procedural irregularities in a capital trial, violating Article 14, will serve to transform the sentence itself into a violation of Article 7. The rationale offered is that a person wrongly convicted, in a procedurally imperfect trial, must suffer greater anguish than a defendant in a procedurally sound capital trial. To be sure, there is no doubt that the prospect of a death sentence is the occasion for anguish on the part of any defendant. But the Covenant did not abolish the death penalty. Within the Covenant itself, the commitments of Article 7 against "torture" or "cruel, inhuman or degrading or punishment" are profound, and should not be used as a redundant form of chastisement of states parties that have not chosen to abolish capital punishment." The second expressed the view that the anguish suffered does not meet the minimum level of severity (*Öcalan v. Turkey*, ECtHR (Grand Chamber), Application No. 43221/99, Joint Partly Dissenting Opinion of Judges Costa, Caflisch, Türmen and Borrego Borrego, Judgment of 12 May 2005: "[I]n the present case, there is no evidence that the applicant has suffered fear and anguish that reaches the necessary threshold due to a lack of impartiality and independence on the part of the national security court. As stated in paragraph 39 of the judgment, during the trial the applicant accepted the main charge against him under Article 125 of the Turkish Criminal Code, that is to say having accomplished acts aimed at separating a part of the State's territory. He also accepted political responsibility for the PKK's general strategy as its leader and admitted having envisaged the establishment of a separate State on the territory of the Turkish State. He knew what the charge against him was and what the penalty would be (there is only one penalty provided for in Article 125 of the Turkish Criminal Code). He also stated expressly that he accepted the National Security Court's jurisdiction. Under such circumstances, the presence of a military judge at an early stage of the trial can hardly have caused fear and anguish reaching a threshold constituting a violation of Article 3."

¹⁹⁷ Law Reports on the Trials of War Criminals, United Nations War Crimes Commission (1949), Volume XIV, pp. 50-51.

the tribunal.”¹⁹⁸ The court did not find that deficiencies in the trial when considered together or separately were decisive, and there was no evidence that the judges were acting on explicit or implicit instructions.¹⁹⁹ The judges were ultimately acquitted.

In a 1956 case, the German Supreme Court considered whether Dr. Otto Thorbeck and Walter Huppenkothen,²⁰⁰ a judge and a prosecutor respectively in the Schutzstaff (SS) Tribunal, were responsible for aiding and abetting murder for their involvement in the sentencing to death of six men alleged to be part of an assassination plot against Hitler. Although the Supreme Court found that the trials over which Thorbeck and Huppenkothen presided were “severely deficient” with regard to procedural guarantees, the deficiencies related mostly to formal requirements and it could not be proven that the judges did not perceive the SS Tribunal hearing as a real trial.²⁰¹ They were accordingly acquitted.

In the *Justice* case²⁰² before the U.S. Military Tribunal established under the London Agreement of 1945, judges were held liable for crimes against humanity for imposing the death penalty. The indictment alleged the judges were part of irregularly composed German courts and tribunals that were established to enforce a reign of terror by, *inter alia*, imposing unwarranted death sentences through discriminatory trial processes.²⁰³ The Tribunal found that the prosecution and imposition of the death penalty of crimes of treason and high treason was a war crime and a crime against humanity because the offences were misnamed and were, in fact, minor offences often imposed on Polish people trying to desert unlawfully annexed parts of Poland by the Third Reich. The offences for which the death penalty was applied under the German Decrees were not for serious offences²⁰⁴ and were not sufficiently precise.²⁰⁵ The Tribunal did not go into detail about the obligation that was to be imposed on judges in respect of how they were to determine whether laws are appropriate or fair in such in such situations. The Tribunal also found the Chief Public Prosecutor liable for crimes against humanity and war crimes for referring cases to the courts; the Tribunal reasoned that, since the courts had no discretion with respect to imposition of the death penalty, he had effectively through such referral determined the punishment to be inflicted.²⁰⁶ Judge Rothaug was also found guilty of crimes against humanity because he was considered a “knowing and willing instrument in

¹⁹⁸ Law Reports on the Trials of War Criminals, United Nations War Crimes Commission (1949), Volume XIV, p. 80.

¹⁹⁹ Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (2015), p. 184.

²⁰⁰ BGH, Urteil vom 19.06.1956 - 1 StR 50/56 (LG Augsburg).

²⁰¹ Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (2015), p. 137.

²⁰² Several other cases relating to the unlawful issuance of the death penalty that were decided contemporaneously with the *Justice Case* were referred to in United Nations War Crime Commission documents, however the ICJ has not been able to locate the judgments in these cases. In any case, it is not clear whether these cases involved violations of the right to a fair trial or whether they considered the issuance of the death penalty after a violation of fair trial rights as a crime against humanity under international law. See UNWCC (ed.), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office, 1948), pp. 493-496, referring to Yugoslav Case Commission no. 956 where members of the Italian Military Court in Cetinje were charged with passing death sentences on captured officers and men of the National Liberation Army of Yugoslavia III/32.20.3.46; French Case Commission no. 264 where members of German Courts Martial were charged with sentencing members of the French Army of Resistance captured after D Day to death; and Luxembourg case Commission no. 991 where death sentences were passed on army deserters and protestors from Luxembourg.

²⁰³ The Justice Case (Case No. 3), *United States v. Altstoetter*, Nuremberg Military Tribunal, Indictment, paras. 9, 11-12, 14, 16.

²⁰⁴ The Justice Case (Case No. 3), *United States v. Altstoetter*, Opinion and Judgment and Sentence, Nuremberg Military Tribunal No. 3, 4 December 1947), pp. 1043-1044, 1075, 1079. The death penalty was to be imposed under Decree of August 1938 for avoiding military service, for example.

²⁰⁵ The Criminal Code was amended so that prosecutors and judges could indict and convict for offences which violated the “spirit” of the law: “[T]hey subverted the spirit and method of interpretation of the criminal law in order to enable the courts to impose punishment, outside the law, in accordance with the political ideology of the regime:” The Justice Case (Case No. 3), *United States v. Altstoetter*, Opinion and Judgment and Sentence, Nuremberg Military Tribunal No. 3, 4 December, 1947), pp. 1044-1046. The death penalty could even be imposed extraterritorially. The Justice Case (Case No. 3), *United States v. Altstoetter*, Opinion and Judgment and Sentence, Nuremberg Military Tribunal No. 3, 4 December 1947), p. 1075.

²⁰⁶ The Justice Case (Case No. 3), *United States v. Altstoetter*, Opinion and Judgment and Sentence, Nuremberg Military Tribunal (3 December 1947), p. 1120.

that program of persecution and extermination.²⁰⁷ He was found to have gone beyond merely applying the laws prescribed by the Nazi regime, on the basis that he actively boasted to colleagues about how he could interpret the laws to carry the greatest penalties (including the death penalty) against Poles and Jews in particular. He admitted that he interpreted laws so that Polish and Jewish transgressors were treated more harshly than German transgressors.²⁰⁸ The tribunal pointed to the lack of procedural guarantees in Judge Rothaug's court room as one basis for concluding that he was "merely an instrument in the program of the leaders of the Nazi State of persecution and extermination,"²⁰⁹ including because he appeared to have made decisions before evidence was presented at hearing.²¹⁰ It appears that the finding of Judge Rothaug's individual responsibility relied on his active willingness (as opposed to reluctance in merely applying the laws) in imposing the discriminatory laws of the Nazi regime.²¹¹ The Tribunal held that an arbitrary and brutal enforcement of those laws which were "shocking to the conscience of mankind" could be punishable.²¹²

Despite extensive research, the ICJ was only able to locate one case post-WWII – the "Dujail Trial" - in which persons were held criminally liable for their involvement in carrying out the death penalty in circumstances in which fair trial guarantees were not met.²¹³ On 11 May 2006, the Iraqi High Tribunal (IHT), a court established by the Iraqi Interim Governing Council in 2003 and later approved by the Iraqi National Assembly in 2005, convicted and sentenced to death 'Awwad Hamad al-Bandar al-Saadoun,²¹⁴ the President of the Revolutionary Court during Saddam Hussein's regime, on the charge of murder as a crime against humanity for sentencing 148 persons to death after a trial violating their rights. Some academic literature suggests this is the only case in which a judge has been prosecuted for their role in issuing the death penalty in a trial involving fair trial rights violations in the post WWII period.²¹⁵

In the Dujail Trial, Al-Bandar was prosecuted along with Saddam Hussein, two other high level officials and three party officials²¹⁶ for murder, torture, forced displacement, unlawful imprisonment,

²⁰⁷ Ibid., p. 1155.

²⁰⁸ Ibid., p. 1145.

²⁰⁹ Ibid., p. 1155.

²¹⁰ Ibid., p. 1156.

²¹¹ Ibid., p. 1156 ("he identified himself with this national program and gave himself utterly to its accomplishment"). The Tribunal did not find that the imposition and carrying out of the death sentence against habitual criminals, looting and war economy-rationing and hoarding, was contrary to international legal standards because of the relative necessity of harsh punishment for such offences in the context of state emergency which is present in war time. For "[c]rimes amounting to an undermining of the defensive strength of the nation; defeatist remarks, criticisms of Hitler, and the like" the Tribunal could not conclude judges were liable for crimes against humanity because the accused did not know "that the war which they were supporting on the home front was based upon a criminal conspiracy or was *per se* a violation of international law" (p. 1026).

²¹² Ibid., p. 1165.

²¹³ Judgment of the Dujail Trial at the Iraqi High Tribunal (Unofficial English Translation), Case No. 1/C 1/2005, 11 May 2006 (Dujail Trial Judgment).

²¹⁴ There are various spellings of the defendant's name in official records. The accused will be referred to as he is most commonly known, "Awwad al-Bandar," in this Guide.

²¹⁵ Jennifer DePiazza, "Denial of Fair Trial as an International Crime: Precedent for Pleading and Proving it under the Rome Statute", in *Journal of International Criminal Justice*, Volume 15, 2017, pp. 257-289, at p. 258. See also DePiazza at p. 266 (the only precedent of how a prosecutor plead denial of fair trial [as a crime against humanity] is in the *Justice Case*); Michael A. Newton, "The Death Penalty and the Iraqi Transition" in Madoka Futamura and Nadia Bernaz (eds) *The Politics of the Death Penalty in Countries in Transition* (2014) p. 199 ("This marks the first time since World War II that a jurist has been convicted of crimes against humanity for perverting the power of the law into the tool of political power"); Michael P. Scharf & Michael A. Newton, "Insights: The Iraqi High Tribunal's Dujail Trial Opinion," in *The American Society of International Law*, Volume 10, 2006 ("Al-Bandar is the first judge since the Nuremberg-era Alstoetter case to be tried for using his court as a political weapon. Sixty years ago, the Alstoetter Tribunal concluded that 'the dagger of the assassin was concealed beneath the robe of the jurist'").

²¹⁶ The defendants in the Dujail Trial were Saddam Hussein Majid (Former President of the Republic); Barazan Ibrahim Hassan (Former Head of the Intelligence Service); Taha Yassin Ramadan, aka Tah al-Jazrawi (former Deputy Prime Minister and Member of the Ba'th Party State Command and half-brother of Hussien); 'Awwad Hamad al-Bandar al-Saadoun (President of the cancelled Revolutionary Tribunal) 'Abdullah Kadhim Ruwayid al-Mashaikh; 'Ali Dayeh 'Ali al- Zubaidi; and Mizher 'Abdullah Kadhim Ruwayid al- Mashaikh (party officials).

enforced disappearance and other inhumane acts as crimes against humanity.²¹⁷ Al-Bandar was prosecuted only for murder as a crime against humanity through membership in a joint criminal enterprise (JCE)²¹⁸ for his role in issuing death sentences against 148 persons accused of attempting to assassinate Saddam Hussein in the town of Dujail in 1982.²¹⁹ The accused persons were referred by Hussein to the Revolutionary Court, and al-Bandar convicted them following a summary trial.

The Trial Chamber set out the intent requirement for murder as a crime against humanity²²⁰ as follows:

The criminal element of (aggravated) deliberate murder must exist, coupled with premeditation or circumstances where there are several victims or both. Thus there must be a criminal behavior that the actor or partner commits. This behavior constitutes murder or causes murder. A criminal outcome must also be present, reflected in the death of the person(s) wronged, as well as a causal relation between the criminal result that occurred and the criminal behavior reflected in the act of killing or causing the killing. If these elements are present, the material element of murder will be established. However, that is not sufficient for the presence of deliberate murder. We must also have the mental element for deliberate killing, which implies that the offender must have criminal intent. This requires the presence of two elements in the offender, those of knowledge and volition, given that criminal intent is the will to realize the criminal event coupled with the knowledge of the constituting elements thereto.

The presence of premeditation in international crimes is established in general on the basis of joint preparation and preplanning for the sake of committing the crime (planning, agreement and preceding period), and through self-composure, which can be recognized from several facts, such as the length of the period separating preparation and planning from the perpetration of the crime.²²¹

With respect to the "criminal outcome" and existence of a "causal relation[ship]," the Trial Chamber found that evidence showing that al-Bandar did not carry out a proper or fair trial²²² – including that 46 persons sentenced to death were already dead at the time of the hearing,²²³ that the courtroom could not have physically accommodated 148 persons,²²⁴ that the sentence was handed down only 17 days after the referral was passed to the Revolutionary Court,²²⁵ and that the 148 persons sentenced to death included minors and no attempt had been made to verify their age²²⁶ – confirmed that "defendant 'Awwad al-Bandar issued an order to murder al-Dujail's victims."²²⁷

²¹⁷ The IHT Statute upon which the charges were based adopted the definition of crimes against humanity under the Rome Statute. While the IHT is constituted as a domestic court, the Law of the Iraqi High Tribunal mandates it to interpret offenses defined in contemporary international criminal law, including crimes against humanity. See article 15(2)(D) of the IHT Statute: Official Gazette of the Republic of Iraq, No. 4006, October 18, 2005 (IHT Statute).

²¹⁸ Joint criminal enterprise is a mode of liability under article 15(2)(D) of the IHT Statute. Joint criminal enterprise is also a mode of liability under international and some domestic law. Modes of liability will be discussed in ICJ's *Practical Guide No. 2*.

²¹⁹ Dujail Trial Judgment, pp. 8, 12. Saddam Hussein, Barzan al-Tikriti and Taha Yassin Ramadan were considered the "senior defendants" and were each charged with committing murder, torture, forced displacement, unlawful imprisonment, enforced disappearance and other inhumane acts as crimes against humanity with both command responsibility and JCE as the mode of liability. The other, lower-level, defendants were convicted of aiding and abetting crimes against humanity.

²²⁰ The other elements were set out in the Dujail Trial Judgment, p. 46.

²²¹ Dujail Trial Judgment, p. 46.

²²² Dujail Trial Judgment, pp. 51-58.

²²³ Dujail Trial Judgment, p. 53.

²²⁴ Dujail Trial Judgment, p. 54.

²²⁵ Dujail Trial Judgment, p. 17.

²²⁶ Dujail Trial Judgment, pp. 17-18, 54.

²²⁷ Dujail Trial Judgment, p. 62.

With respect to Al-Bandar's intent, the Trial Chamber found:

[T]he criminal intent of defendant 'Awwad al-Bandar existed also through the presence of knowledge and volition. Defendant 'Awwad was cognizant of all of the elements of this criminal event, and he wanted to accomplish it. The fact that the trial is bogus and not real demonstrates that defendant 'Awwad al-Bandar, along with anyone who signed the promulgation of the verdict or what was called verdict decision, had criminal intent. This criminal intent also applied to those who contributed to the commission of this act or those acts leading to the murder of those victims who were still alive.²²⁸

The Trial Chamber considered whether al-Bandar was ordered or pressured by Hussein to deliver the death penalty verdict.²²⁹ Although al-Bandar had given evidence that he was in a "difficult position," the Trial Chamber found that al-Bandar was not acting under duress, having given other evidence that he was not under pressure to deliver particular outcomes through his judgements.²³⁰ Beyond this, the Trial Chamber appears not to have examined in any detail the extent of discretion that al-Bandar had in handing down the 148 death sentences.²³¹

The Trial Chamber concluded that al-Bandar and the other defendants who were high-ranking officials had been participants in a JCE, linking the conduct of al-Bandar with the some of the other defendants because they were leaders of government institutions whose purposes were served by sentencing the 148 persons to death.²³² Although the Trial Chamber did not distinguish between "systemic," "basic" or "extended" JCEs, it appears from case law cited by the Trial Chamber and the knowledge and intent standards imposed that the Chamber was referring to systemic JCE.²³³

On appeal, the IHT Appeals Commission upheld the Trial Chamber's findings without examining its application of the law. After reviewing the facts, the Appeals Chamber found that the "evidence supports the conclusion that he was an executive employee for the regime, carrying out the duties of his job...without being an independent judge of the court deciding the fate of innocent people."²³⁴ Al-Bandar was executed along with Saddam Hussein after the appeal judgment was issued.

The judgment was strongly criticized by human rights organizations who monitored the trial. Human Rights Watch criticized the IHT's finding that al-Bandar had the requisite knowledge and intent for a joint criminal enterprise because it was made "simply because he was chief judge in the Revolutionary Court and a senior member of the Ba'th Party" and because it failed to "poin[t] to evidence that would show actual knowledge, or alternatively, that such a finding was the only reasonable inference from the evidence."²³⁵ They compared the IHT Trial Chamber's reasoning with the *Justice Case*:

²²⁸ Dujail Trial Judgment, p. 62.

²²⁹ Dujail Trial Judgment, p. 52.

²³⁰ Dujail Trial Judgment, p. 58.

²³¹ However, when considering Hussein's own criminal responsibility, the Trial Chamber noted that "his subordinates did not have discretion to act without orders given and determined by him." Dujail Trial Judgment, p. 134.

²³² Dujail Trial Judgment, p. 65.

²³³ Dujail Trial Judgment, pp. 66-67. See Human Rights Watch (HRW), *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case*, June 2007. The IHT Trial Chamber cited two cases relating to joint criminal enterprise: *Prosecutor v. Krnojelac*, ICTY, IT-97-25, Appeals Chamber, Judgment, 17 September 2003; and *Prosecutor v. Aleksovski*, ICTY, IT-95-14/1, Appeals Chamber, Judgment, 24 March 2000. Both of these cases are "systemic" joint criminal enterprise cases.

²³⁴ Iraqi High Tribunal, Number: 29/c/2006, 26 December 2006.

²³⁵ HRW, *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case*, June 2007, p. 12. See also Nehal Bhuta, "Fatal Errors The Trial and Appeal Judgments in the Dujail Case", in *Journal of International Criminal Justice*, Volume 6, 2008, pp. 39-65, at p. 46. There were also criticisms of the Trial Chamber's factual findings in this regard. HRW found that the notice of charges left it unclear what basis of liability was alleged against each of the defendants, but that al-Bandar appeared to have been convicted on the basis of participation in a joint criminal enterprise. See HRW, *The Poisoned Chalice: A*

[T]he evidence before the IHT trial chamber clearly showed that 'Awwad al-Bandar had conducted a summary trial that did not respect basic fair trial requirements. However, he was not charged with murder simpliciter. He was accused of murder as a crime against humanity, as a participant in a joint criminal enterprise. Hence, it was necessary to show not just that he conducted a summary or sham trial, but that he did so pursuant to a criminal plan or policy. As the court in *Alstoetter* pointed out, showing arbitrary behavior by the judge in the courtroom is not sufficient; rather it must be proved that the arbitrary behavior amounted to participation in a criminal policy or plan.²³⁶

The application of systemic JCE was criticized also because this form of liability is usually applied to "an organized system of ill-treatment," the most common example being concentration camps.²³⁷ The Dujail Trial concerned, on the other hand, multiple crimes committed over a number of years all over Iraq. Some of the other defendants with whom it was alleged al-Bandar had entered a JCE were involved only in the torture or detainment of victims, and had nothing to do with the trial of the 148 accused victims.²³⁸

The appeal decision of the IHT was criticized for its "cursory and inadequate review," which "failed to correct [the] errors [of the trial chamber] and, in fact, compounded them by misstating several essential legal principles."²³⁹ Both the Trial Chamber and Appeals Commission were criticized for failing to ensure fundamental fair trial guarantees were met.²⁴⁰

It is possible that in certain circumstances, and depending on the *mens rea* of the individual and other elements, imposition of the death penalty following a violation of fair trial rights (or other condition) could constitute the crime against humanity of persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds provided the chapeau elements of crimes against humanity are met (discussed in more detail in section f below). Persecution as a crime against humanity requires the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. A violation of fair trial rights could constitute a breach of fundamental rights provided it reaches the level of gravity of other underlying acts.²⁴¹

There is no explicit guidance regarding how many fair trial guarantees reaches the threshold of a breach of "fundamental rights." States drafting the Rome Statute rejected an approach based on a breach of a "sufficient number of violated rights."²⁴² To conclude that a perpetrator committed persecution through a violation of fair trial rights, it must be shown that they intended to cause severe deprivation of fundamental rights of one or more persons. The same requirement would apply

Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case, June 2007, p. 8.

²³⁶ HRW, *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case*, June 2007, footnote 53.

²³⁷ HRW, *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case*, June 2007, p. 10, citing *Prosecutor v. Vasiljevic*, ICTY, IT-98-32, Appeals Chamber, Judgment, 25 February 2004, para. 98.

²³⁸ Dujail Trial Judgment, p. 209. The Trial Chamber established the requisite knowledge of another defendant on the basis of his position and relationship with Hussein, such as being the Vice-President.

²³⁹ HRW, *The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case*, June 2007, p. 5.

²⁴⁰ Amnesty International, *Iraq: Dujail Trial Fundamentally Flawed: Court Should Overturn Verdict, Death Penalty*, 19 November 2006, referring to the HRW, *Judging Dujail: The First Trial before the Iraqi High Tribunal*, 19 November 2006.

²⁴¹ See article 7(1)(h) of the ICC Statute, as defined in as defined in ICC Elements of Crimes, Article 7(1)(h), Crimes Against humanity, element 1. The ICC Elements of Crimes, along with the Rome Statute are available on the ICC website in English and French here: <https://www.icc-cpi.int/resource-library#coreICCTexts>.

²⁴² Jennifer DePiazza, "Denial of Fair Trial as an International Crime: Precedent for Pleading and Proving it under the Rome Statute," in *Journal of International Criminal Justice*, Volume 15, 2017, pp. 257-289, at p. 274.

to a person who intended to impose the death penalty following (or through) the violation of fair trial rights.

As discussed above, on the particular facts of the *Larranga v. The Philippines* (HRC) and *Öcalan v. Turkey* (ECtHR) cases, the imposition of the death penalty following a violation of fair trial rights was found to reach the minimum threshold of severity to constitute inhumane treatment under the ICCPR and ECHR as a matter of State responsibility. This raises the question whether the imposition of the death penalty in a trial in which the accused's fair trial rights were violated could, in certain circumstances constitute the crime against humanity of "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" within the meaning of the Rome Statute article 7(1)(k) (discussed in section f below). In addition to the general requirements for crimes against humanity, and consideration of *mens rea* and other factors, a court would need to consider, among other things, whether the effects of the imposition of the death penalty in the context of the particular trial reached the threshold of severity to be "inhumane," and was "of a similar character to other" to the other crimes against humanity listed in article 7(1)(k).

ii. Tunisian law in light of international law and standards

Article 22 of the 2014 Constitution states that "the right to life is sacred, [and] cannot be infringed upon except in extreme cases provided for by law." This constitutional right is implemented through prohibitions in the Tunisian Criminal Code and other laws governing the use of force by law enforcement officials.

a) Homicide

The Tunisian Criminal Code punishes homicide, both intentional and premeditated.²⁴³ Premeditated homicide, that is homicide committed pursuant to "a plan, developed before the action, to carry out an attack against another person,"²⁴⁴ attracts the death penalty.²⁴⁵ Homicide that is intentional but not premeditated is punishable with life imprisonment,²⁴⁶ however will attract the death penalty if it is preceded, accompanied or followed by another offence punishable by imprisonment, or where its purpose was either to prepare, facilitate or carry out the offence, or to encourage the flight or ensure the impunity of the perpetrators or accomplices.²⁴⁷ If the perpetrator intentionally injures the victim without intending to kill them, but nevertheless the injuries cause the victim's death, the penalty is 20 years' imprisonment, or life imprisonment in aggravating circumstances.²⁴⁸ Unintentional homicide caused by clumsiness, carelessness, negligence, distraction or failure to comply with regulations is punishable with two years' imprisonment and a pecuniary fine.²⁴⁹

Under article 39 of the Criminal Code, a perpetrator may be excused when they were "faced with a circumstance that exposed his [or her] life or that of his relatives to an imminent danger and when this danger could not be otherwise avoided." If the person is not a relative, the judge has discretion to "assess the degree of responsibility."²⁵⁰ Under article 40 of the Criminal Code, a person may also kill or inflict injuries on a person to repel someone from climbing or breaking walls, fences or

²⁴³ Criminal Code, article 201.

²⁴⁴ Criminal Code, article 202.

²⁴⁵ Criminal Code, article 201.

²⁴⁶ Criminal Code, article 205.

²⁴⁷ Criminal Code, article 204.

²⁴⁸ See Criminal Code, article 208 (as amended by Law No. 2017-58, which entered into force on 1 February 2018). Under this provision, aggravating circumstances include: (i) the age of the victim (if the victim is a child); (ii) the relationship between perpetrator and the victim (if the perpetrator is the spouse or partner of the victim); (iii) the use or threat of use of weapons; (iv) if the victim is physically or mentally impaired or in other situation of vulnerability; and (v) the involvement of multiple perpetrators or accomplices.

²⁴⁹ Criminal Code, article 217.

²⁵⁰ Criminal Code, article 39. See, for instance, Court of Cassation, *Decision No. 31839*, 6 March 1990, p. 156.

entrances of a dwelling or its outbuildings at night, or defending against robbery or looting executed with violence.²⁵¹

Article 42 of the Criminal Code provides that a person is not liable for crimes under the Criminal Code, including homicide, if their acts were carried out pursuant to other laws or orders from a competent authority. Article 46 of Law No. 82-70 on the Statute of Internal Security Forces of 6 August 1982 limits this immunity in relation to orders given to officers of the Internal Security Forces by requiring the orders be given “by their superior in the framework of legality.”

While the domestic prohibition on murder is facially consistent with the right to life, a number of exceptions under domestic law are not consistent with international law and standards. In particular, article 40 of the Criminal Code excuses killings relating to the entry into property at night or protection of property executed with violence, which do not constitute acts in defence of a threat to life and are therefore not in line with international law and standards. Article 42 of the Criminal Code also appears to be overbroad if it could be applied to provide impunity to perpetrators of conduct amounting to extrajudicial executions under international law. Superior orders are not a defence to crimes under international law.²⁵²

b) Use of lethal force and firearms by public officials

The use of lethal force by law enforcement officials is regulated by the Criminal Code, Law No. 82-70 and Law No. 69-04 regulating public meetings, processions, parades, public gatherings and assemblies of 24 January 1969.²⁵³ Article 3 of Law No. 82-70 states that the use of lethal force is regulated by articles 39, 40 and 42 of the Criminal Code, which were set out above.

Law No. 69-04 regulates the use of lethal force and firearms in the context of public meetings, processions, parades, public gatherings, and assemblies. Under article 20, law enforcement officials may use firearms in three circumstances:

1. As a last resort and if there are no other means to “defend the places they occupy, the buildings they are protecting, or the positions or persons they are assigned to guard, or if the resistance cannot be mitigated by any means other than the use of firearms;”
2. When arresting a suspect, if he or she does not comply with a repeated order to stop and tries to escape and there is no other means to stop other than the use of firearms; and
3. When trying to stop a vehicle or other means of transport, if the driver does not stop and there is no other means to force them to stop than the use of firearms.

Law No. 69-04 also contains a procedure for law enforcement officials to follow where a public gathering is “unlawful,” i.e. an “armed public gathering and non-armed public gathering, which are considered likely to disturb the peace.”²⁵⁴ According to article 21, law enforcement officers are permitted to use force if the protesters in an unlawful public gathering refuse to disperse in spite of warnings to do so, using the following methods in the order in which they are listed: (i) water cannons or striking with batons; (ii) teargas; (iii) firing into the air; (iv) firing above the heads of the protesters; and (v) firing towards their legs. Under article 22, if “the protesters try to achieve their goal by force despite having used all of these means,” then “the security agents will fire directly on them.”

²⁵¹ Criminal Code, article 40.

²⁵² Modes of liability will be covered in the ICJ’s *Practical Guide No. 2*.

²⁵³ Law No. 82-70 on the Statute of the Internal Security Forces, article 3.

²⁵⁴ Law No. 69-04, article 13.

Tunisian law also permits the use of lethal force in a broader range of circumstances than that permitted under international law. In particular, under article 20 of Law No. 69-04 the use of firearms is permitted to defend property, “mitigate” a resistance, or stop a vehicle or other form of transport in the context of public meetings, processions, parades, public gatherings, and assemblies. Article 21 also permits the use of lethal force to disperse an unlawful gathering where other means of dispersal have failed.

Under international law, the intentional use of lethal force must be reasonable, necessary and proportional,²⁵⁵ and is only permissible if it is “strictly necessary in order to protect life from an imminent threat to life,”²⁵⁶ not property. International law also only permits the use of lethal force to disperse *violent* gatherings, and only when “only when less dangerous means are not practicable and only to the minimum extent necessary.”²⁵⁷ In the case of non-violent assemblies, the use of force should be avoided, and where that is not practicable, restricted to the minimum extent necessary.²⁵⁸ Those using force must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former, and they must minimize damage and injury.

c) *Imposition of death penalty after unfair trial*

Under Tunisia’s domestic law, the imposition or carrying out of the death penalty following a violation of fair trial rights is not defined as a specific criminal offence.²⁵⁹ The crimes against humanity listed in article 7(1) of the Rome Statute have not been specifically codified as such in Tunisian domestic law. Murder is criminalized (but no specific offences of “persecution” or “other inhumane acts” exist in the Tunisian criminal code), as is ill-treatment by persons acting in an official capacity under articles 101 and 103 of the Penal Code (discussed in section f below). Complicity in the commission of offences or commission through abuse of power are also penalized under articles 32 and 114 of the Penal Code.

b. Arbitrary deprivation of liberty

The right to liberty is protected under customary international law, and several international instruments including the ICCPR and ACHR, to which Tunisia is a party. The right prohibits arbitrary arrest and detention at all times, whether in times of peace or conflict, and requires that certain procedural safeguards and other minimum rights are afforded to persons when detained. An arbitrary deprivation of liberty, while a violation of international law, does not always constitute a crime. It may, however, constitute a crime where it violates domestic criminal law, or constitutes torture, an enforced disappearance or a crime against humanity.

The Tunisian Criminal Code criminalizes the arrest or detention (or abduction) of a person (i) without a judicial order, (ii) by a public official without a legitimate basis to obtain information or a confession or (iii) by fraud, violence or threats. The Code of Criminal Procedure regulates the circumstances in

²⁵⁵ HRC, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 12.

²⁵⁶ *Ibid.*, para. 12.

²⁵⁷ Basic Principles on the Use of Force, principle 14.

²⁵⁸ Basic Principles on the Use of Force, principle 13.

²⁵⁹ A moratorium on enforcing death sentences has been applied since 1991. Tunisia voted in favour of a United Nations General Assembly’s Resolution on a moratorium on death penalty in December 2012. See General Assembly Resolution A/RES/67/176, 20 March 2013. In 2012, one month after his election President Moncef Marzouki granted 125 persons condemned to death a special pardon and commuted their sentences to life imprisonment. However, the death penalty still applies by law to certain crimes in Tunisia (e.g. under article 5 of the Criminal Code and for homicide) and death sentences continue to be imposed in some cases. See HRC, Summary of stakeholders’ submissions on Tunisia, Report of the Office of the High Commissioner for Human Rights, UN Doc. A/HRC/WG.6/27/TUN/3, 20 February 2017, para. 29.

which authorized officials may restrict the liberty of persons, including without a judicial order, but does not impose criminal penalties for violations of procedural requirements.

i. The right to liberty under international law

Article 9(1) of the ICCPR states that “[e]veryone has the right to liberty and security of person” and that “[n]o one shall be subjected to arbitrary arrest or detention,” which is reflected in similar provisions contained in the ACHPR and Arab Charter on Human Rights.²⁶⁰ This prohibition is reflective of customary international law and a *jus cogens* norm²⁶¹ which must be respected at all times, including in situations of armed conflict or other public emergency.²⁶² The prohibition applies to all deprivations of liberty, whether or not they take place in the context of criminal proceedings and irrespective of duration.²⁶³

Under international law, a deprivation of liberty may be “arbitrary” for numerous reasons, including where it does not have a lawful basis in national or international law,²⁶⁴ the legal basis contravenes

²⁶⁰ See ACHPR, article 6; Arab Charter on Human Rights, article 14. See also UDHR, article 9; ACHR, article 7(1); ECHR, article 5(1); Rome Statute, article 55(1)(d); *Principles on Fair Trial and Legal Assistance in Africa*, 2003, principle M(1)(b). Many non-binding instruments elaborate upon the implications of this prohibition. See, e.g., the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions No. 663 C (XXIV) of 31 July 1957 and No. 2076 (LXII) of 13 May 1977; the *United Nations Body of Principles for the Protection of All Persons under a Form of Detention or Imprisonment* adopted by the General Assembly by its Resolution No. 43/173 of 9 December 1988; *United Nations Basic Rules for the Treatment of Prisoners*, adopted by the General Assembly by its Resolution No. 45/111 of 14 December 1990; the *Council of Europe Minimum Rules for the Treatment of Prisoners*, adopted by the Committee of Ministers by its Resolution No. (73)5 of 19 January 1973; and the *IACoMHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, adopted by its Resolution No. 1/08 of 13 March 2008.

²⁶¹ HRC, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; HRC, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8. See also Working Group on Arbitrary Detention, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, UN Doc. A/HRC/22/44, 24 December 2012, paras. 37-75.

²⁶² Arab Charter on Human Rights, articles 4(2) and 14(6); ACoMHR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, principle M(5)(e); HRC, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 64-67. See also Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), IACtHR, Advisory Opinion OC-8/87, Series A No. 8 (1987).

²⁶³ HRC, General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982, para. 1; Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, paras. 55, 57-58. See also Deliberations Nos. 1, 4, 5 and 7, and Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1998/44, 19 December 1997, para. 41.

²⁶⁴ Under the ICCPR, ACHPR and Arab Charter, “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.” ICCPR, article 9(1); ACHPR, article 6; Arab Charter on Human Rights, article 14(2). See also: ECHR, article 5(1); ACHR, article 7(2); Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 62 (the law “must be accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including authorities, and be consistent with other applicable law”). An arrest or detention authorized by domestic law and nonetheless be arbitrary. See HRC, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, 16 December 2014, para. 12 (the “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality” must be met); *Hugo van Alphen v. The Netherlands*, HRC Communication No. 305/1988, Views of 15 August 1990, para. 5.8 (“remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances [citations omitted]. Remand in custody must further be necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime”); *A. W. Mukong v. Cameroon*, HRC Communication No. 458/1991, Views of 21 July 1994, para. 9.8; *Aage v. Norway*, HRC Communication No. 631/1995, Views of 5 November 1999, para. 6.3; *A (name deleted) v. Australia*, HRC Communication No. 560/1993, Views of 3 April 1997, para. 9; *Saadi v. United Kingdom*, ECtHR, Application No. 13229/03, Judgment of 29 January 2008, paras. 67-70 (where “there has been an element of bad faith or deception on the part of the authorities” and whether a balance has been “struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty” are

rights and protections under international human rights law,²⁶⁵ or it does not comply with procedural or fair trial requirements.²⁶⁶

An arbitrary detention in violation of the States' responsibilities under international law will not always constitute a crime under international law.²⁶⁷ Situations in which individuals may (or, in some cases, international law requires they must) be prosecuted for involvement in an arbitrary deprivation of liberty include where it constitutes:

- A crime under domestic law;
- Torture or similar cruel, inhuman or degrading treatment, for example through prolonged incommunicado detention (discussed in section c below);²⁶⁸
- An enforced disappearance (discussed in section d below);²⁶⁹ or
- A crime against humanity, i.e. where committed in the context of a widespread or systematic attack against a civilian population, with knowledge of the attack (discussed in section f below).²⁷⁰

relevant factors). A detention that is considered legitimate at the outset may become arbitrary over time. See *Judgment of 21 January 1994*, IACtHR, *Gangaram Panday v. Suriname*, Series C No. 16, paras. 46-47; *Judgment of 8 July 2004*, IACtHR, *Gómez Paquiyauri v. Peru*, Series C No. 110, para. 83; *Judgment of 23 November 2003*, IACtHR, *Maritza Urrutia v. Guatemala*, Series C No. 103, para. 65; *Judgment of 18 September 2003*, IACtHR, *Bulacio v. Argentina*, Series C No. 100, para. 125; *Judgment of 7 June 2003*, IACtHR, *Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 78. See also Council of Europe and ECtHR, *Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security*, updated 30 April 2019.

²⁶⁵ See HRC, General Comment No. 35, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, 16 December 2014, para. 17. See also Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, para. 63 (“[a] detention, even if it is authorized by law, may still be considered arbitrary if it is premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds”).

²⁶⁶ See, e.g., HRC, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 17-18. Procedural safeguards governing the right to liberty and a fair trial under international law are discussed in detail in the ICJ’s *Practical Guide No. 3 on the Prosecution and Adjudication of Gross Human Rights Violations*. See, more generally, the WGAD report in which it discussed such categories of arbitrary detentions, as well as where asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review of remedy: Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law. See, in particular, para. 38.

²⁶⁷ See e.g. HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

²⁶⁸ See: Report of the Working Group on Arbitrary Detention, A/HRC/16/47, 19 January 2011, para. 54; Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, para. 60. See also HRC, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 35, 56, 58, and *Aboufaied v. Libya*, HRC Communication No. 1782/2008, Views of 21 March 2012, paras. 7.4, 7.6; *Berzig [Djebrouni] v. Algeria*, HRC Communication No. 1781/2008, Views of 31 October 2011, para. 8.5; *El-Megreisi v. Libyan Arab Jamahiriya*, HRC Communication No. 440/1990, Views of 23 March 1994, para. 5.4.

²⁶⁹ *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, UN Doc. A/HRC/13/42, 20 May 2010, para. 292(e).

²⁷⁰ Article 7(e) of the Rome Statute of the ICC includes “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law” as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. See also *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances

ii. Tunisian Law in light of international law and standards

Article 29 of the 2014 Constitution states that “[n]o person may be arrested or detained unless *in flagrante delicto* or by virtue of a judicial order. The person placed under arrest shall be immediately informed of his or her rights and the relevant charges. The person may appoint a lawyer to represent him or her. The period of the arrest and detention shall be defined by law.”

The constitutional right is reflected in the Criminal Code and Criminal Procedure Code. Article 103, as amended by Law-Decree No. 2011-106, prohibits public officials or persons acting in an official capacity from violating the personal liberty of another person without legitimate justification (or resorting to violence or ill-treatment against an accused, a witness or an expert) in order to obtain information or a confession. Article 103 attracts a maximum sentence of five years’ imprisonment and a 5000 Dinar fine, or six months’ imprisonment in the case of threats of ill-treatment.²⁷¹

Article 237 of the Tunisian Criminal Code punishes any person who, “by fraud, violence or threats, abducted ... or dragged, embezzled or displaced” a person, or attempted such acts, with 10 years’ imprisonment. The sentence increases to 20 years’ or life imprisonment where aggravating circumstances apply.²⁷²

Article 250 punishes “everyone who, without a judicial order, catches, arrests, detains or abducts a person” with 10 years’ imprisonment and a 20,000 Dinar fine. The penalty is increased to twenty years’ imprisonment where aggravating circumstances apply, or the death penalty if the offence “was accompanied or followed by death.”²⁷³ Aggravating circumstances include where the acts are performed for the purpose of hostage taking.²⁷⁴ The penalty is reduced to two to five years’ imprisonment if the offender released the person before the fifth day from the perpetration of one of the acts.²⁷⁵

The Tunisian Code of Criminal Procedure regulates the circumstances in which authorized officials may restrict the liberty of persons. It permits judicial police to arrest persons upon the basis of a judicial order, or without the judicial order referred to in the Criminal Code *in flagrante delicto*, provided one of the other offences in the Criminal Code is not violated.²⁷⁶ For the purposes of this guide it is not necessary to examine all the procedural rights associated with restrictions on the right

Represented by its Chair, Jeremy Sarkin, UN Doc. A/HRC/13/42, 20 May 2010, para. 30. Arbitrary detention during an armed conflict may also constitute a war crime, including as torture. See article 8 of the Rome Statute of the ICC.

²⁷¹ Prior to 2005, article 103 read: “The public official who unlawfully interferes with the personal liberty of another person or who exercises or causes violence or ill-treatment against an accused person, a witness or an expert to obtain confessions or statements is liable to imprisonment for five years and a fine of 500 francs. If there were only threats of violence or ill-treatment, the maximum of the prison sentence is reduced to 6 months.” By Law No. 2005-46 of 6 June 2005, the definition changed to the following: “A public official is liable to five years’ imprisonment and a fine of one hundred and twenty dinars for causing any offense to the personal freedom of another person or to the use or use of violence or ill-treatment of an accused person, a witness or expert, to obtain confessions or statements for no legitimate reason. The sentence is reduced to six months imprisonment if there has been only threats of violence or ill-treatment.”

²⁷² In particular, where the victim is a public official or member of the diplomatic or consular corps or their family member or a child under 18 years of age (20 years) or if carried out using a weapon or with the aid of a false public uniform, identify or order, or resulted in a physical disability or illness (life imprisonment).

²⁷³ Criminal Code, article 251.

²⁷⁴ In particular, where accompanied by threats to kill the detained person, interfere with his or her personal integrity or continue to detain them for the purpose of compelling a third party, whether a natural or legal person or group of persons, a state or international organization or government, to perform or abstain from performing a specific act. See Criminal Code, article 251. Other aggravating circumstances are where the crime was accompanied by violence or threats, was carried out by armed or several perpetrators, or where the victim is a public official or member of the diplomatic or consular corps or their family member.

²⁷⁵ Criminal Code, article 252.

²⁷⁶ Code of Criminal Procedure, article 12. The Code of Criminal Procedure has been amended numerous times in the last several decades, with the most recent amendments taking place in 2016. See Law No. 2016-5 of 16 February 2016.

to liberty, given their violation does not give rise to criminal liability under domestic law²⁷⁷ unless it results in a violation of the prohibitions set out in the Criminal Code discussed above.

Tunisia's Criminal Code criminalizes the deprivation of liberty against the will of the person concerned without a lawful basis (judicial order or where caught *in flagrante delicto*), where based on fraud, violence or threats, or where it is without a legitimate basis because of a declaration made or in order to obtain a confession. These may be used as the basis for some cases involving arbitrary deprivation of liberty transferred to the SCC. They may, however, not capture all deprivations of liberty by State officials that could constitute crimes under international law (such as deprivations of liberty amounting to torture, or enforced disappearance, or crimes against humanity), particularly where they might be deemed not to fall within the above provisions of the Tunisian Criminal Code because they were carried out pursuant to domestic laws that applied at the time.

c. Torture and other cruel, inhuman or degrading treatment or punishment

International law strictly prohibits torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment) in any circumstances. This prohibition is recognized in several international instruments including the ICCPR and the CAT to which Tunisia is a party, as part of customary international law, the general principles of law, and as *jus cogens* norm, universally binding at all times.

Tunisia criminalized torture in 1999; however, the definition of the offence in the initial legislation was narrower than required by international law. Although the revised 2011 definition of torture broadened its scope to include public officials and others acting in an official capacity, it also narrowed the scope to exclude punishment as a possible purpose of torture and limit the discrimination element to cover only racial discrimination. The current definition also potentially grants exemption from prosecution to persons who commit acts of torture but subsequently disclose such acts to the administrative or judicial authorities before they are aware of them. Tunisian law does not criminalize other acts of ill-treatment *per se*, but criminalizes underlying acts of violence in the Criminal Code.

i. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law

International law prohibits torture and other ill-treatment in all circumstances.²⁷⁸ Since the adoption of the CAT, the absolute and non-derogable character of this prohibition has become accepted as a fundamental principle of customary international law and a *jus cogens* norm.²⁷⁹ States are obligated

²⁷⁷ An assessment of additional procedural rights and obligations pertaining to the arrest and detention of a suspect and accused person is set out in the ICJ's *Practical Guide No. 3 on the Investigation, Prosecution and Adjudication of Gross Human Rights Violations*.

²⁷⁸ CAT, articles 2 and 16; ICCPR, articles 7 and 4(2); ACHPR, article 5; Arab Charter on Human Rights, articles 4(2) and 8. See also Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 5-7.

²⁷⁹ See HRC, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8; Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 1 and 3. See also ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, rule 90 and commentary; and *Prosecutor v. Furundzija*, ICTY, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 153 ("Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules").

to criminalize, investigate and, where there is sufficient evidence, prosecute torture irrespective of its status under domestic law.²⁸⁰

In addition to torture or other ill-treatment as autonomous crimes, when committed in the context of a widespread or systematic attack against a civilian population, they may constitute crimes against humanity. As set out in section f, torture as a crime against humanity under the Rome Statute does not include the purposive requirement.

a) Torture

Under article 4 of CAT, States must criminalize all acts of torture, including attempts to commit torture, and ensure they punishable by appropriate penalties taking into account their grave nature.²⁸¹ Article 1 defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The CAT definition of torture is reflective of customary international law.²⁸² However, it is without prejudice to broader definitions under international or national law (article 1(2)).

This definition includes objective and subjective elements, all of which must be met:

Objective

1. Severe pain or suffering: infliction of severe pain or suffering, whether physical or mental, on a person, that does not arise from, or is not inherent in or incidental to, lawful sanctions. "Lawful sanctions" cover only those sanctions that are lawful under both national and international law, and must be interpreted narrowly (essentially, to cover only the ordinary consequences of imprisonment in conditions that comply with international standards);²⁸³
2. Link to public authority: The act/s must be committed by, or at the instigation or with the consent or acquiescence of, a public official or other person acting in an official capacity;

Subjective

²⁸⁰ CAT, article 12; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, principle 2; Geneva Convention IV, article 146(1–2); ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, rule 158; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

²⁸¹ Article 4 requires states to also criminalise attempt to commit and complicity in torture.

²⁸² *Prosecutor v. Brđanin et al.*, ICTY, IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 246.

²⁸³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/60/316, 30 August 2005, paras. 26–28.

3. Intent: The infliction of pain or suffering was intentional; and
4. Purpose: The act/s were committed for such purposes as obtaining from the victim or a third person information or a confession, punishing the victim for an act s/he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person, or for any reason based on discrimination (in the case of torture as a crime against humanity, the Rome Statute does not impose a purpose requirement²⁸⁴ (discussed in section f below)).

In terms of the element of “severe” pain and suffering, international and regional authorities have repeatedly held that the threshold of severity must not be set unduly high. According to the ECtHR, in assessing whether the threshold has been passed, relevant factors include: (i) the duration of the treatment; (ii) the physical effects of the treatment; (iii) the mental effects of the treatment; and (iv) the sex, age and state of health of the victim.²⁸⁵ The assessment in any given case involves a mixture of subjective and objective elements. Some acts, such as rape, are regarded as inherently resulting in “severe pain and suffering,” such that once the rape is established no separate evidence of the specific pain and suffering experienced by the victim is required.²⁸⁶ The ICTY has emphasized that the CAT’s “drafting history makes clear that ‘severe pain or suffering’ is not synonymous with ‘extreme pain or suffering’.”²⁸⁷

Examples of acts that have resulted in findings of torture include, among others, prolonged solitary confinement;²⁸⁸ prolonged incommunicado detention;²⁸⁹ prolonged unlawful detention;²⁹⁰ suspending persons upside down, sometimes over hot coals, and beating them;²⁹¹ “wall-standing,” “hooding,” subjection to noise, sleep deprivation, deprivation of food and water, and prolonged blind-

²⁸⁴ ICC Elements of Crimes, article 7(1)(f), Crime against humanity of torture, footnote 14.

²⁸⁵ *Ireland v. The United Kingdom*, ECtHR, Application No. 5310/71, Judgment of 18 January 1978, para. 162. See also *Egyptian Initiative for Personal Rights & Interights v. Egypt*, AComHPR, Communication No. 323/06, 16 December 2011, para. 193; *Aktas v. Turkey*, ECtHR, Application No. 24351/94, Judgment of 24 April 2003, para. 312.

²⁸⁶ See for example *Prosecutor v. Kunarac, Kovac and Vukovic*, ICTY, IT-96-23-T and IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2001, para. 150.

²⁸⁷ See *Prosecutor v. Brđanin et al.*, ICTY, IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 249.

²⁸⁸ See e.g. *Ilaşcu and Others v. Moldova and Russia*, ECtHR, Application No. 48787/99, Judgment, 8 July 2004, paras. 434-440. For examples of where solitary confinement was found not to constitute torture or ill-treatment, see *Öcalan v. Turkey*, ECtHR (Grand Chamber), Application No. 46221/99, Judgment of 12 May 2005, para. 191 (“Complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment”); *G. Esslin, A. Baader and J. Raspe v. Federal Republic of Germany*, European Commission on Human Rights, Communication 7572/76, 7586/76 & 7587/76, 8 July 1978, para. 50; *Ramirez Sanchez v. France*, ECtHR (Grand Chamber), Application No. 59450/00, Judgment of 4 July 2006, para. 150. See also HRC, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 6.

²⁸⁹ See e.g., *Medjnoune v. Algeria*, HRC Communication No. 1297/2004, Views of 14 July 2006, para. 8.4; *Judgment of 21 November 2007*, IACtHR, Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Series C No. 170, para. 171; *Judgment of 17 September 1997*, IACtHR, Loayza-Tamayo v. Peru, Series C No. 33, para. 58; *Judgment of 18 November 2004*, IACtHR, De La Cruz-Flores v. Peru, Series C No. 115, paras. 135-136.

²⁹⁰ Regarding the IACtHR, see, e.g., *Judgment of 18 August 2000*, IACtHR, Cantoral-Benavides v. Peru, Series C No. 69, para. 90; *Judgment of 19 November 1999*, IACtHR, The “Street Children case” (Villagrán-Morales et al.) v. Guatemala, Series C No. 63, para. 166; *Judgment of 27 November 2003*, IACtHR, Maritza Urrutia v. Guatemala, Series C No. 103, para. 85. Concerning the ECtHR, see e.g. *Ireland v. the United Kingdom*, ECtHR, Application No. 5310/71, Judgment of 18 January 1978, para. 16.

²⁹¹ *Malawi African Association and Others v. Mauritania*, AComHPR, Communications Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para. 20 (as well as burning a person with cigarettes and hot metal rods).

folding;²⁹² rape and other forms of sexual violence;²⁹³ the imposition of death penalty in violation of a fair trial;²⁹⁴ psychological torture;²⁹⁵ and enforced disappearance.²⁹⁶

According to the Committee against Torture, States must not prosecute torture as a lesser offence, where evidence would be sufficient to convict for torture *per se*.²⁹⁷ The Convention further requires that all complicity and participation in torture also be criminalised, and all offences in relation to torture must be “punishable by appropriate penalties which take into account their grave nature.”²⁹⁸

b) *Other cruel, inhuman or degrading treatment or punishment*

International law, including the ICCPR, ACHR and Arab Charter, also prohibit other cruel, inhuman and degrading treatment or punishment (ill-treatment).²⁹⁹ However, international law does not define specific elements of ill-treatment as it does for torture. Whether an act constitutes ill-treatment must be determined on a case-by-case basis. Acts that would otherwise constitute torture but lack the purposive or severity requirements are often characterised as ill-treatment.

In relation to State responsibility, ill-treatment should be widely defined³⁰⁰ to apply to a broad range of behaviour. Based on decisions of international bodies and regional courts, it can include inhumane conditions of detention;³⁰¹ denial of medical care;³⁰² destruction of homes;³⁰³ excessive use of

²⁹² *Ireland v. the United Kingdom*, ECtHR, Application No. 5310/71, Judgment of 18 January 1978, para. 167 (“(a) wall-standing: forcing the detainees to remain for periods of some hours in a “stress position”, described by those who underwent it as being “spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers”; (b) hooding: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations”); *Weinberger v. Uruguay*, HRC Communication No. 28/1978, Views of 29 October 1980, paras. 2 and 16 (“During this period of 10 months, he suffered severe torture, and was most of the time kept blindfolded with his hands tied together. In addition, like all other prisoners, he was forced to remain every day during 14 hours sitting on a mattress. He was not allowed to move around, nor to work or read. Food was scarce (a piece of bread and thin soup twice a day without any meat). When his family was allowed to visit him after 10 months, serious bodily harm (one arm paralysed, leg injuries, infected eyes) could be seen. He had lost 25 [kilograms] and showed signs of application of hallucinogenic substances.”). See also OHCHR, *Interpretation of Torture in the Light of The Practice and Jurisprudence of International Bodies*, 2011, pp. 13-14.

²⁹³ See Chapter 3, section e of this Guide.

²⁹⁴ The imposition of a death sentence following an unfair trial would automatically entail a violation of the prohibition of torture because of the anxiety rising from the fear of being killed. See for instance, *Larrañaga v. The Philippines*, HRC Communication No. 1421/2005, Views of 24 July 2006, para. 7.11; *Pratt and Morgan v. Jamaica*, HRC Communication No. 210/1986 & 225/1987, Views of 6 April 1989, paras. 13.6-13.7.

²⁹⁵ *Njaru v. Cameroon*, HRC Communication No. 1353/2005, 19 March 2007, para. 6.1; *Judgment of 7 September 2004*, IACtHR, *Tibi v. Ecuador*, Series C No. 114, para 146; *Judgment of 27 November 2003*, IACtHR, *Maritza Urrutia v. Guatemala*, Series C No. 103, para. 93; *Judgment of 18 August 2000*, *Cantoral-Benavides v. Peru*, Series C No. 69, para. 104; *Soering v. United Kingdom*, ECtHR, Application no. 14038/88, Judgment of 7 July 1989, para. 111.

²⁹⁶ See Chapter 3, section d of this Guide.

²⁹⁷ Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 10 (“it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present”).

²⁹⁸ CAT, article 4.

²⁹⁹ CAT, article 16; ICCPR, articles 7 and 4(2); ACHPR, article 5; ACHR, articles 13 and 4(2).

³⁰⁰ See, e.g., *Curtis Francis Doebbler v. Sudan*, AComHPR, Communication No. 236/00, Views of 4 May 2003, para. 37.

³⁰¹ *Ananyev and Others v. Russia*, ECtHR, Application No. 42525/07 and 60800/08, Judgment of 10 January 2012.

³⁰² *Todorov v. Ukraine*, ECtHR, Application No. 16717/05, Judgment of 12 January 2012, paras. 51-55.

³⁰³ *Dulaş v. Turkey*, ECtHR, Application No. 25801/94, Judgment of 30 January 2001, paras. 49-56.

force;³⁰⁴ rendering individuals (such as asylum seekers) destitute;³⁰⁵ unnecessary strip searches;³⁰⁶ confining a prisoner in a metal case in the courtroom;³⁰⁷ corporal punishment;³⁰⁸ incommunicado detention;³⁰⁹ and solitary confinement (for periods not yet constituting torture).³¹⁰

However, unlike torture, not all acts of other ill-treatment need necessarily be criminalised.³¹¹ The HRC has stated that the obligation to bring perpetrators of certain violations of the ICCPR to justice applies “in respect of those violations recognized as criminal under either domestic or international law, such as torture and *similar* cruel, inhuman and degrading treatment (article 7)” [emphasis added].³¹²

ii. Tunisian law in light of international law and standards

Tunisia ratified the CAT in 1988 but did not criminalize torture until 1999 when it introduced article 101*bis* to the Criminal Code. Torture, punishable by eight years’ imprisonment, was defined as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.³¹³

A 2011 amendment to article 101*bis* redefined torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession regarding an act he or a third person has committed or is suspected of having committed.

³⁰⁴ *Güler and Öngel v. Turkey*, ECtHR, Applications Nos. 29612/05 and 30668/05, Judgment of 4 October 2011, paras. 23-31.

³⁰⁵ *M.S.S. v. Belgium and Greece*, ECtHR (Grand Chamber), Application No. 30696/09, Judgment of 21 January 2011, paras. 220-222.

³⁰⁶ *Weiser and Bicos Beteiligungen GmbH v. Austria*, ECtHR, Application No. 74336/01, Judgment of 16 October 2007, para. 167.

³⁰⁷ *Svinarenko and Slyadnev v. Russia*, ECtHR, Applications Nos. 32541/08 and 43441/08, Judgment of 17 July 2014, paras. 113-139.

³⁰⁸ *Tyrer v. the United Kingdom*, ECtHR, Application No. 5856/72, Judgment of 25 April 1978, paras. 28-35; *Osbourne v. Jamaica*, HRC Communication No. 759/1997, Views of 13 April 2000, para. 9.1; *Judgment of 11 March 2005*, IACtHR, *Caesar v. Trinidad and Tobago*, Series C No. 123, paras. 72 (see also para. 73, where it found it can also constitute torture); *Curtis Francis Doebbler v. Sudan*, AComHPR, Communication No. 236/00, Views of 4 May 2003, paras. 35-42.

³⁰⁹ *Lucía Arzuaga Gilboa v. Uruguay*, HRC Communication No. 147/1983, Views of 1 November 1985, para. 14 (15 days); *Polay Campos v. Peru*, HRC Communication No. 577/1994, Views of 6 November 1997, para. 8.4; *Law Office of Ghazi Suleiman v. Sudan*, AComHPR, Communication No. 222/98 and 229/99, Views of May 2003, para. 44; *Amnesty International and Others v. Sudan*, AComHPR, Communication Nos. 48/90, 50/91, 52/91, 89/93, Views of November 1999, para. 54. See also *Liesbeth Zegveld and Messie Ephrem v. Eritrea*, AComHPR, Communication No. 250/2002, Views of November 2003, para. 55.

³¹⁰ *G.B. v. Bulgaria*, ECtHR, Application No. 42346/98, Judgment of 11 March 2004, paras. 82-88; *Judgment of 30 May 1999*, IACtHR, *Castillo-Petruzzi et al. v. Peru*, Series C No. 52, para. 195; *Judgment of 12 November 1997*, IACtHR, *Suárez-Rosero v. Ecuador*, Series C No. 35, para. 90. See also *Liesbeth Zegveld and Messie Ephrem v. Eritrea*, AComHPR, Communication No. 250/2002, Views of November 2003, para. 55.

³¹¹ See *United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly resolution 3452 (XXX), UN Doc. A/RES/30/3452, 9 December 1975, article 10 (“If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings” [emphasis added]).

³¹² HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

³¹³ Law No. 99 of 2 August 1999.

Is considered torture the fact of intimidating or coercing a person or intimidating or coercing a third person for such purposes as obtaining information or a confession.

Is considered torture the pain, suffering, intimidation or coercion inflicted for any other reason based on racial discrimination.

Is considered to be a torturer, the public official or other person acting in an official capacity who orders, incites, approves or remains silent about torture in the exercise of his or her function.

Is not considered torture the suffering resulting from lawful sanctions, caused by them or inherent to them.³¹⁴

The sentence for torture now ranges from eight years' to life imprisonment or "harsher penalties for attacks on persons."³¹⁵

Article 101*quater* of the Criminal Code excuses public officials or persons acting in an official capacity if they "took the initiative, before the competent authorities become aware of the case, and after he received an order to commit torture, was incited to commit torture or became aware of acts of torture, of informing the administrative or judicial authorities thereby disclosing the offence or avoiding its commission."³¹⁶ Where torture has already commenced or occurred, the penalty is halved "if the disclosure of information enables an end to be put to the torture, to identify those responsible or to avoid injury to or the death of the victim." In such cases, life imprisonment is reduced to twenty years. Under article 101*quater*, any person who acts in "good faith cannot be the subject of an action for reparation or be found guilty."

The Tunisian Criminal Code also criminalizes some forms of ill-treatment. Under article 101, violence committed without a legitimate reason by a public servant or other person acting in an official capacity, or through an intermediary, is punishable by five years' imprisonment and a 120 Dinar fine.³¹⁷ The phrase "legitimate reason" is undefined. Article 103, as amended by Law-Decree No. 2011-106, prohibits public officials or persons acting in an official capacity from violating the personal liberty of another person without legitimate justification, or resorting to violence or ill-treatment against an accused, a witness or an expert in order to obtain information or a confession. Article 103 attracts a maximum sentence of five years' imprisonment and a 5000 Dinar fine, or six months' imprisonment in the case of threats of ill-treatment.

The Criminal Code also criminalizes other forms of violence or assault committed by any person. Under article 218, "anyone who voluntarily injures, beats, or commits any other violence or assault that does not fall within article 319 [regulating violence that does not cause serious harm], shall be punished by imprisonment for one year or a fine of 1000 Dinars,"³¹⁸ three years' imprisonment and a 3000 Dinar fine in aggravating circumstances,³¹⁹ or 10 to 12 years' imprisonment where the

³¹⁴ As amended by Law-Decree No. 2011-106.

³¹⁵ Criminal Code, article 101*ter* (eight years' imprisonment for any public official or person acting in an official capacity acting in the exercise or performance of his or her duties; 12 years' imprisonment and a 20,000 Dinar fine if the torture has led to the amputation or fracture of a limb or has generated a permanent disability; 10 years' imprisonment and a 20,000 Dinar fine if the torture is inflicted on a child; 16 years' imprisonment and a 25,000 Dinar fine if the torture inflicted on a child has caused the amputation or the fracture of a member or a permanent handicap; life imprisonment for torture that resulted in death, "without prejudice to the application of harsher penalties for attacks against persons").

³¹⁶ Criminal Code, article 101*quater*.

³¹⁷ The use of force is regulated elsewhere in the Criminal Code and Law No. 69-04 regulating public meetings, processions, parades, public gatherings, and assemblies. See Chapter 3, section a of this Guide.

³¹⁸ Criminal Code, article 218. See also article 319.

³¹⁹ Criminal Code, article 218. Aggravating circumstances include where (i) the victim is a child; (ii) the author is an ascendant or descendant of the victim, whatever the degree; (iii) the author has authority over the victim or abuse of the authority conferred upon him by his functions; (iv) the author is one of the spouses, ex-spouses, fiancés or ex-fiancés; (v) the offense committed is facilitated by the apparent, or known, vulnerability of the

violence causes mutilation or other form of permanent disability.³²⁰ Article 221 of the Criminal Code, as amended in 2017, prohibits “any aggression resulting in disfigurement or female genital mutilation in whole or in part” (“agression s’il en résulte une défiguration ou mutilation partielle ou totale de l’organe génital de la femme”), which is punishable by twenty years’ imprisonment or life imprisonment where act results in the death of the victim.

Attempt to commit these crimes is punishable by a general provision in the Tunisian Criminal Code in force prior to 1999 if they give rise to a sentence of more than 5 years’ imprisonment.³²¹

The 2014 Constitution codified prohibitions against torture and ill-treatment. Article 23 requires “the protection of the dignity of individuals and their physical integrity” and prohibits “all forms of psychological and physical torture,” and article 30 states that “every detainee shall have the right to humane treatment that preserves his or her dignity.”

Tunisia’s domestic law criminalizes torture and other forms of ill-treatment. However, the definition of torture in the Tunisian Criminal Code is not consistent with the definition of torture under international law insofar as it adopts an exhaustive rather than inclusive list of prohibited purposes (notably excluding any reference to punishment as also required by international law), limits the discriminatory basis to racial discrimination (excluding discrimination of any kind) and exempts from prosecution perpetrators who subsequently disclose the commission of torture to the administrative or judicial authorities before they are aware of them.

Regarding other ill-treatment, the Tunisian Criminal Code criminalizes other acts of violence committed by public officials and female genital mutilation but not other forms of cruel, inhuman or degrading treatment or punishment.

d. Enforced disappearance

International law prohibits enforced disappearance without exception. The International Convention for the Protection of all Persons from Enforced Disappearances (ICPPED), adopted in 2006, is the leading global instrument prohibiting enforced disappearance. It obliges states to “take the necessary measures to ensure that enforced disappearance constitutes an [autonomous] offence under ... criminal law.”³²² The ICCPED was preceded by the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in 1992 (1992 Declaration).

Tunisia ratified the ICCPED on 29 June 2011³²³ but, despite efforts to draft a law on enforced disappearances, has not implemented it.³²⁴ A small number of provisions in the Tunisian Criminal Code criminalize conduct that underlies an enforced disappearance, including prohibitions on arbitrary deprivation of liberty and abduction, but they fall short of meeting the requirement to criminalize enforced disappearance as an autonomous crime.

victim; (vi) the victim is a witness, an injured person or a civil party, and the act is committed either to prevent him or her from giving evidence, to denounce the offense or to file a complaint, or because of his or her complaint, complaint or deposition.

³²⁰ Criminal Code, article 219.

³²¹ Criminal Code, article 59.

³²² ICCPED, article 4.

³²³ See Law Decree No. 2011-2 of 19 February 2011, approving the ICCPED, and Law Decree No. 2011-550 of 14 May 2011, on the ratification of the ICCPED. Notification of ratification was formally deposited with the UN on 29 June 2011.

³²⁴ Committee on Enforced Disappearances, *Concluding observations on the report submitted by Tunisia under article 29 (1) of the Convention*, UN Doc. CED/C/TUN/CO/1, 25 May 2016, para. 14. See also OSCE and ODHIR, *Opinion on the Draft Act on the Crime of Enforced Disappearance of Tunisia*, 6 May 2016.

i. The prohibition of enforced disappearance under international law

Under article 2 of the ICCPED, enforced disappearance is defined as:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The definition is drawn in large measure from the 1992 Declaration, which defined the crime in its preamble.³²⁵

Article 7(1) of the ICCPED requires states to enact domestic law providing for penalties commensurate with the gravity of the offence.³²⁶ More generally, States are obligated to criminalize, investigate and, where there is sufficient evidence, prosecute enforced disappearances.³²⁷

The Working Group on Enforced and Involuntary Disappearances (WGEID) identified the three cumulative minimum elements that should be contained in any definition of enforced disappearances:

1. A deprivation of liberty (whether otherwise legal or illegal) against the will of the person concerned;
2. The involvement of government officials, directly or indirectly by acquiescence; and
3. A refusal to disclose the fate and whereabouts of the person concerned.³²⁸

³²⁵ Defined as persons "arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law." Various other international instruments prohibit enforced disappearance, including the Inter-American Convention on Forced Disappearance of Persons.

³²⁶ ICCPED, article 7(1). See also ICJ, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioners Guide No. 9 (2015), pp. 12-20. See also, e.g. UN Human Rights Council, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/HRC/13/42, 19 February 2010, para. 9, in which secret detention in the context of counter-terrorism operations was defined to constitute an enforced disappearance. The Joint Study on Secret Detention also clarified that secret detention does not require deprivation of liberty in a secret location. This means that secret detention may take place "not only in a place that is not an officially recognized place of detention, or in an officially recognized place of detention, but in a hidden section or wing that is itself not officially recognized, but also in an officially recognized site. Whether detention is secret or not is determined by its incommunicado character and by the fact that State authorities ... do not disclose the place of detention or information about the fate of the detainee." *Ibid.*, para. 9.

³²⁷ ICCPED, articles 3 and 10; *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992 (DPPED), article 13(1); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

³²⁸ Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010, para. 21. See, e.g., *Judgment of 26 November 2013*, IACtHR, *Osorio Rivera and Family v. Peru*, Series C No. 274, para. 113, confirming these essential elements.

The WGEID has confirmed that a detention that is initially lawful can subsequently become an enforced disappearance if State officials then refuse to disclose the fate or whereabouts of the persons concerned or refuse to acknowledge the act having been perpetrated at all.³²⁹

The prohibition on enforced disappearance is a peremptory norm of international law, or *jus cogens*, such that it is non-derogable.³³⁰ Article 1(2) of the ICPPED explicitly states that no circumstances whatsoever justify an enforced disappearance. The prohibition and accordant duty to investigate and prosecute is recognized as part of customary international law, including in jurisprudence issued by regional courts³³¹ and other international instruments.³³²

Article 3 of the ICPPED also requires State Parties to investigate acts defined in article 2 “committed by persons or groups of persons acting *without the authorization, support or acquiescence of the State* and to bring those responsible to justice” (emphasis added),³³³ albeit that these don’t constitute enforced disappearances per se.

a) *Enforced disappearance as an autonomous crime involving multiple victims and the violation of multiple rights*

Relatives of the person forcibly disappeared are also victims of the crime. Article 21(1) of the ICPPED stipulates that for the purposes of this Convention, “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”³³⁴ International jurisprudence confirms that the victims of enforced disappearance include not only the disappeared person but relatives as well.³³⁵

Enforced disappearance also inherently involves the violation of other human rights protected by international law instruments, including the ICCPR and CAT. For example, the ECtHR found that in circumstances where the whereabouts and fate of missing persons are not clarified there is a continuing violation of multiple rights under the ECHR, including the right to life, the right to liberty and security and the prohibition of torture.³³⁶ The IACtHR described forced disappearance as “a multiple and continuous violation of many rights,”³³⁷ including the prohibition on arbitrary deprivation of liberty, to be taken without delay before a judge, to habeas corpus, the prohibition on cruel, inhuman and degrading treatment or punishment and the right to life,³³⁸ as well as the

³²⁹ See Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2, 10 January 2008, para. 26.

³³⁰ See e.g. *Judgment of 22 September 2006*, IACtHR, Goiburú et al. v. Paraguay, Series C No. 153, paras. 93, 128; *Judgment of 23 November 2009*, IACtHR, Radilla-Pacheco v. Mexico, Series C No. 209, para. 139.

³³¹ Ibid.

³³² For example, see Resolution Nos. 49/193, 23 December 1994 (enforced disappearance); 51/94, 12 December 1996 (enforced disappearance); 53/150, 9 December 1998 (enforced disappearance); 55/111, 4 December 2001 (extrajudicial execution); and 67/168 of 20 December 2012 (extrajudicial executions); HRC General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Definition B “Serious crimes under international law.” See also ICJ, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioners Guide No. 9 (2015), pp. 167-168.

³³³ See Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2, 10 January 2008, para. 26.

³³⁴ ICPPED, article 24 (1). The 1992 Declaration also states that “any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families.” DPPED, article 1 (2).

³³⁵ See e.g., *Boucherf v. Algeria*, HRC Communication No. 1196/2003, Views of 30 March 2006, para. 9.7; *Judgment of 26 November 2013*, IACtHR, Osorio Rivera and Family v. Peru, Series C No. 274, paras. 113, 227.

³³⁶ *Cyprus v. Turkey*, ECtHR (Grand Chamber), Application No. 25781/94, Judgment of 10 May 2001, paras. 132-136, 142-158. See also *Varnava and Others. v. Turkey*, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, para. 100.

³³⁷ *Judgment of 29 July 1988*, IACtHR, Velásquez Rodríguez v. Honduras, Series C No. 4, para. 155.

³³⁸ Ibid., paras. 155-157.

right to juridical personality.³³⁹ The HRC³⁴⁰ and WGEID³⁴¹ have also confirmed an enforced disappearance constitutes a violation of many other rights, including the rights to liberty and security of person; not to be arbitrarily detained; to a fair trial by an independent court; not to be subjected to torture and ill-treatment; to family life; the right to recognition of legal personality; and, in many situations, the right to life. With respect to family members, the HRC, ECtHR and IACtHR have all found that the adverse impact of an enforced disappearance and repeated refusal to reveal the whereabouts and fate of the missing person to family members constituted cruel and inhuman treatment.³⁴²

Although conduct underlying enforced disappearance can be prosecuted as a violation of these other rights where criminal, under international law States are obligated to hold perpetrators accountable for enforced disappearance as an autonomous crime. The WGEID stated that:

a number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.³⁴³

The obligation to criminalize enforced disappearance as an autonomous offence has been confirmed by international courts. For example, in the *Heliodoro Portugal* case, the IACtHR stated:

[R]egarding the forced disappearance of persons, the definition of this autonomous offence and the specific description of the punishable conducts that constitute the offense are essential for its effective eradication. Considering the particularly grave nature of forced disappearance of persons, the protection offered by criminal laws on offenses such as

³³⁹ *Judgment of 22 September 2009*, IACtHR, Anzualdo Castro v. Peru, Series C No. 202, paras. 87-101. See also *Judgment of 26 November 2013*, IACtHR, Osorio Rivera and Family v. Peru, Series C No. 274, para. 113.

³⁴⁰ *Mukunda Sedhai v. Nepal*, HRC Communication No. 1865/2009, Views of 19 July 2013, para. 8.2 (“including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10)”). See also *Louisa Bousroual v. Algeria*, HRC Communication No. 992/2001, Views of 30 March 2006, para. 9.2; *Jegatheeswara Sarma v. Sri Lanka*, HRC Communication No. 950/2000, Views of 16 July 2003, para. 9.3; and *Katwal v. Nepal*, HRC Communication No. 2000/2010, Views of 1 April 2015, para. 11.3.

³⁴¹ Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1435, 13 March 1981, paras. 184-187. See also General Comment on article 17 of the Declaration on the Protection of All Persons from Enforced Disappearance, in Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/2001/68, 18 December 2000, para. 31.

³⁴² See e.g., *Boucherf v. Algeria*, HRC Communication No.1196/2003, Views of 30 March 2006, para. 9.7; *Salem Saad Ali Bashasha v. The Libyan Arab Jamahiriya*, HRC Communication No. 1776/2008, Views of 20 October 2010, paras. 7.5-7.6; *Cyprus v. Turkey*, ECtHR (Grand Chamber), Application No. 25781/94, Judgment of 10 May 2001, paras. 132-136, 142- 158; *Kurt v. Turkey*, ECtHR, Application No. 15/1997/799/1002, Judgment of 25 May 1998, paras. 130-134. See also *Judgment of 26 November 2013*, IACtHR, Osorio Rivera and Family v. Peru, Series C No. 274, paras. 113 and 227. The right to family life, as well as the rights of the family to education, health and other socio-economic rights may be infringed. See Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1435, 13 March 1981, para. 187.

³⁴³ Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation, A/HRC/16/48/Add.3, 28 December 2010, para. 9. See also General Comment on Enforced Disappearance as a Continuous Crime, in Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, 26 January 2011, para. 39; Committee on Enforced Disappearances, *Concluding observations on the report submitted by Spain under Article 29, paragraph 1, of the Convention*, UN Doc. CED/C/ESP/CO/1, 12 December 2013, para. 9.

abduction or kidnapping, torture and homicide is insufficient. Forced disappearance of persons is a different offense, distinguished by the multiple and continuing violation of various rights protected by the Convention.³⁴⁴

b) Continuous nature

The crime of enforced disappearance continues until the fate or whereabouts of the person has been revealed. Article 24(6) of the ICCPED states that State Parties have the “obligation to continue the investigation until the fate of the disappeared person has been clarified,” underlining the permanent or continuous nature of the crime of enforced disappearance. The WGEID stated that “[e]nforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is [continuing], that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.”³⁴⁵

The continuing nature of enforced disappearance has important implications. As the WGEID noted “[e]ven if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim’s fate or whereabouts are established, the matter should be heard, and the act should not be fragmented.” Accordingly, “it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity. The crime cannot be separated and the conviction should cover the enforced disappearance as a whole.”³⁴⁶

This is supported by international jurisprudence, in which enforced disappearance is characterized as a permanent or continuous violation of human rights and crime.³⁴⁷ The ECtHR, for example, found it had temporal jurisdiction over an enforced disappearance where the victims had been presumed dead prior to the State’s acceptance of individuals’ right to petition the Court because the disappearance was continuing because the State had failed to account for the whereabouts and fate of the missing persons.³⁴⁸

c) Enforced disappearance as constitutive element of other crimes under international law

Enforced disappearance can also be a constitutive element of other crimes under international law, in particular a crime against humanity³⁴⁹ and torture or cruel, inhuman or degrading treatment or punishment.³⁵⁰ These are dealt with in sections f and c of this chapter respectively.

³⁴⁴ *Judgment of 12 August 2008*, IACtHR, *Heliodoro Portugal v. Panama*, Series C No. 186, para. 181.

³⁴⁵ Working Group on Enforced or Involuntary Disappearances, General Comment on Enforced Disappearance as a Continuous Crime, in Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, 2010, para. 39, sub-para. 1.

³⁴⁶ *Ibid.*

³⁴⁷ See e.g.: *Judgment of 26 November 2013*, IACtHR, *Osorio Rivera and Family v Peru*, Series C No. 274, para. 31; *Judgment of 22 September 2009*, IACtHR, *Anzualdo Castro v. Peru*, Series C No. 202, para. 59; *Judgment of 22 September 2006*, IACtHR, *Goiburú et al. v Paraguay*, Series C No. 153, paras. 83 and 85; *Judgment of 29 July 1988*, IACtHR, *Case of Velásquez Rodríguez v Honduras*, Series C No. 4, para. 155; *Cyprus v. Turkey*, ECtHR (Grand Chamber), Application No. 25781/94, Judgment of 10 May 2001, paras. 136, 150 and 158; *Loizidou v. Turkey*, ECtHR (Grand Chamber), Judgment of 18 December 1996, Application No. 15318/89, para. 41. The HRC also underscored the permanent character of enforced disappearance: see, e.g. *Norma Yurich v. Chile*, HRC Communication No. 1078/2002, Views of 2 November 2005, para. 6.4.

³⁴⁸ *Varnava and Others. v. Turkey*, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, paras. 136-148.

³⁴⁹ See Chapter 3, section f of this Guide.

³⁵⁰ *Norma Yurich v. Chile*, HRC Communication No. 1078/2002, Views of 2 November 2005, para. 6.5; *Rafael Mojica v. Dominican Republic*, HRC Communication No. 449/1991, Views of 15 July 1994, para. 5.7; *Jegatheeswara Sarma v. Sri Lanka*, HRC Communication No. 950/2000, Views of 16 July 2003, para. 9.3; *El*

ii. Tunisian law in light of international law and standards

As set out in the chapter on the arbitrary deprivation of liberty, article 103 of the Tunisian Criminal Code, as amended by Law Decree No. 2011-106, also criminalizes the conduct of any public official or persons acting in an official capacity who violates the personal liberty of another person without legitimate justification, or resorts to violence or ill-treatment against an accused, a witness or an expert in order to obtain information or a confession.³⁵¹

Article 237 of the Criminal Code punishes any person who, "by fraud, violence or threats, abducted ... or dragged, embezzled or displaced" a person, or attempted such acts, with 10 years' imprisonment. The sentence increases to 20 years' or life imprisonment where aggravating circumstances apply.³⁵²

Finally, article 250 punishes "everyone who, without a judicial order, catches, arrests, detains or abducts a person" with 10 years' imprisonment and a 20,000 Dinar fine. The penalty is increased to twenty years where aggravating circumstances apply, or the death penalty if the offence "was accompanied or followed by death."³⁵³ Aggravating circumstances include where the acts are performed for the purpose of hostage taking.³⁵⁴ The penalty is reduced to two to five years' imprisonment if the offender released the person before the fifth day from the perpetration of one of the acts.³⁵⁵

The Tunisian Code of Criminal Procedure requires the authorities to inform the family of a person in pre-charge detention or any other person indicated by the detainee of the measures taken against them and their place of custody.³⁵⁶ However, failure to comply with the requirement does not give rise to criminal sanctions.

Tunisia's domestic law does not contain an autonomous definition of enforced disappearance as defined under article 2 of the ICPPED. The offences penalized in the Tunisian Criminal Code only effectively criminalize detention without a judicial order and abduction. These offences meet the first requirement of the definition, namely the deprivation of liberty against the will of the person concerned. With respect to the second requirement of the definition, although these offences do not

Megreisi v. Libyan Arab Jamahiriya, HRC Communication No. 440/1990, Views of 23 March 1994, para. 5.4. See also HRC, *Concluding Observations: Kuwait*, CCPR/CO/69/KWT, 27 July 2000, para. 11 (recognized "the degree of suffering involved in being held indefinitely without contact with the outside world"); HRC, *Concluding Observations: Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 10.

³⁵¹ Prior to 2005, article 103 read: "The public official who unlawfully interferes with the personal liberty of another person or who exercises or causes to be subjected to violence or ill-treatment against an accused person, a public official, is liable to imprisonment for five years and a fine of 500 francs. witness, an expert, to obtain confessions or statements. If there were only threats of violence or ill-treatment, the maximum of the prison sentence is reduced to 6 months." By Law No. 2005-46 of 6 June 2005, the definition changed to "A public official is liable to five years' imprisonment and a fine of one hundred and twenty dinars for causing any offense to the personal freedom of another person or to the use or use of violence or ill-treatment of an accused person, a witness or expert, to obtain confessions or statements for no legitimate reason. The sentence is reduced to six months imprisonment if there has been only threats of violence or ill-treatment."

³⁵² In particular, where the victim is a public official or member of the diplomatic or consular corps or their family member or a child under 18 years of age (20 years) or if carried out using a weapon or with the aid of a false public uniform, identify or order, or resulted in a physical disability or illness (life).

³⁵³ Criminal Code, article 251.

³⁵⁴ In particular, where accompanied by threats to kill the detained person, interfere with his or her personal integrity or continue to detain them for the purpose of compelling a third party, whether a natural or legal person or group of persons, a state or international organization or government, to perform or abstain from performing a specific act. See Criminal Code, article 251. Other aggravating circumstances are where the crime was accompanied by violence or threats, was carried out by armed or several perpetrators, or where the victim is a public official or member of the diplomatic or consular corps or their family member.

³⁵⁵ Criminal Code, article 252.

³⁵⁶ Current article 13*bis* of the Code of Criminal Procedure, adopted by Law No. 2016-5 on 16 February 2016 and entering into force on 1 June 2016. Prior to 2016, article 70 of the Code of Criminal Procedure imposed such a requirement. See *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, p. 63.

exclude the involvement of government officials, if an enforced disappearance has initially been executed by government officials acting pursuant to a judicial order, the perpetrators may not be liable and therefore the second requirement is not met. The offences also do not meet the third requirement that those responsible refuse to disclose the fate and whereabouts of the person concerned. The procedural requirement to inform families of the whereabouts of a person detained pre-charge does form part of these offences and does not attract any criminal penalties for non-compliance. The offences also do not take heed of the special significance of the crime, which is based in the refusal to reveal the fate and whereabouts of the victim, or the significance attached to the involvement of government officials by, for example, aggravating the sentence in such circumstances.

e. Rape and other forms of sexual assault

Under international law, rape and other forms of sexual assault are prohibited under any circumstances, and States are obligated to investigate and prosecute them as crimes against personal security, sexual autonomy, and bodily and psychological integrity, as opposed to offences against honour, decency or morality. Rape and other forms sexual assault may also constitute crimes against humanity³⁵⁷ and war crimes.³⁵⁸ Moreover, whether in custodial settings or not, rape perpetrated by State actors, such as members of the army or police officers, constitute torture.³⁵⁹ Rape and other forms of sexual assault, in certain circumstances, also constitute a violation of the prohibition on gender discrimination³⁶⁰ and the right to privacy,³⁶¹ and autonomous crimes. Sexual

³⁵⁷ E.g., rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, according to articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Rome Statute of the ICC, may constitute crimes against humanity and war crimes. See further Chapter 3, section f of this Guide.

³⁵⁸ CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 16 and footnote 23. Sexual violence against minors is also prohibited by articles 19(1) and 34 of the CRC. The prohibition on sexual and gender-based violence is also found in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (articles 1-3) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) of 11 May 2011, article 3(a). See further ICJ, *Women's Access to Justice for Gender-Based Violence*, Practitioner's Guide No. 12 (2016), pp. 199-203.

³⁵⁹ See, e.g., *Aydin v. Turkey*, ECtHR (Grand Chamber), Application No. 23178/94, Judgment of 27 September 1997, paras. 74-86.

³⁶⁰ CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para. 21: "Gender-based violence against women constitutes discrimination against women under article 1 and therefore engages all of the obligations in the Convention." See also CEDAW, General Recommendation No. 19: Violence against Women, UN Doc. A/47/38, 1992, para. 7, stating that gender-based violence includes "acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty." See para. 14. See also CEDAW, article 1; ICCPR, article 26; ACHPR, article 18; ACHR, article 11.

³⁶¹ *X & Y v. The Netherlands*, ECtHR, Application No. 8978/80, Judgment of 26 March 1985, para. 22 (the rape of a 16 year old mentally disabled girl "concern[ed] a matter of 'private life', a concept which covers the physical and moral integrity of the person, including his or her sexual life").

assault, including rape, is also prohibited under international humanitarian law, in both international and non-international armed conflicts,³⁶² prohibitions that must equally apply during peacetime.³⁶³

Tunisia's domestic law criminalizes rape and "indecent assault." However, the definitions of rape and indecent assault under domestic law and applicable to the period over which the SCC has temporal jurisdiction are not in line with the definitions under international law and standards. However, the ICJ considers that, in the context of cases before the SCC, there is scope to interpret and apply the domestic law provisions in accordance with international law and standards so as to capture all conduct constituting rape and sexual assault in line with such law and standards.

i. The prohibition of rape and sexual assault under international law

Under international law, rape and other forms of sexual assault may constitute torture or other ill-treatment, crimes against humanity or autonomous crimes. As discussed in Chapter 2 of this Guide, States have an obligation to criminalize, investigate and, where there is sufficient evidence, prosecute rape and sexual assault.³⁶⁴ The obligation to guarantee respect for international human rights norms – including the prohibition on discrimination, the right to be free from torture and other ill-treatment and the right to privacy, among others, gives rise to an obligation to criminalize,

³⁶² Sexual violence was addressed by international humanitarian law instruments from an early stage. See article 44 of the Lieber Code of 1863, which provided explicit protection against rape in article 44. The Hague Regulations of 1899 and 1907 protected the "family honour and rights" of the population of an occupied territory. Similarly, the 1929 Geneva Convention on prisoners of war provided that prisoners of war are entitled to respect for "their persons and honour" and that "women [prisoners of war] shall be treated with all consideration due to their sex." Contemporary international humanitarian law treaties explicitly prohibit rape, while the prohibition of other sexual violence is encompassed in other provisions. Article 27 of the Geneva Convention IV requires that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Article 75(2)(b) of the Additional Protocol I, provides that "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault," are "prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents." Furthermore, article 76(1) of the Additional Protocol I protects specifically women "against rape, enforced prostitution and any other form of indecent assault" and article 77(1) children "against any form of indecent assault." This prohibition protects women, girls, boys and men. The prohibition of rape and other forms of sexual violence in armed conflict is considered customary international law. Numerous military manuals state that rape, enforced prostitution and indecent assault are prohibited and many of them specify that these acts are war crimes. See ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, rule 93 and commentary.

³⁶³ CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 2: "the prohibition of gender-based violence against women has evolved into a principle of customary international law", and footnote 3 citing relevant instruments and states practice supporting this prohibition at all times.

³⁶⁴ CAT, article 12; Maputo Protocol, articles 2(a), 3(4), 4(2), 11(3), 12(1)(c)(d); 13(c), 14(2)(c), 22(b), 23(b); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000, principle 2; Geneva Convention IV, article 146(1-2); ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, rule 158; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18. See also Committee Against Torture, General Comment 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 15; CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, paras. 21-22; CEDAW Committee, General Recommendation No. 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc. CEDAW/C/GC/30, 18 October 2013, para. 38(a) and (b); CEDAW Committee, General Recommendation No. 19, "Violence against women", UN Doc. A/47/38, 1992, para. 24(b); Report of the Special Rapporteur on violence against women (Yakin Ertürk), "Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women – The Due Diligence Standards as a Tool for The Elimination of Violence Against Women", UN Doc. E/CN.4/2006/61, 20 January 2006, para. 19.

investigate, prosecute and sanction rape and other forms of sexual assault.³⁶⁵ International human rights law thus requires that all forms of sexual assault, including rape, be adequately criminalized under domestic criminal law. Article 4(2)(a) of the *Maputo Protocol*, in particular, requires States to “enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.”

Domestic criminal offences should identify rape and other acts constituting sexual assault as crimes against the physical and mental integrity and sexual autonomy of the victim, not crimes against morality, public decency or honour.³⁶⁶ Domestic criminal provisions defining rape and other forms of sexual assault as crimes should also be gender-neutral. Accordingly, rape, for example, may be committed against and by anybody, regardless of the perpetrator’s or the victim’s gender (e.g., against males by men and women, and against females by men and women).³⁶⁷

Under international law and standards, the charges in cases before the SCC involving rape and other forms of sexual assaults – largely carried out through sexual violence committed in the context of detention or other custodial settings – disclose evidence of: rape as an autonomous crime; rape and other acts of sexual assault as torture or other ill-treatment; and rape and other forms of sexual assault as crimes against humanity.

International and regional authorities have drawn heavily on the jurisprudence of international criminal tribunals defining and interpreting rape as a crime against humanity when they adjudicate cases of rape as an autonomous crime or rape as torture or other ill-treatment. Even where discussing rape as an underlying act of crimes against humanity, the jurisprudence of international courts and tribunals provides clear interpretive guidance of the constitutive elements of rape and other forms of sexual assault. Accordingly, such jurisprudence is relied upon below in relation to the discussion on rape as an autonomous crime and on rape as torture and other ill-treatment.

a. Rape as an autonomous crime

International law and standards require a comprehensive definition of rape that includes the following elements: (i) the intentional penetration of a sexual nature of the body of another person with any bodily part or object; (ii) the lack of or absence of consent or the fact that consent is vitiated; (iii) that coercive circumstances negate consent; and (iv) that ability to consent to engage in sexual activity is integrally related to the concept of legal capacity, without which, some sexual acts may entail criminal liability (e.g., age-related incapacity; incapacity as a result of intoxication).³⁶⁸

³⁶⁵ E.g. ICCPR, article 2(2); CEDAW, article 2(a); CRC, article 4; CAT, article 2(1); ACHR, article 1; ACHPR, article 1; HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18. See Chapter 2 of this Guide.

³⁶⁶ CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 33. See also, Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women, 2012, pp. 12, 24; Istanbul Convention, article 36 (1). Under international law, sexual harassment also constitutes a separate offence from rape and other forms of sexual violence. The Istanbul Convention defines sexual harassment as unwanted behaviour that has the purpose or effect of: (i) violating a person’s dignity; or (ii) creating for that person an intimidating, hostile, degrading, humiliating or offensive environment. Istanbul Convention, article 40. Given the SCC only has jurisdiction over offences committed by State actors, the sexual harassment offences are not discussed further in this Guide.

³⁶⁷ See UN Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women, 2012, p. 12. See, for example, according to article 7(3) of the ICC statute, “the term ‘gender’ refers to the two sexes, male and female, within the context of society.” With regard to the crime of rape, the ICC Elements of Crimes specify that “[t]he concept of ‘invasion’ [of the victim’s body by the perpetrator] is intended to be broad enough to be gender-neutral.” ICC Elements of Crimes, article 7(1)(g)-1, footnote 15, article 8(2)(b)(xxii)-1, footnote 50, and article 8(2) (e)(vi)-1, footnote 63. See also *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 100.

³⁶⁸ Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, March 2011, pp. 9-30.

The first international definition was espoused by the ICTR in 1998, which defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”³⁶⁹ The ICTR stated that, although no definition could be clearly discernable from an international instrument or convention at the time, rape had been defined in national jurisdictions as “non-consensual intercourse” and the prohibition under international humanitarian law was “readily apparent” at the time.³⁷⁰ In the subsequent *Kunarac et al.* case, the ICTY Appeals Chamber provided a more detailed definition of rape under international law:

[T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.³⁷¹

This definition is reflected in article 36(a) of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (otherwise known as the Istanbul Convention), the first comprehensive treaty-based framework dedicated to combatting violence against women. It defines sexual violence and rape as “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.”³⁷²

The ICC Elements of Crimes, also agreed in 2011, defines rape as war crime and as a crime against humanity as:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.³⁷³

³⁶⁹ *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 688. See also *Prosecutor v. Delalić et al.*, ICTY, ICTR-96-4-T, Trial Chamber, Judgment, 16 November 1998, paras. 478-479.

³⁷⁰ *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, paras. 596, 686.

³⁷¹ *Prosecutor v. Kunarac, Kovać and Vuković*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 460. See also *Prosecutor v. Gacumbitsi*, ICTR, ICTR-2001-64-1, Appeals Chamber, Judgment, 7 July 2006, paras. 155, 157.

³⁷² Istanbul Convention, article 36(1)(a). This may include “causing another person to engage in non-consensual acts of a sexual nature with a third person” under article 36(1)(c). See also ICC Elements of Crimes, elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under Article 7(1)(g)-1, p. 8, and the war crime of rape in international and non-international armed conflicts under article 8(2)(b)(xxii)-1, p. 28, and article 8(2)(e)(vi)-1, pp. 36-37. Legislation should also provide for aggravating circumstances including, but not limited to, the age of the survivor, the relationship of the perpetrator and survivor, the use or threat of violence, the presence of multiple perpetrators, and grave physical or mental consequences of the attack on the victim. UN Handbook for Legislation on Violence against Women for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women, 2012, p. 24. States should “[s]pecifically criminalize sexual assault within a relationship (that is ‘marital rape’, either by providing that sexual assault provisions apply ‘irrespective of the nature of the relationship’ between the perpetrator and complainant; or [by] stating that ‘no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation’).”

³⁷³ Rome Statute, article 7; ICC Elements of Crimes, article 7 (1)(g)-1, Crime against humanity of rape, elements 1 and 2, and article 8(2) (e)(vi) (as a war crime), elements 1 and 2.

(1) Element of penetration

The element of penetration should be defined broadly. As set out above, in the ICC Elements of Crimes, penetration can be “of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.” In the *Furundžija* case, the ICTY confirmed that rape involved “the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; by coercion or force or threat of force against a victim or third person.”³⁷⁴ In the *Miguel Castro-Castro Prison* case, the IACTHR found that “an alleged finger vaginal ‘examination’ constituted sexual rape.”³⁷⁵

(2) Lack of or absence of consent or the fact that consent is vitiated - coercive circumstances negate consent

Consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances.³⁷⁶ Consent can be withdrawn at any stage. In the *Furundžija* case, the ICTY stated that “[f]orce or threat of force provides clear evidence of non-consent.”³⁷⁷

A context characterized by coercive circumstances, including, for example, custodial settings, negates consent. There is a broad range of “coercive circumstances.”³⁷⁸ With respect to this, in the *Furundžija* case, the ICTY held that “[a] narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”³⁷⁹

Rule 70 of the Rules of Procedure and Evidence of the ICC recognized that a main point of inquiry for the Court in rape trials is whether a perpetrator used “force, threat of force, coercion” or was “taking advantage of a coercive environment.”³⁸⁰ In the presence of such force, threat of force or coercion, or taking advantage of a coercive environment, consent cannot be inferred by reason of any words or conduct of a victim.³⁸¹ Consent also cannot be inferred from silence or lack of resistance of a victim.³⁸² In its jurisprudence, the ICC clarified that coercion may be inherent in certain circumstances, such as armed conflict, military presence,³⁸³ or other coercive environments of which a perpetrator may take advantage to commit rape. Several factors may contribute to creating a coercive environment, for instance, the number of people involved in the commission of the crime,

³⁷⁴ See *Prosecutor v. Furundžija*, ICTY, IT-95-17/1, Trial Chamber, Judgment, 10 December 1998, para. 185. See also *Prosecutor v. Kunarac, Kovač and Vuković*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 131-132.

³⁷⁵ *Judgment of 25 November 2016*, IACTHR, *Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 312. The Court concluded the rape constituted torture due the effect it had on the victim. See Chapter 3, section e below.

³⁷⁶ *M.C. v. Bulgaria*, ECtHR, Application No. 39272/98, Judgment of 4 December 2003, para. 163. See also *Karen Tayag Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 22 September 2010, para. 8.9(b)(ii)(a); Istanbul Convention, article 36 (2); CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/CG/35, 14 July 2017 para. 33; UN Handbook for Legislation on Violence against Women, 2012, p. 24.

³⁷⁷ *Prosecutor v. Kunarac, Kovač and Vuković*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 129.

³⁷⁸ E.g., *R.P.B. v. Philippines*, CEDAW Communication No. 34/2011, Views of 12 March 2014, para. 3.4. See also para. 8.10.

³⁷⁹ *Prosecutor v. Kunarac, Kovač and Vuković*, ICTY, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 129.

³⁸⁰ ICC Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3 (2002), rule 70. See also *Amnesty International, Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, 2011, pp. 17-31.

³⁸¹ ICC Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3 (2002), rule 70(a).

³⁸² ICC Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3 (2002), rule 70(c).

³⁸³ *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 440; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 162.

or where the rape is committed during or immediately following a combat situation or is committed together with other crimes.³⁸⁴ In relation to the existence of a “coercive environment,” it must be proven that the perpetrator’s conduct involved “taking advantage” of such a coercive environment.³⁸⁵ The term “coercion” does not require physical force but includes threats, intimidation, extortion, and other forms of duress which prey on fear or desperation.³⁸⁶

Coercion – and thus evidence of lack of consent - may also result from abuse of power, where the perpetrator is in a position of political, military or other power over the victim.³⁸⁷ The ICC Elements of Crimes recognize abuse of power as a type of conduct that would constitute coercion.³⁸⁸ Abuse of power or official capacity can also constitute an aggravating circumstance, which the Court may consider in sentencing.³⁸⁹

In *M.C. v. Bulgaria*, the ECtHR confirmed that an absence of violence does not mean the victim consented. The Court concluded that where rapists deliberately misled the applicant in order to take her to a deserted area, this created an environment of coercion³⁹⁰ that was sufficient to overcome the sexual autonomy of the victim.³⁹¹ The Court stated:

[I]n international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The International Criminal Tribunal for the former Yugoslavia has found that, in international criminal law, any sexual penetration without the victim's consent constitutes rape and that consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances. While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.³⁹²

The determination of whether a victim consented should not be based on assumptions about a victim’s behaviour in such circumstances. In the case of *Karen Tayag Vertido v. the Philippines*, the CEDAW Committee stressed that “there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.”³⁹³ The Committee recommended that the respondent State enact a definition of sexual assault that either:

- a. Requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or

³⁸⁴ *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 104.

³⁸⁵ *Ibid.*, para. 104.

³⁸⁶ *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 440; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 162.

³⁸⁷ *Prosecutor v. Musema*, ICTR, ICTR-96-13-A, Trial Chamber, Judgment, 27 January 2000, paras. 880-881.

³⁸⁸ ICC Elements of Crimes, article 7(1)(g)-1, para. 2. See also Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, March 2011, pp. 23-26.

³⁸⁹ *Prosecutor v. Delalić et al.*, ICTY, IT-96-21, Trial Chamber, Judgment, 16 November 1998, para. 495. See also ICC Rules of Procedure and Evidence, rule 145(2)(b)(ii).

³⁹⁰ *M.C. v. Bulgaria*, ECtHR, Application No. 39272/98, Judgment of 4 December 2003, para. 180.

³⁹¹ *Ibid.*, paras. 164-166.

³⁹² *Ibid.*, para. 163.

³⁹³ *Karen Tayag Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 22 September 2010, para. 8.5. See also ICC Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3 (2002), rule 70 (c).

b. Requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.³⁹⁴

The ability to consent to engage in sexual activity is integrally related to the concept of legal capacity, without which, some sexual acts may entail criminal liability. The ICC Elements of Crimes state that a victim cannot give genuine consent “if affected by natural, induced or age-related incapacity.”³⁹⁵ Rule 70(b) of the Rules of Procedure and Evidence of the ICC recognize that, in cases of sexual violence, “consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent.”³⁹⁶

b) Rape as torture and other ill-treatment

Numerous international authorities, including courts and tribunals, have confirmed that rape constitutes a form of torture (defined in section c above) under the ICCPR, ACHPR and CAT when committed by or at the instigation of or with the consent or acquiescence of public officials because it causes serious physical and mental suffering not only when it might be inflicted to obtain information or a confession, or to punish or intimidate the victim, but also because its perpetration is rooted in gender discrimination.³⁹⁷

The ICTY has affirmed the infliction of rape is rooted in gender discrimination in a number of cases.³⁹⁸

For rape to constitute torture, the harm inflicted as a result of rape need not be committed solely or even predominantly for one of the prohibited purposes,³⁹⁹ provided one of the purposes is a prohibited purpose.⁴⁰⁰

In the *De Mejía v. Peru* case in 1996, the IACoMHR was the first international body to determine that rape constituted torture. It stated that:

[R]ape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community. ... Rape causes physical and mental suffering in the victim. In addition to the violence at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.⁴⁰¹

³⁹⁴ *Karen Tayag Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 22 September 2010, para. 8.9(b)(ii).

³⁹⁵ ICC Elements of Crimes, article 7(1)(g)-1, footnote 16. See also article 7(1)(g)-5, footnote 20 stating that “genuine consent” in relation to the crime against humanity of enforced sterilization is understood as not including consent obtained through deception.

³⁹⁶ ICC Rules of Procedure and Evidence, UN Doc. ICC-ASP/1/3 (2002), rule 70. See also *Amnesty International, Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, 2011, pp. 27-28.

³⁹⁷ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3, 15 January 2008, paras. 34-36; *Prosecutor v. Brđanin*, ICTY, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 523; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 633, 682, 698 (Vol. 1).

³⁹⁸ *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 129 (perpetrator did not rape any male detainees); *Prosecutor v. Zejnil Delalić et al.*, ICTY, IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, paras. 941, and 963 (rapes were committed because the victims were female); *Prosecutor v. Brđanin*, ICTY, No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 523.

³⁹⁹ For a list of prohibited purposes, see Chapter 3, section c of this Guide.

⁴⁰⁰ *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23& IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 153, 155; *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-A, Appeal Chamber, Judgment, 28 February 2005, para. 369-370.

⁴⁰¹ See *Report No. 5/96 of 1 March 1996*, IACoMHR, Raquel Martín de Mejía v. Peru, Case No. 10.970.

In the *Aydin v. Turkey* case in 1997, the ECtHR held that “[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.” In the specific circumstances of the case, the Court noted that “the applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.”⁴⁰² Considering that the applicant “was also subjected to a series of particularly terrifying and humiliating experiences while in custody ... having regard to her sex and youth and the circumstances under which she was held,”⁴⁰³ it concluded that “[t]he suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes.”⁴⁰⁴ Against this background, the Court was satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the ECHR. Notably, the Court added that it would have reached this conclusion on either of these grounds taken separately.⁴⁰⁵

In the *Miguel Castro-Castro Prison* case in 2006, the IACtHR stated that “rape is an extremely traumatic experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim ‘physically and emotionally humiliated,’ situation [sic] difficult to overcome with time, contrary to what happens with other traumatic experiences.”⁴⁰⁶ Accordingly, it concluded that “the acts of sexual violence to which an inmate was submitted under an alleged finger vaginal “examination” constituted sexual rape that due to its effects constituted torture.”⁴⁰⁷

In *V.L. v. Switzerland* in 2007, a case relating to a refusal by the Swiss authorities to grant asylum to a Belarusian citizen currently living in Switzerland, the Committee against Torture considered the woman’s complaint that she had been raped by three Belarusian police officers, including by being penetrated with objects, who wanted information about the whereabouts of her husband, and subsequently kidnapped and raped her again.⁴⁰⁸ After concluding that the victim was “under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities,” the Committee against Torture found that:

the acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture.⁴⁰⁹

The ICTY has also confirmed in multiple cases that rape necessarily reaches the threshold level of pain and suffering⁴¹⁰ required for the purposes of establishing torture. For example, although in the

⁴⁰² See *Aydin v. Turkey*, ECtHR (Grand Chamber), Application No. 23178/94, Judgment of 25 September 1997, para. 83.

⁴⁰³ *Ibid.*, para. 84.

⁴⁰⁴ *Ibid.*, para. 85.

⁴⁰⁵ *Ibid.*, para. 86.

⁴⁰⁶ *Judgment of 25 November 2016*, IACtHR, *Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 311.

⁴⁰⁷ *Ibid.*, para. 312.

⁴⁰⁸ *V.L. v. Switzerland*, Committee against Torture Communication No. 262/2005, Decision of 22 January 2007, paras. 2.3-2.4.

⁴⁰⁹ *Ibid.*, para. 8.10.

⁴¹⁰ *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23& IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, para. 150; *Prosecutor v. Zejnil Delalić et al.*, ICTY, IT-96- 21-T, Trial Chamber, Judgment, 16 November 1998, paras. 495-496; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, para. 48 (Vol. 1).

context of determining whether torture as a crime against humanity had been committed, in the *Kunarac* case the ICTY Trial Chamber stated:

[G]enerally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture ... Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.⁴¹¹

In the *Simić et al.* case, the ICTY held that acts including “ramming a police truncheon in the anus of a detainee” and “forcing male prisoners to perform oral sex on each other and on Stevan Todorović, sometimes in front of other prisoners” constituted torture.⁴¹² In the specific circumstances of the case, it held that “[t]hese acts caused severe physical and mental pain and suffering.”⁴¹³ Although the Trial Chamber called these acts “sexual assaults” which constituted torture, they involved penetration which could give rise to a finding that they also constituted rape.

c) Other forms of sexual assault

As confirmed by the Istanbul Convention, other forms of sexual assault should be criminalized and broadly defined to include “other non-consensual acts of a sexual nature with a person.”⁴¹⁴ Albeit in the context of determining whether acts of sexual violence constituted crimes against humanity, in the *Akayesu* case the ICTR defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”⁴¹⁵ The ICTR stated that sexual violence “is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”⁴¹⁶ International authorities have found that other forms of sexual assault can constitute torture or other ill-treatment,⁴¹⁷ including: the touching of sexual organs and threats of rape,⁴¹⁸ being forced to watch sexual violence committed against an

⁴¹¹ *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23& IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras. 150-151. See also *Prosecutor v. Akayesu*, ICTR, ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 597; *Prosecutor v. Zejnil Delalić et al.*, ICTY, IT-96- 21-T, Trial Chamber, Judgment, 16 November 1998, para. 496.

⁴¹² *Prosecutor v. Simić, Tadić and Zarić*, ICTY, IT-95-9, Trial Chamber, Judgment, 17 October 2003, para. 778.

⁴¹³ *Ibid.*, para. 772.

⁴¹⁴ Istanbul Convention, article 36(1)(b). As for rape, this includes “causing another person to engage in non-consensual acts of a sexual nature with a third person.” See article 36(1)(c). The UN Handbook for Legislation on Violence against Women recommends that States define sexual assault as a violation of bodily integrity and sexual autonomy. UN Department of Economic and Social Affairs, Division for the Advancement of Women, Handbook for Legislation on Violence against Women, UN Doc. ST/ESA/ 329 (2010), p. 26.

⁴¹⁵ *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 598.

⁴¹⁶ *Ibid.*, para. 688. See also *Prosecutor v. Alfred Musema*, ICTR, ICTR-96-13, Trial Chamber, Judgment, 27 January 2000, para. 965; *Prosecutor v. Rukundo*, ICTR, ICTR-2001-70-T, Trial Chamber, Judgment, 27 February 2009, paras. 379-380.

⁴¹⁷ The UN Special Rapporteur on torture had already noted in 1986 that sexual abuse is one of the various methods of physical torture. See *Report of the Special Rapporteur on Torture*, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 119. See also CEDAW Committee, General Recommendation No. 19: Violence against Women, UN Doc. A/47/38, 1992, para. 7.

⁴¹⁸ *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, paras. 560-561.

acquaintance or relative,⁴¹⁹ forced mutual masturbation,⁴²⁰ beatings including kicking a (male) prisoner in the genitals,⁴²¹ forced nudity,⁴²² forced sterilization,⁴²³ and forced pregnancy.⁴²⁴

d) Rape and other forms of sexual assault as crimes against humanity

Rape and other forms of sexual assault, including sexual slavery, enforced prostitution, forced pregnancy, and forced sterilization can constitute an underlying act of crimes against humanity, provided the chapeau elements of the crime are met. The chapeau elements of crimes against humanity and elements of each underlying act are discussed in further detail in section f below.

Notably, under the ICC definition of crimes against humanity it is sufficient to prove that the victim was in the custody or control of the perpetrator where torture is charged as a crime against humanity (see section f for further discussion). This is consistent with the jurisprudence of the ICTY, which determined that sexual violence in detention settings constituted torture in circumstances where interrogation was absent.⁴²⁵

⁴¹⁹ *Prosecutor v. Furundžija*, ICTY, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras. 267-268; *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 149; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 1214, 1235, 1246 (Vol. 1).

⁴²⁰ *Prosecutor v. Martić*, ICTY, IT-95-110T, Trial Chamber, Judgment, 12 June 2007, paras. 288, 413, footnote 899.

⁴²¹ *Prosecutor v. Brđanin*, ICTY, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, paras. 498, 500. See also *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 613, 698 (Vol. 1) (uncovering the breast of a female detainee and running a knife along it for several minutes while camp guards laugh).

⁴²² *Valasinas v. Lithuania*, ECtHR, Application No. 44558/98, Judgment of 24 July 2001, paras. 117-118 (“while strip-searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner;” obliging a male prisoner “to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him”); *Judgment of 25 November 2016*, IACtHR, *Miguel Castro-Castro Prison v. Peru*, Series C No. 160, paras. 306, 308 (“Having forced the females [sic] inmates to remain nude in the hospital, watched over by armed men, in the precarious health conditions in which they were, constituted sexual violence ..., which caused them constant fear of the possibility that said violence be taken even further by the police officers, all of which caused them serious psychological and moral suffering, which is added to the physical suffering they were already undergoing due to their injuries. Said acts of sexual violence directly endangered the dignity of those women”).

⁴²³ Istanbul Convention, article 39 (b) (“performing surgery which has the purpose or effect of terminating a woman’s capacity to naturally reproduce without her prior and informed consent or understanding of the procedure”); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/22/53, 1 February 2013, paras. 45-48, 71, 76-78, 80, 88. See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3, 15 January 2008, paras. 38, 39, 69; *M.T. v. Uzbekistan*, HRC Communication No. 2234/2013, Views of 23 July 2015, paras. 3.1, 3.10, 5.15, 7.4, 7.6 (a hysterectomy performed on the victim without her consent constituted torture (as well as a violation of the prohibition on discrimination), for which the State had violated its obligation to promptly and impartially investigate). See also HRC, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 11.

⁴²⁴ *L.M.R. v. Argentina*, HRC Communication No. 1608/2007, Views of 29 March 2011, para. 9.2.

⁴²⁵ *Prosecutor v. Kvočka et al.*, ICTY, ICTY-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 157; *Prosecutor v. Stanišić & Župljanin*, ICTY, IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, paras. 489, 698 (Vol. 1); *Prosecutor v. Brđanin*, ICTY, IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 518; *Prosecutor v. Kunarac et al.*, ICTY, IT-96-23& IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 654.

ii. Tunisian law in light of international law and standards

The Tunisian Criminal Code criminalizes rape and “indecent assault.”⁴²⁶ The definitions of these crimes that applied prior to 2017 were largely inconsistent with international law and standards. The Code was amended in 2017 by Law No. 58 of 2017 on Eliminating Violence Against Women⁴²⁷ to bring some of these crimes, in particular the definition of rape, in line with international law. These crimes continue to be addressed in the Criminal Code in the chapter on “crimes against decency,” as opposed to serious crimes against the person, physical integrity and sexual autonomy. The limitation period for rape and “indecent assault” against a minor commences when the child reaches the age of majority.⁴²⁸

Article 227 of the Criminal Code prohibits rape. Prior to Law No. 58 of 2017, article 227 (as amended by Law No. 9 of 1985 and Law No. 23 of 1989) stated:

[S]hall be punished by death anyone who:

- (1) forces a woman to sexual intercourse through violence or arms or threat thereof;
- (2) forces a girl under the age of 10 years to sexual intercourse, even without the use of violence or arms or threat thereof.

Sexual intercourse without the women’s consent committed outside of the above-mentioned cases is punishable by life imprisonment.

Consent shall be considered absent if the victim is under the age of 13 years.

Law No. 28 of 2017 amended the above-mentioned provision to bring it in line with international law. Article 227 now defines rape as “any act of sexual penetration, whatever its nature and by whatever means, committed against a woman or a man without their consent,” and is punishable either by a sentence of 20 years’ imprisonment, or by life imprisonment where aggravating circumstances apply.⁴²⁹

⁴²⁶ Tunisian law also criminalizes female genital mutilation. This is not an act of sexual violence per se, but constitutes cruel inhuman or degrading treatment or punishment. See Chapter 3, section c of this Guide. Tunisian law also criminalizes human trafficking and sexual harassment.

⁴²⁷ Law No. 2017-58 of 26 July 2017 on violence against women. The law entered into force on 1 February 2018. Article 3 defining terms in the Law provided for a definition of “sexual violence” – “any act or word whose objective is to subject the woman to his own sexual desires or the sexual desires of others, by (means of) duress, fraud, pressure or other means, such as to weaken or impair the will, regardless of the relationship of the author with the victim.” However, neither article 3 or the remainder of Law No. 58 of 2017 provide for criminalization of sexual violence *per se*.

⁴²⁸ Criminal Code, article 226.

⁴²⁹ Criminal Code, article 227, paras. 1, 3, as amended by Law No. 2017-58 of 26 July 2017. Aggravating circumstances apply when rape is committed, for example, with violence or the use or threat of use of a weapon, against a person who is under the age of 16 years, or by abuse of power. The legal age of majority in Tunisia however is 18 years, see article 153 of the Personal Status Code. A victim cannot consent if they are under the age of 16. Criminal Code, article 227, para. 2. According to amended article 227*bis* regarding sexual abuse committed by a child against a child, where the perpetrator is a child, article 59 of the Code on the Protection of the Child applies. Under that provision, the family judge may pronounce one of the following measures: (i) maintain the child with his family; (ii) keep the child with his family and instruct the child protection officer to follow up the child, help and guidance of the family; (iii) subject the child to a medical or psychological check; (iv) place the child under guardianship or entrusting him or her to a foster family or a social or specialized educational institution; or (v) place the child in a training center or school. Any consensual sexual intercourse or attempt to have a sexual intercourse with a child between 16 and 18 years of age is punishable by 5 years’ imprisonment, or 10 years in aggravating circumstances. Criminal Code, article 227*bis*, as amended by Law No. 2017-58 of 26 July 2017. Prior to 2017, article 227*bis* (Added by Law No. 1958 of March 4, 1958 and amended by Law No. 69-21 of March 27, 1969 and amended by Law No. 89-23 of February 27, 1989) provided that a person “who subjects without violence to a sexual act a female child under fifteen years of age” is punished by six years’ imprisonment (para. 1); the penalty is five years’ imprisonment if the victim’s age is more than fifteen years and less than twenty years of age (para. 2); attempt to commit rape is punishable (para. 3); the marriage of the accused with the victim in both cases provided for in this article shall terminate the proceedings

Article 228 of the Criminal Code (as amended by Law No. 93 of 1995) provided that “whoever assaults an adult male or female without his consent shall be punished by six years’ imprisonment.” The provision was defined to include the sexual penetration of a men (excluded until 2017 from the definition of rape)⁴³⁰ and any other sexual act on the body of a victim.⁴³¹ The penalty is increased to twelve years’ imprisonment if the victim is under 18 years of age (pre-2017).⁴³² Where the offence “was committed by use of a weapon, threat, abduction or by inflicting injury or mutilation or disfigurement or any other act likely to put the life of the victim in danger,” the penalty is life imprisonment.⁴³³

Tunisia’s definitions of rape and “indecent assault” – the two provisions through which sexual violence is to be adjudicated by the SCC – do not conform with international law and standards. The pre-2017 definition of rape does not include rape committed against men and is confined to “intercourse,” which if defined narrowly to only include vaginal penetration; as such, it is inconsistent with the definition of rape under international law and standards, which, in turn, encompasses penetration of or by any sexual organ. The post-2017 definition complies with international law, provided it is applied consistently with international jurisprudence on the meaning of “consent.”

The law does not otherwise criminalize other forms of “sexual assault” *per se*, except to the extent that “indecent assault” may be broadly interpreted to capture all non-penetrative non-consensual (broadly interpreted to include coercive circumstances) conduct, and to the extent that the definition of torture and other ill-treatment may be applied consistently with international law.

f. Crimes against humanity

International law prohibits the commission of crimes against humanity in any circumstance. The prohibition has been recognized as part of customary international law since World War II, and as a peremptory norm of international law or *jus cogens*, such that it is non-derogable.⁴³⁴ The prohibition has also been codified in a number of international instruments establishing international and hybrids courts and tribunals, including in the Rome Statute, which Tunisia ratified on 24 June 2011⁴³⁵ and which entered into force on 1 July 2002.

Tunisian law does not prohibit crimes against humanity *per se*, but criminalizes some of its underlying acts, such as murder, enslavement, imprisonment or other severe deprivation of liberty, torture, rape, sexual slavery and persecution. These domestic crimes do not incorporate the chapeau requirements that make crimes against humanity one of the most serious crimes under international law. Moreover, the domestic crimes do not always accord with definitions under international law,

or the effects of the sentence (para. 4); the prosecution or the effects of the sentence shall be resumed if, before the expiration of two years from the date of consummation of the marriage, the marriage terminates by the divorce pronounced at the request of the husband, in accordance with Article 31(3) of the Personal Status Code (para. 5).

⁴³⁰ This was the judicial practice before the amendment of article 227 Penal Code. Although it was not clearly defined by the abrogated version of article 227, rape was always considered in jurisprudence as “natural penetration” made by a male on a female body. See Cour de Cassation Decision N. 6417 on 16 June 1969 (“The crime of rape is characterised only in the case where sexual natural penetration occurs, i.e. vaginal penetration”).

⁴³¹ Cour de Cassation, Decision No. 34524 of 16 June 1981 (“sexual assault is committed by any act over the body of the victim to sexually intimidate them”).

⁴³² Criminal Code, article 228, para 2. Law No. 2017-58 of 26 July 2017 amended the provision to aggravate the offence where committed against a child but without violence.

⁴³³ Criminal Code, article 227, para. 3.

⁴³⁴ See *Prosecutor v. Kupreškić et al* (“Lašva Valley” Case), ICTY, IT-95-16, Trial Chamber, Judgment, 14 January 2000, para. 520, where the ICTY stated that “most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.” The UN General Assembly called for prosecution of crimes against humanity in 1946. See UN General Assembly Resolution 95(1) of 11 December 1946 affirming the principles of the Nuremberg Charter and UN General Assembly Resolution 3(1) of 13 February 1946 recommending the extradition and punishment of persons accused of crimes under the Nuremberg Charter.

⁴³⁵ See Law Decree No. 2011-549 of 14 May 2011, on the ratification of the ICC Statute.

as set out above, or with the definitions provided for under the Rome Statute. Domestic law also does not criminalize extermination, enforced disappearance, deportation and forcible transfer, persecution or other acts of sexual violence (namely enforced prostitution, enforced sterilization and some acts of sexual violence) constituting underlying acts of crimes against humanity.

i. Crimes against humanity under international law

a) *Definition under customary international law*

Tunisia is bound by the customary international law and Rome Statute definition of crimes against humanity. As for some other crimes, ascertaining the applicable definition of crimes against humanity under customary international law at any given time since 1955 is not straightforward given the numerous iterations of it in international instruments since WWII.

Crimes against humanity have been defined in numerous enactments establishing international criminal tribunals and courts, including the Charter of the International Military Tribunal of 1945 (IMT Statute),⁴³⁶ Control Council Law No. 10 of 1945⁴³⁷ (pursuant to which post-WWII crimes were prosecuted), and the statutes establishing the ICTY in 1993,⁴³⁸ the ICTR in 1994⁴³⁹ and other courts of a hybrid or special nature to prosecute international crimes such as the SCSL and the ECCC.⁴⁴⁰ In the course of describing the jurisdiction of the relevant courts and tribunals, these enactments confirmed that the crimes against humanity to which they referred already constituted crimes under customary international law.

The definitions in these enactments contained both chapeau elements and underlying acts. The chapeau elements of crimes against humanity were commonly defined in these instruments as “acts committed as part of a widespread or systematic attack against any civilian population,” a core of the definition which is accepted as part of customary international law.

Additional jurisdictional requirements or elements were contained in the definitions of crimes against humanity in the IMT, ICTY, ICTR and ECCC Statutes, in particular requirements that they be committed (i) in the context of an armed conflict (IMT and ICTY)⁴⁴¹ or (ii) against a civilian population on national, political, ethnic, racial or religious grounds (ICTR and ECCC).⁴⁴² The ICTY and ICTR, however, concluded that these additional elements were included only to define the jurisdiction of

⁴³⁶ “Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connect with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” Charter of the International Military Tribunal, art. 6(c) (adopted 8 August 1945). The definition of crimes against humanity in article 5(c) of the Charter of the International Military Tribunal for the Far East was identical.

⁴³⁷ “[A]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.” Control Council Law No. 10, article 2(1)(c) (adopted 20 December 1945).

⁴³⁸ “[T]he following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.” ICTY Statute, article 5 (adopted 23 May 1993).

⁴³⁹ “[T]he following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.” ICTR Statute, article 3 (adopted 8 November 1994).

⁴⁴⁰ See also SCSL Statute, article 2; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC Statute), article 5.

⁴⁴¹ Charter of the International Military Tribunal, art. 6(c); Charter of the International Military Tribunal for the Far East, article 5(c); ICTY Statute, article 5.

⁴⁴² ICTR Statute, article 3; ECCC Statute, article 5.

the particular tribunals, and did not form part of the definitions of the crimes themselves under customary international law.⁴⁴³

With respect to the underlying acts of crimes against humanity, the acts recognised as such in international instruments have included murder, extermination, enslavement, deportation, imprisonment, torture, rape and sexual violence, other inhumane acts, persecution on political, racial, religious or other such grounds, and enforced disappearance. Acts which were not explicitly listed may fall within “other inhumane acts” which was included in all international instruments and may be considered reflective of customary international law.

The Rome Statute represents confirmation by States that a range of crimes against humanity already existed under customary international law at the time of its adoption in 1998. While the Rome Statute is legally binding on Tunisia since its accession in 2011, the crimes against humanity it refers to were already binding on Tunisia prior to 1998 as a matter of customary international law. It is also important to recognise that the definitions in the Rome Statute are included for the purpose of defining the particular jurisdiction of the ICC and were not necessarily intended to be an exhaustive list of all possible crimes against humanity under customary international law. Therefore, any conduct falling within the definitions in the Rome Statute can be clearly and quickly confirmed to have constituted a crime under international law since 1998, and for some period prior to that. However, this also means that the fact that certain conduct is not covered by the definition in the Rome Statute, does not exclude the possibility that it would nevertheless constitute a crime against humanity under current or prior customary international law.⁴⁴⁴

b) *Definition under the Rome Statute*

Under article 7(1) of the Rome Statute, crimes against humanity are defined as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

⁴⁴³ *Prosecutor v. Tadić*, ICTY, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 139-141 (noting that Control Council Law No. 10, adopted on 20 December 1945, did not contain an armed conflict requirement and as such it may not have formed part of customary international law at all); *Prosecutor v. Tadić*, ICTY, IT-94-1, Appeals Chamber, Judgment, para. 305 (noting discriminatory intent is only necessary for the underlying act of persecution as a crime against humanity). See also *Prosecutor v. Akayesu*, ICTR, ICTR-96-4-A, Appeals Chamber, Judgment, 1 June 2001, paras. 460-465 (discriminatory intent not generally required under international law). The absence of the armed conflict requirement from the 1948 Nuremberg Principles, the 1968 Convention on the Non-Applicability of Statutory Limitations, the 1948 Genocide Convention, the 1973 Convention on the Suppression and Punishment of Apartheid, numerous subsequently enacted domestic laws (such as the Canadian Criminal Code (para. 7), French Criminal Code (articles 212-211) and post-WWII jurisprudence (e.g. *Einsatzgruppen* case, p. 49) and discriminatory intent requirement from all instruments other than the ICTR and ECCC Statutes confirm this finding.

⁴⁴⁴ The International Law Commission has drafted a treaty on crimes against humanity to be considered by States. For the most recent definition in the Draft Treaty, see draft article 3(1) in Report of the International Law Commission, Sixty-ninth session (1 May-2 June, 3 July-4 August 2017), UN Doc. A/72/10, Chapter IV, para. 45, p. 11. The definition of crimes against humanity under draft article 3 reflects the definition of crimes against humanity under article 7(1) of the Rome Statute of the ICC.

- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Article 7(2) goes on to state that, for the purposes of the definition, an “‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of [the above] acts ... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

The notable difference between the Rome Statute and prior statutory instruments and/or customary international law is that the Rome Statute: (i) narrows the definition by requiring crimes against humanity to be committed pursuant to or in furtherance of a State or organizational policy to commit such attack,⁴⁴⁵ and (ii) explicitly lists additional underlying acts not previously included (but which may have fallen under “other inhumane acts” in instruments such as the ICTY Statute). These underlying acts are discussed in more detail below.

c) *Understanding the contextual or chapeau elements*

As discussed above, for crimes against humanity to be established, one or more underlying acts must be committed in the context of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.” These contextual elements can be broken down into the following requirements:

1. There must be an attack;
2. The acts of the perpetrator must be part of the attack;
3. The attack must be directed against any civilian population;
4. The attack must be widespread or systematic;
5. The attack must be committed pursuant to or in furtherance of a State or organizational policy to commit such attack.
6. The perpetrator must know that there is a widespread or systematic attack against a civilian population and know that his or her acts constitute part of such an attack.

With the exception of the state policy requirement, the chapeau elements in the ICC definition are largely consistent with the chapeau elements applied by the *ad hoc* tribunals,⁴⁴⁶ the jurisprudence of which is therefore useful as interpretive guidance.

“Attack”

⁴⁴⁵ Under the definition applied by the *ad hoc* tribunals, the existence of a plan or policy may be used to demonstrate the existence of a widespread or systematic attack directed against a civilian population but is not a legal requirement. See *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 98; *Prosecutor v. Blaškić*, ICTY, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 120.

⁴⁴⁶ Each of these elements was listed *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 85.

According to the ICC's Elements of Crimes, an attack directed against a civilian population means "a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1" which "need not constitute a military attack."⁴⁴⁷ This is consistent with the interpretation of the definition before the ICTY, subsequently confirmed by the ICC,⁴⁴⁸ which found that an attack can precede, coincide with or continue beyond an armed conflict, or involve the use of armed force, but does not require it.⁴⁴⁹ Rather, an attack entails any mistreatment of the civilian population through a broad course of conduct, involving the commission of prohibited acts, of which the acts allegedly committed by the defendant form part.⁴⁵⁰

"Widespread or systematic attack"

The requirement that the attack be "widespread or systematic" excludes random or isolated acts of violence.⁴⁵¹ However, it is the attack, not the underlying acts which must be widespread and systematic. A single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of widespread or systematic attack.⁴⁵²

The terms "widespread or systematic" are disjunctive; thus, either condition could be met to establish the existence of the crime.⁴⁵³ The term "widespread" refers to "the large-scale nature of the attack and the number of targeted persons," although there is no numerical threshold of victims that must be met.⁴⁵⁴ It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians. The attack need not have a geographical continuity; it can be carried out in one or more locations, regardless of the dimensions concerned.⁴⁵⁵

⁴⁴⁷ ICC Elements of Crimes, article 7, Introduction, para. 3.

⁴⁴⁸ *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, paras. 1097, 1101. See also *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 149.

⁴⁴⁹ *Prosecutor v. Tadić*, ICTY, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras. 248, 251.

⁴⁵⁰ *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 86; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, ICTR, ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 916.

⁴⁵¹ See, e.g. *Decision on the prosecution application under Article 58(7) of the Statute*, ICC, Prosecutor v. Ahmad Harun and Ali Muhammad al Abd-al-Rahman, ICC-02/05-01/07, 27 April 2007, Pre-Trial Chamber I, para. 62; *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 394; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 77; *Decision on the Prosecutor's application under Article 58*, ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Pre-Trial Chamber II, 13 July 2012, para. 19. See also *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 90.

⁴⁵² *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, paras. 1112-1113. See also *Prosecutor v. Duško Tadić*, ICTY, IT-94-1-T, Trial Chamber, Judgment and Opinion, 7 May 1997, para. 649.

⁴⁵³ See *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 82; *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC, ICC-01/09, Pre-Trial Chamber II, 31 March 2010, para. 95. See also *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 93; Report of the International Law Commission, Sixty-ninth session (1 May-2 June, 3 July-4 August 2017), UN Doc. A/72/10, Chapter IV, Commentary, para. 46, pp. 31-32.

⁴⁵⁴ *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1123; *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 163. See also *Sylevstre Gacumbitsi v. The Prosecutor*, ICTR, ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 101; *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 94; Report of the International Law Commission, Sixty-ninth session (1 May-2 June, 3 July-4 August 2017), UN Doc. A/72/10, Chapter IV, Commentary, para. 46, p. 33.

⁴⁵⁵ *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 395. See, e.g., *Decision on the Prosecutor's application under Article 58*, ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Pre-Trial Chamber II, 13 July 2012, para. 30; *Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute*, ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-

The term “systematic” refers to the organised nature of the underlying offences. It features a pattern of continuous commission and planning.⁴⁵⁶ Although a systematic attack “will in principle presuppose the existence of a State or organisational policy,” they are not considered “synonymous.” It is “the scale and regular nature of the pattern followed – which first and foremost distinguishes a crime against humanity and constitutes its ‘hallmark’.”⁴⁵⁷ The ICC has established that while “systematic” requires high levels of organization and patterns of conduct or recurrence of violence, to “establish a ‘policy’, it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community.”⁴⁵⁸

An assessment of whether an attack is widespread or systematic must be conducted on a “case by case basis and may take into account the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, and any identifiable patterns of crimes.”⁴⁵⁹

“Directed against any civilian population”

The second element is that the attack must be “directed against any civilian population.” The term “any” indicates that “civilian population” should be interpreted broadly. An attack can thus be committed against any civilians, “regardless of their nationality, ethnicity or other distinguishing feature,” and can be committed against “either nationals or foreigners.”⁴⁶⁰ Those targeted may “include a group defined by its (perceived) political affiliation.”⁴⁶¹

The civilian population need only be predominantly civilian in nature; the presence of non-civilians does not necessarily deprive the population of its civilian character.⁴⁶² Whether the presence of non-

01/11, Pre-Trial Chamber II, 23 January 2012, para. 177; *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, paras. 688-689. See also Report of the International Law Commission, Sixty-ninth session (1 May-2 June, 3 July-4 August 2017), UN Doc. A/72/10, Chapter IV, Commentary, para. 46, pp. 33-34. See also *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 163 (an attack can be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”).

⁴⁵⁶ See e.g. *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, paras. 1098, 1162. See also *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, ICTY, IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 437; *Prosecutor v. Duško Tadić*, ICTY, IT-94-1-T Opinion and Judgment, 7 May 1997, para. 648; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR, ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999, para. 123; *Prosecutor v. Jean-Paul Akayesu*, ICTR, ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 580.

⁴⁵⁷ *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1111.

⁴⁵⁸ *Ibid.*, paras. 1112-1113.

⁴⁵⁹ See, e.g., *Prosecutor v. Karadžić*, ICTY, IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 477, citing *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002 para. 95; *Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the Situation in the Republic of Kenya*, ICC, ICC-01/09, Pre-Trial Chamber II, 31 March 2010, para. 95; *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 163.

⁴⁶⁰ *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, ICTY, IT-96-23-T & IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 423.

⁴⁶¹ *Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute*, ICC, ICC-01/09-01/11, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 23 January 2012, para. 164.

⁴⁶² *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1105 (holding that the population targeted “must be primarily composed of civilians” and that the “presence of non-civilians in its midst has therefore no effect on its status of civilian population”).

civilians alters its character depends upon their number and whether they are on leave.⁴⁶³ Each individual victim, therefore, need not be civilian.⁴⁶⁴

The attack also need not be directed against the entire civilian population of the geographic entity, but must target more than “a limited and randomly selected number of individuals” within the population.⁴⁶⁵ The term population implies the “collective nature of the crime as an attack upon multiple victims.”⁴⁶⁶

An attack is directed at a civilian population if that population was the “primary target rather than an incidental target of the attack.” To make such a determination, the following non-exhaustive list of factors were set out by the ICTY: means and method used during the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in the course of the attack, the resistance to the assailants at the time of the attack, and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.⁴⁶⁷

“Pursuant to or in furtherance of a state or organisational policy”

The ICC Elements of Crimes states that a “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.⁴⁶⁸ As noted above, to establish a “policy,” it need only be demonstrated that the State or organisation meant to commit an attack against a civilian population.⁴⁶⁹ Such a policy may “be implemented by a State or organization ... or in exceptional circumstances ... by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”⁴⁷⁰ Random acts of individuals acting on their own initiative and without any connection to a State or organization are excluded.⁴⁷¹

“With knowledge of the attack”

In addition to the required *mens rea* for the particular prohibited act, the perpetrator must also be aware that there is an attack on the civilian population and, further, that his or her act is a part of that attack.⁴⁷² The ICC Elements of Crimes state that this “element should not be interpreted as

⁴⁶³ See, e.g., *Prosecutor v. Tadić*, ICTY, IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 638; *Prosecutor v. Kordić and Čerkez*, ICTY, IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 50; *Prosecutor v. Mrkšić and Šljivančanin*, ICTY, IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 31.

⁴⁶⁴ See, e.g., *Prosecutor v. Mile Mrkšić, and Veselin Šljivančanin*, ICTY, IT-95-13/1-A, Appeals Chamber, Judgment, paras. 29 (noting under customary international law persons *hors de combat* can also be victims), 32; *Prosecutor v. Martić*, ICTY, IT-95-11-A, Appeals Chamber, Judgment, 8 October 2008, paras. 307, 313-314.

⁴⁶⁵ See e.g., *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 90. See *Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the Situation in the Republic of Kenya*, ICC, ICC-01/09, Pre-Trial Chamber II, 31 March 2010, para. 82; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, ICC-01/05-01/08-424, Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 77.

⁴⁶⁶ *Prosecutor v. Tadić*, ICTY, IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 644.

⁴⁶⁷ *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, para. 91; *Prosecutor v. Mile Mrkšić, and Veselin Šljivančanin*, ICTY, IT-95-13/1-A, Appeals Chamber, Judgment, para. 25.

⁴⁶⁸ ICC Elements of Crimes, article 7, Introduction, para. 3.

⁴⁶⁹ *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, paras. 1112-1113.

⁴⁷⁰ ICC Elements of Crimes, article 7, Introduction, para. 3, footnote 6.

⁴⁷¹ *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 161; and *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1097.

⁴⁷² See e.g. *Prosecutor v. Milutinović et al*, ICTY, IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, paras. 153-162 (Vol. 1) (“Either the physical perpetrator or the person who planned, ordered, or instigated the acts of the physical perpetrator or a member of the joint criminal enterprise, must know that there is an attack on the civilian population and know, or take the risk, that his acts comprise part of this attack”); *Judgment of 7 March*

requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization,” but that “is satisfied if the perpetrator intended to further such an attack.”⁴⁷³ The personal motive of the perpetrator for taking part in the attack, however, is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack and need only know that his acts form part of that attack.⁴⁷⁴

The term perpetrator refers to both the physical perpetrator (the person physically committing the underlying act) as well as the indirect perpetrator (the person liable through another mode of liability⁴⁷⁵ such as aiding and abetting, ordering or joint criminal enterprise).⁴⁷⁶ This means that a person can commit the underlying act without knowledge that their act is committed in the context of a crime against humanity, but the person ordering them or using them as tools as part of a joint criminal enterprise to commit the act has the requisite knowledge, such that the latter person is liable for crimes against humanity.

d) Underlying crimes

In addition to the chapeau elements discussed above, one or more of the prohibited acts must be committed. For each of these prohibited acts, the act must be perpetrated with intent and with knowledge of the relevant circumstances, unless other specific *mens rea* requirements apply (e.g. discriminatory intent for persecution).⁴⁷⁷

The ICC Elements of Crimes lists the elements required for each underlying act. Some of these acts would constitute crimes under national or international law, whether or not they happened in a context (i.e. the attack) that would qualify them as crimes against humanity (e.g. murder or torture). Other acts might not necessarily constitute crimes under international law if committed outside of the context of the required attack.

In relation to the former, the definitions that apply to torture and enforced disappearance as crimes against humanity under the Rome Statute vary from those provided under international law more generally. For torture, the CAT and customary international law (and the domestic) definition of torture does not require that the person or persons were in the custody or under the control of the perpetrator. Conversely, the Rome Statute definition does not require that the infliction of pain or suffering be for any particular purpose.⁴⁷⁸ For enforced disappearance, the requirement that the perpetrator intended to “remove the victim from the protection of the law for a prolonged period of time” is not required by the definition which applies under the ICPPED and customary international law.⁴⁷⁹

2014, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1125; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, ICC-01/05-01/08-424, Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 88. See also Report of the International Law Commission, Sixty-ninth session (1 May-2 June, 3 July-4 August 2017), UN Doc. A/72/10, Chapter IV, Commentary, para. 46, pp. 42-43.

⁴⁷³ ICC Elements of Crimes, article 7, Introduction, para. 2. See also *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1125.

⁴⁷⁴ See, e.g., *Prosecutor v. Kunarac et al*, ICTY, IT-96-23 & IT-96-23-A, Appeals Chamber, Judgment, 12 June 2002, paras. 102-103; *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1125.

⁴⁷⁵ Modes of liability are discussed in ICJ’s *Practical Guide No. 2*.

⁴⁷⁶ *Prosecutor v. Karadžić*, ICTY, IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 472, footnote 1543. Knowledge of the attack and awareness that the perpetrator’s conduct was part of such attack may be inferred from circumstantial evidence, such as the accused’s position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred. See *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 402.

⁴⁷⁷ See article 30 of the Rome Statute of the ICC.

⁴⁷⁸ See Chapter 3, section c of this Guide.

⁴⁷⁹ See Chapter 3, section d of this Guide.

Moreover, the definitions that apply to some underlying acts in the Rome Statute differ to those applied by the ad hoc tribunals and under customary international law. In addition to the difference to the torture definition noted above, the offence of “other inhumane acts” contained in the Rome Statute is somewhat narrower in scope than its international criminal law antecedents. According to the Pre-Trial Chamber in the *Katanga* case, “other inhumane acts” in the ICTR and ICTY Statutes were considered a “catch-all provision,” leaving a broad margin for the jurisprudence to determine its limits.”⁴⁸⁰ In contrast, according to the elements of crimes, “an other inhumane act must be of a similar character to any other [underlying] act,” for which “character” shall be understood as referring to the nature and gravity of the act.”⁴⁸¹ In the *Kenyatta* case, the Pre-Trial Chamber stated that the provision “must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity.”⁴⁸²

In dealing with cases that may involve crimes against humanity, SCC judges will therefore need to make some preliminary determinations about which definitions will apply to the case. If the charges do not allege crimes against humanity, then definitions from more general international sources such as customary international law, the CAT, the ICPPED and/or national law would presumably be the relevant ones for the SCC to apply. If the charges do allege crimes against humanity, and the charges allege conduct falling within the definitions in the Rome Statute, then the SCC may decide to apply the definitions and Elements of Crimes adopted in that context (though if the conduct was prior to 1998 the SCC would still need to confirm whether the conduct constituted crimes against humanity at the time it was committed). However, the SCC should remain aware of the possibility that conduct not falling within the terms of the Rome Statute definitions could still constitute crimes against humanity under customary international law, and be prepared to undertake inquiries to ascertain the customary international law as it existed at the relevant time.

The elements of the underlying acts provided in the ICC Elements of Crimes are set out in the table below,⁴⁸³ with explanatory material provided in footnotes where necessary.

Underlying act	Elements
Murder (Article 7(1)(a))	1. The perpetrator killed ⁴⁸⁴ one or more persons. ⁴⁸⁵
Extermination (Article 7(1)(b))	1. The perpetrator killed (through direct or indirect methods) one or more persons, including by inflicting conditions of life calculated

⁴⁸⁰ *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 450.

⁴⁸¹ *Ibid.*, para. 451.

⁴⁸² *Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute*, ICC, ICC-01/09-01/11, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 23 January 2012, para. 269.

⁴⁸³ Given its lack of relevance to the Tunisian context, the underlying act of apartheid has not been included in the table. The elements of apartheid are set out in ICC Elements of Crimes, article 7(1)(j), Crime against humanity of apartheid.

⁴⁸⁴ The term “killed” is interchangeable with the term “caused death.” ICC Elements of Crimes, article 7 (1)(a), Crime against humanity of murder, element 1 and footnote 7.

⁴⁸⁵ A causal link must be established between the conduct and the result. *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 767. Accordingly, murder may also be committed by omission. *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 1125; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, ICC-01/05-01/08-424, Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 132. The death of the victim may be inferred from factual circumstances, provided that the victim’s death is the only reasonable conclusion that can be drawn. *Judgment of 7 March 2014*, ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, para. 768. See also *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Chamber II, 15 June 2009, para. 132. The Elements are satisfied whether or not the body has been recovered or the victims’ identities known. *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 88; *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 422.

	<p>to bring about the destruction of part of a population (such as deprivation of food and medicine).⁴⁸⁶</p> <p>2. The conduct constituted, or took place as part of,⁴⁸⁷ a mass killing of members of a civilian population.⁴⁸⁸</p>
Enslavement (Article 7(1)(c))	<p>1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁴⁸⁹</p>
Deportation or forcible transfer (Article 7(1)(d))	<p>1. The perpetrator deported or forcibly⁴⁹⁰ transferred, without grounds permitted under international law, one or more persons to another State (in the case of deportation)⁴⁹¹ or location (in the case of forcible transfer), by expulsion or other coercive acts.</p> <p>2. Such person or persons were lawfully present in the area from which they were so deported or transferred.</p> <p>3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.</p>
Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of	<p>1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.</p> <p>2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.⁴⁹²</p>

⁴⁸⁶ ICC Elements of Crimes, article 7 (1)(b), Crime against humanity of extermination, element 1 and footnotes 8 and 9.

⁴⁸⁷ The term "as part of" includes the initial conduct in a mass killing. ICC Elements of Crimes, article 7 (1)(b), Crime against humanity of extermination, element 2 and footnote 10. According to the ICTY, each individual perpetrator need not kill all victims, but they must intend to "kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths." *Prosecutor v. Stakić*, ICTY, IT-IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 60.

⁴⁸⁸ According to the ICTY, the element of "massiveness" is what distinguishes extermination from the crime of murder. *Prosecutor v. Stakić*, ICTY, IT-IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 60. There is no numerical threshold for extermination, such that assessment of scale must be conducted on a case-by-case basis taking into account the circumstances, including: the time and place of the killings; the selection of victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity. *Prosecutor v. Lukić & Lukić*, ICTY, IT-98-32/1-A, Appeals Chamber, Judgment, 4 December 2012, para. 538. Extermination may therefore be committed even where the number of persons is limited. *Prosecutor v. Krstić*, ICTY, IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 503. For example, in the Lukić & Lukić case, the killing of 60 persons was found to constitute extermination. See *Prosecutor v. Lukić & Lukić*, ICTY, IT-98-32/1-A, Appeals Chamber, Judgment, 4 December 2012, paras. 539-546.

⁴⁸⁹ The deprivation of liberty can include "exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956." The conduct underlying enslavement also includes "trafficking in persons, in particular of women and children." ICC Elements of Crimes, article 7 (1)(c), Crime against humanity of enslavement, element 1, footnote 11.

⁴⁹⁰ The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment. ICC Elements of Crimes, article 7 (1)(c), Crime against humanity of deportation or forcible transfer of population, element 1. It need not be established that unlawful targeting took place. Rather, it must be that there was a genuine lack of choice on the part of the individuals transferred; any consent must be "given voluntarily and as a result of the individual's free will," taking into account "the prevailing situation and atmosphere as well as other relevant circumstances, including in particular the victims' vulnerability." *Judgment of 8 July 2019*, ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, para. 1056 (citing *Prosecutor v. Milomir Stakić*, ICTY, IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 279).

⁴⁹¹ See *Request under Regulation 46(3) of the Regulations of the Court*, ICC, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC-Ro46(3)-01/18, 6 September 2018, para. 60.

⁴⁹² The Rome Statute definition could include conduct not criminalized pursuant to domestic law, including where judicial orders to detain a person are executed in violation of other fundamental rights and freedoms, such as

international law (Article 7(1)(e))	3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
Torture (Article 7(1)(f))	<ol style="list-style-type: none"> 1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. 2. Such person or persons were in the custody or under the control of the perpetrator. 3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
Rape (Article 7(1)(g)-1)	<ol style="list-style-type: none"> 1. The perpetrator invaded⁴⁹³ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁴⁹⁴
Sexual slavery ⁴⁹⁵ (Article 7(1)(g)-2)	1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. ⁴⁹⁶

rights to freedom of religion, expression, association, assembly, political opinions, and from discrimination, because it need only constitute a violation of the fundamental rules of international law.

⁴⁹³ According to the ICC Elements of Crimes, the concept of "invasion" is intended to be broad enough to be gender-neutral." ICC Elements of Crimes, article 7 (1)(g)-1, Crime against humanity of rape, element 1, footnote 15. Invasion of a person's body includes same-sex penetration, and encompasses both male and/or female perpetrators and victims. Oral penetration, by a sexual organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration. *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, paras. 100-101.

⁴⁹⁴ A person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity. ICC Elements of Crimes, article 7 (1)(g)-1, Crime against humanity of rape, element 2, footnote 16. Coercion may be inherent in certain circumstances, such as in situations of armed conflict or military presence. The term "coercion" does not require physical force but includes threats, intimidation, extortion, and other forms of duress which prey on fear or desperation. *Decision on the Confirmation of Charges*, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008, para. 440; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC, ICC-01/05-01/08-424, Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 162; *Judgment of 8 July 2019*, ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, paras. 934-935. Several factors may contribute to creating a coercive environment, for instance, the number of people involved in the commission of the crime, or where the rape is committed during or immediately following a combat situation or is committed together with other crimes. In relation to the requirement of the existence of a "coercive environment," it must be proven that the perpetrator's conduct involved "taking advantage" of such a coercive environment. *Judgment of 21 March 2016*, ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Trial Chamber III, para. 104; *Judgment of 8 July 2019*, ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, para. 935.

⁴⁹⁵ The ICC Elements of Crimes recognizes that its commission could involve more than one perpetrator as a part of a common criminal purpose. ICC Elements of Crimes, article 7 (1)(g)-2, Crime against humanity of sexual slavery, footnote 17.

⁴⁹⁶ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children. ICC Elements of Crimes, article 7 (1)(g)-2, Crime against humanity of sexual slavery, element 1, footnote 18. Factors in determining whether the perpetrator exercised a power of ownership over another person include control of the victim's movement, the nature of the physical environment, psychological control, measures taken to prevent

	2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
Enforced prostitution (Article 7(1)(g)-3)	1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
Forced pregnancy (Article 7(1)(g)-4)	1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law
Enforced sterilization (Article 7(1)(g)-5)	1. The perpetrator deprived one or more persons of biological reproductive capacity. ⁴⁹⁷ 2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent. ⁴⁹⁸
Sexual violence (Article 7(1)(g)-6)	1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. ⁴⁹⁹ 2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute. 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
Persecution (Article 7(1)(h))	1. The perpetrator severely deprived, contrary to international law, ⁵⁰⁰ one or more persons of fundamental rights.

or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour, and the victim's vulnerability. Sexual slavery need not involve a commercial transaction. The victims need not be physically confined, but otherwise unable to leave as they have nowhere else to go and fear for their lives. See *Judgment of 8 July 2019*, ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, para. 952.

⁴⁹⁷ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice. ICC Elements of Crimes, article 7 (1)(g)-5, Crime against humanity of enforced sterilization, element 1, footnote 19.

⁴⁹⁸ It is understood that "genuine consent" does not include consent obtained through deception. ICC Elements of Crimes, article 7 (1)(g)-5, Crime against humanity of enforced sterilization, element 2, footnote 20. A person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity. ICC Elements of Crimes, article 7 (1)(g)-5, Crime against humanity of enforced sterilization, element 2, footnote 16.

⁴⁹⁹ A person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity. ICC Elements of Crimes, article 7 (1)(g)-6, Crime against humanity of sexual violence, element 2, footnote 16.

⁵⁰⁰ This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes, which states that the requirement of "unlawfulness" found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes. ICC Elements of Crimes, article 7 (1)(h), Crime against humanity of persecution, element 1, footnote 21. Accordingly, the

	<p>2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.⁵⁰¹</p> <p>3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.</p> <p>4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.⁵⁰²</p>
<p>Enforced disappearance⁵⁰³ (Article 7(1)(i))</p>	<p>1. The perpetrator:</p> <p>(a) Arrested, detained,⁵⁰⁴ or abducted one or more persons; or</p> <p>(b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.⁵⁰⁵</p> <p>2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or</p> <p>(b) Such refusal was preceded or accompanied by that deprivation of freedom.</p>

deprivation of rights, based on discriminatory grounds, need not be criminal in itself. Violations of international rights such as the right to liberty or cruel, inhumane or degrading treatment or punishment which does not constitute a crime (or imprisonment of inhumane acts under article 7(1)(e) or (k) of the Rome Statute) could constitute persecution where inflicted on discriminatory grounds and in connection with another underlying act or crime within the jurisdiction of the Court. *Decision on the Confirmation of Charges against Dominic Ongwen*, ICC, Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Pre-Trial Chamber II, 23 March 2016, pp. 75, 80-81, 84-84, 88-89 (rights to liberty and security of person, to freedom of movement and to private property). The same test applied before the *ad hoc* tribunals. See *Prosecutor v. Zoran Kupreškić et al.*, ICTY, IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, para. 615 ("Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights"); *Prosecutor v. Blagoje Simić et al.*, ICTY, IT-95-9-T, Trial Chamber, Judgment, 17 October 2003, para. 58 ("issuance of discriminatory orders, policies, decisions or other regulations may constitute the *actus reus* of persecution provided that these orders infringe upon a person's basic rights and that the violation reaches the level of gravity of the other crimes against humanity listed in Article 5 of the Statute"). Dismissing people from government positions, encouraging and promoting hatred on political grounds and interrogations have been found not to be of sufficient gravity to constitute persecution. See *Prosecutor v. Blagoje Simić et al.*, ICTY, IT-95-9-T, Trial Chamber, Judgment, 17 October 2003, paras. 55, 67, 69; *Prosecutor v. Dario Kordić & Mario Čerkez*, ICTY, IT-94-14/2-T, Trial Chamber, Judgment, 26 February 2001, paras. 209-210.

⁵⁰¹ The perpetrator may target only members of certain groups, or target individuals for not belonging to a certain group, for instance by targeting all but one ethnic group within a community. Not all victims of the crime of persecution are required to be members, sympathisers, allies of, or in any other way related to, the protected group. *Judgment of 8 July 2019*, ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, paras. 1009, 1011.

⁵⁰² It is understood that no additional mental element is necessary other than that inherent in the requirement that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. ICC Elements of Crimes, article 7 (1)(h), Crime against humanity of persecution, element 4, footnote 22, element 6.

⁵⁰³ Given the continuing nature of enforced disappearances, the ICC Elements of Crimes specifies that the ICC only has jurisdiction over this crime if committed in the context of a widespread and systematic attack against the civilian population and perpetrator knew it was committed in such context. ICC Elements of Crimes, article 7 (1)(i), Crime against humanity of enforced disappearance, footnote 24.

⁵⁰⁴ The word "detained" includes a perpetrator who maintained an existing detention. ICC Elements of Crimes, article 7 (1)(i), Crime against humanity of enforced disappearance, element 1, footnote 25. Under certain circumstances an arrest or detention may have been lawful. ICC Elements of Crimes, article 7 (1)(i), Crime against humanity of enforced disappearance, element 1, footnote 26.

⁵⁰⁵ This aspect of the definition explicitly confirms that both the person detaining a victim of enforced disappearance and the person refusing to acknowledge their whereabouts can be liable.

	<p>3. The perpetrator was aware that:⁵⁰⁶</p> <p>(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons;⁵⁰⁷ or</p> <p>(b) Such refusal was preceded or accompanied by that deprivation of freedom.</p> <p>4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.</p> <p>5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.</p> <p>6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.⁵⁰⁸</p>
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⁵⁰⁶ The ICC Elements of Crimes states that this element was inserted “without prejudice to the General Introduction to the Elements of Crimes.” ICC Elements of Crimes, article 7 (1)(i), Crime against humanity of enforced disappearance, element 3, footnote 27.

⁵⁰⁷ In the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place. ICC Elements of Crimes, article 7 (1)(i), Crime against humanity of enforced disappearance, element 3, footnote 28.

⁵⁰⁸ The concept of “a prolonged period of time” in the ICC Elements of Crimes is not specifically defined. See ICJ, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioners Guide No. 9 (2015), p. 19. However, given that the concept of enforced disappearance involves removal from the protection of the law, interpretation of the concept of “a prolonged period of time” and of the definitions that do not include this language can both be aided by considering limits imposed by international standards on the maximum length of time that can permissibly elapse between the deprivation of liberty of a person and their having access to a judicial or other competent authority and legal counsel. All persons deprived of liberty on grounds of allegedly criminal conduct (whether or not formalized in charges) must be proactively brought “promptly” before a judge or a competent authority. ICCPR, article 9(3); Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and Peoples’ Rights, article 2(C); *Body of Principles for the Protection of All Persons under Any Form of Detention*, principle 11(1); 1992 Declaration, article 10(1). See also Inter-American Convention on Forced Disappearance of Persons, article 11; ECHR, article 5(3); ACHR: article 7(5). In all situations of deprivation of liberty, persons must be able, both in law and in practice, to challenge at any time the lawfulness of the deprivation of liberty before a court, which in turn implies access to legal counsel. According to the HRC, no person may be detained on criminal grounds for longer than 48 hours before being brought before a judicial authority. Delays longer than 48 hours from arrest or detention should remain absolutely exceptional and be justified under the specific circumstances. HRC, General Comment No. 35: Article 9 (Liberty and Security of Person), UN Doc. CCPR/C/GC/35, 16 December 2014, para. 33. Similarly, paragraph 7 of the *United Nations Basic Principles on the Role of Lawyers* provides that “all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.” For all persons, whatever the reason for their detention, Principle 15 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that no-one may be denied access to a lawyer under any circumstances for “more than a matter of days.” International and regional authorities including the WGEID have confirmed that the prohibition of enforced disappearance under international law covers also short-term enforced disappearances. See Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/30/38, 10 August 2015, paras. 67, 102 (“there is no time limit, no matter how short, for an enforced disappearance to occur and that accurate information on the detention of any person deprived of liberty and their place of detention shall be made promptly available to their family members”). See *El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR (Grand Chamber), Application no. 39630/09, Judgment of 13 December 2012, para. 240; *Yrusta and Yrusta v. Argentina*, Committee on Enforced Disappearance, UN Doc. CED/C/10/D/1/2013, 12 April 2016, para. 10.3. The WGEID recommended that the definition “be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.” Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation, UN Doc. A/HRC/16/48/Add.3, 28 December 2010, para. 15. See also ICJ, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Practitioners Guide No. 9 (2015), pp. 19-20.

Other inhumane acts	<ol style="list-style-type: none"> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.⁵⁰⁹ 3. The perpetrator was aware of the factual circumstances that established the character of the act.⁵¹⁰
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ii. Tunisian law in light of international law and standards

Tunisia has not criminalized crimes against humanity as such in domestic law. Although a number of underlying acts are, to varying extents, criminalized in domestic law, including arbitrary deprivation of life (in particular murder), arbitrary deprivation of liberty, torture and cruel, inhumane and degrading treatment or punishment, and rape and other acts of sexual assault, the Tunisian Criminal Code does not explicitly recognise that when committed in the context of a systematic or widespread attack, these underlying crimes become even more serious, as provided for by international law.

Moreover, the definitions of the domestic crimes do not always accord with definitions of the underlying acts under international law, whether under the Rome Statute or customary international law. With respect to the underlying act of imprisonment or other severe deprivation of liberty, for instance, Tunisia criminalizes the deprivation of liberty not subject to judicial order, while allowing judicial police and prosecutors to detain suspects pre-charge irrespective of the purpose for which they were detained. However, a detention that may have been legal under national law could still constitute a crime against humanity under international law, where for instance as reflected in the Rome Statute, the gravity of the conduct was such that it was in violation of fundamental rules of international law, which could include for example cases where the detention was undertaken in violation of the rights to freedom of religion, expression, association, assembly, political opinions, and from discrimination.⁵¹¹

As a further example, torture under domestic law requires the crime be committed for a (limited) prohibited purpose, a requirement not contained in the Rome Statute definition of torture as a crime against humanity. On the other hand, the ICC Elements of crimes requires that for torture as a crime against humanity, the person be in the custody of the perpetrator, while this is not required for the crime of torture under Tunisian law (nor is it required by the CAT definition of torture as an ordinary crime under international law).⁵¹² Other inhumane acts extend beyond the definition of crimes related to ill-treatment in Tunisian law; while the domestic offences appear to require an act of violence, the ICC Elements of Crimes requires that the perpetrator inflicted great suffering, or serious

⁵⁰⁹ "Character" refers to the nature and gravity of the act. ICC Elements of Crimes, article 7 (1)(k), Crime against humanity of other inhumane acts, element 2, footnote 30.

⁵¹⁰ The ICTY also examined the notion of inhuman and cruel treatment in its jurisprudence on war crimes and crimes against humanity. Accordingly, it defined it as "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity." See *Prosecutor v. Delalić et al.* (Čelebići case), ICTY, IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 552. See also *Prosecutor v. Kunarac, Kovac and Vuković*, ICTY, IT-96-23-T and IT-96-23/1-T, Trial Chamber, Judgment, 22 February 2001, para. 514; *Prosecutor v. Blaškić*, ICTY, IT-45-14-T, Trial Chamber, Judgment, 3 March 2000, para. 186; and *Prosecutor v. Jelesić*, ICTY, IT-95-10-T, Trial Chamber, Judgment, 14 December 1999, para. 41. Given neither inhumane acts nor torture include a purposive requirement, the definition of inhumane acts indicates that it may require a lower threshold than torture for physical or mental harm where the person is in the custody or control of the perpetrator (the latter being a requirement of torture), but of equivalent gravity to other underlying acts.

⁵¹¹ See footnote 492 above. For a discussion of the difference between the definitions of the crime as a standalone crime under domestic law and under international law, see Chapter 3, section b of this Guide.

⁵¹² For a discussion of the difference between the definitions of the crime as a standalone crime under domestic law and under international law, see Chapter 3, section c of this guide.

injury to body or to mental or physical health, by means of an inhumane act, which was of a character similar to any other underlying act.⁵¹³

With respect to rape and sexual assault, the definitions under the Rome Statute are significantly broader than the definitions under domestic law. The pre-2017 definition of rape does not include rape committed against men and is confined to “intercourse,” which is defined narrowly to only include vaginal penetration; rape under the Rome Statute can be committed against males and females and penetration can be of any or by any sexual organ. The post-2017 definition of rape only accords with the ICC Elements of Crimes if applied consistently with the international jurisprudence and the Rome Statute and Elements of Crimes’ definitions of “consent.” The underlying acts of enforced prostitution and enforced sterilization may be criminalized where committed in the context of human trafficking under section 2(1) and (7) of Law No. 2016-61 related to the prevention of and fight against human trafficking,⁵¹⁴ however only to the extent that they are applied consistently with the elements of these acts under the ICC Elements of Crimes. Where committed in other contexts they appear not to be criminalized. Other acts of sexual assault are not criminalized except to the extent that “indecent assault” may be broadly interpreted to capture all non-penetrative non-consensual (broadly interpreted to include coercive circumstances) conduct, and to the extent that the definition of torture and other ill-treatment may be applied consistently with international law.

The domestic definition of trafficking in persons, which includes slavery, is the closest equivalent to enslavement under the Rome Statute. According to Law No. 2016-61 related to the prevention of and fight against human trafficking, the crime of “slavery” is defined as “any situation of a person over whom any or all of the powers attaching to the right of ownership are exercised,”⁵¹⁵ and explicitly includes debt bondage, serfdom, forced marriage of women, forced pregnancy, the use of children in criminal activities or armed conflict, child adoption for the purpose of exploitation, and economic and sexual exploitation of a child.⁵¹⁶ The commission of slavery is punishable by ten years’ imprisonment and a 50,000 Tunisian Dinar fine (US\$17,675);⁵¹⁷ incitement to commit crimes under the Law and offences connected with them are punishable by half the applicable penalty;⁵¹⁸ and engagement or participation in an organized criminal group that aims to prepare, prepares or commits a crime under the Law is punishable by seven years’ imprisonment and a 40,000 Tunisian Dinar fine (US\$14,140) or 15 years’ imprisonment and a 100,000 Tunisian Dinar fine (US\$35,344) for constituents or managers of such group.⁵¹⁹

Domestic law also does not criminalize extermination, deportation and forcible transfer, persecution or enforced disappearance.

⁵¹³ See footnotes 509 and 510 above. For a discussion of the difference between the definitions of the crime as a standalone crime under domestic law and under international law, see Chapter 3, section c of this guide.

⁵¹⁴ Relating to exploitation of prostitution and removal of organs, tissues, cells or gametes.

⁵¹⁵ Law No. 2016-61 of 3 August 2016 related to the prevention of and the fight against human trafficking, article 2(4).

⁵¹⁶ *Ibid.*, article 2(5).

⁵¹⁷ *Ibid.*, article 8.

⁵¹⁸ *Ibid.*, article 9.

⁵¹⁹ *Ibid.*, article 10.

4. Recommendations

The Tunisian Constitution is clear on the primacy of international treaties over domestic law, and there is nothing in the Constitution that precludes domestic courts, including the SCC, from applying such international treaties as well as relevant customary international law. Accordingly, the SCC should give due regard to international treaties and customary international law when assessing how the SCC should apply Tunisian law in a manner consistent with Tunisia's international obligations.

Under the general rules of State responsibility in international law, as well as under human rights treaties, the SCC is an organ of the State and its acts and certain forms of inaction can result in Tunisia violating its international legal obligations. The SCC must accordingly exercise all means open to it to help ensure Tunisia complies with its obligations deriving from ratified international law treaties and customary international law, particularly *jus cogens* norms. These obligations apply to the criminalization of conduct in international law, as well the principles underlying criminal law.

Accordingly, while adjudicating gross human rights violations that amount to crimes under international law, the SCC should, when exercising their powers, interpret domestic law consistently with Tunisia's international law obligations, including with respect to the scope of criminal conduct and the principle of legality.

Under international law, a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." On the one hand, any gaps in Tunisian law would not provide a justification in international law for failing to prosecute those responsible for crimes under international law. On the other hand, constitutional or other provisions directing Tunisian courts not to apply the principle of legality to certain crimes cannot justify proceedings that would otherwise violate article 15 of the ICCPR. Tunisian courts may therefore face dilemmas where national law appears to be inconsistent with international law.

Courts should interpret both general provisions of Tunisian law relative to crimes and to the jurisdiction and powers of judicial authorities and provisions of Tunisian Law specifically empowering and mandating the SCC to seek to apply domestic criminal law consistently with the definitions of correlating crimes under international law. Where Tunisian law does not otherwise explicitly criminalize gross violations of human rights named in the SCC's empowering statutes, the SCC will need to decide whether Tunisian law provides authority for the SCC to directly apply definitions of crimes set out in treaties or customary international law, or whether the SCC can only use international definitions to define the scope of its jurisdiction but only apply the related offences prohibited under Tunisian law.

In a similar vein, while adjudicating individual criminal responsibility for gross human rights violations that amount to crimes under international law, the SCC should, when exercising their powers, interpret domestic law to the extent possible to abide with Tunisia's international law obligations, including with respect to the applicable mode of liability. Courts should interpret general provisions of Tunisian law relative to modes of liability and the jurisdiction and powers of judicial authorities, and provisions specifically empowering and mandating the SCC, to seek to apply domestic criminal law consistently with the definition of correlating modes of liability under international law. Where Tunisian law does not otherwise explicitly criminalize certain modes of liability, the SCC will need to decide whether Tunisian law provides authority for the SCC to directly apply definitions of modes of liability set out in treaties or customary international law, or whether the SCC can only use international definitions to define the scope of its jurisdiction but only apply the related modes of liability explicitly defined in Tunisian law.

With respect to conduct such as corruption, or economic or electoral crimes, that do not necessarily constitute crimes under international law (or did not at the relevant time), the SCC should determine

whether or not the conduct charged constituted a crime under international law at the relevant time and, assuming it did not, should seek to give effect to the prohibition on retroactivity under article 15(1) of the ICCPR. It may for instance be possible to interpret article 148(9) of the Constitution as referring only to non-application of the prohibition of retroactivity contained in the Tunisian Constitution, and not any parallel prohibition contained in international law, so as to avoid an interpretation that would place Tunisian law in direct conflict with article 15(1) of the ICCPR as regards conduct that was neither criminal under international or national law at the relevant time (such as, potentially, corruption or economic or electoral crimes).

With regard to sentencing, the SCC should determine whether the existing provisions under the Tunisian Criminal Code defining the power of Tunisian courts to impose penalties⁵²⁰ allow the SCC to ensure sentences to comply with Tunisia's international legal obligations, including the principles of legality and non-retroactivity, whether the SCC may only impose penalties specifically and explicitly prescribed for each offence as defined in Tunisian law, or whether any other approach to sentencing that may be compatible with Tunisian and international law is available to avoid or minimize impunity.

With regard to statutory limitations, the Tunisian Constitution and the 2013 Law are consistent with international law standards that prohibit the application of statutory limitations to gross human rights violations adjudicated by the SCC.

In light of the above analysis, the ICJ recommends to SCC judges that:

- i. SCC judges should be aware of the international law and standards applicable to Tunisia. SCC judges should be aware that, as an organ of the State, an act (or failure to act) by the judge that is inconsistent with international law will place Tunisia in violation of its international obligations. SCC judges should accordingly seek to ensure that all their decisions and other acts or inaction are fully consistent with the Tunisia's international legal obligations.
- ii. When a SCC judge is confronted with an apparent conflict between domestic and international law, in which an application of domestic law by the judge could lead to a violation by Tunisia of its international human rights obligations, the judge should consider using any judicial means and techniques or discretion at his or her disposal to avoid the potential violation, including for instance interpretative techniques and constitutional remedies. If the SCC judge is of the opinion that a violation would be an unavoidable consequence of applying domestic law, the judge should make this clear to all affected parties, their lawyers, and the government, and:
 - a. Where the judicial act or inaction would make the judge responsible for or complicit in a crime under international law, the judge should refuse to do the act or desist from the omission, and state his or her reasons for so doing;
 - b. Where the judicial act or inaction would constitute or contribute to a violation of international human rights not constituting a crime under international law, the judge, if he or she does not refuse to act (or to omit to act), should at minimum explicitly state in the judgment, order or decision that he or she believes the act or

⁵²⁰ Article 5 of the Tunisian Criminal Code divides the different types of sentences into six levels: the death penalty, life imprisonment, a fixed term of imprisonment, community service, a fine and punitive damages. Article 6 states that for every offence, the Code establishes the applicable maximum penalty. It further specifies that the applicable minimum penalty is provided by articles 14 and 16 of the Code. Pursuant to article 53 of the Code judges have broad judicial discretion to impose lighter offences than the ones provided for in the Code. The judge has discretion to impose a sentence which is two levels lower than the maximum sentence set out in law. Consequently, a death sentence can be reduced to a time-limited prison sentence, life imprisonment can be reduced to community service and a time-limited prison sentence can be reduced to a fine.

inaction to be in violation of the Tunisia's international human rights obligations but that the judge considered that he or she was nevertheless compelled by domestic law to make such a ruling. In such circumstances, any power to suspend the operation of the judgment, order or decision so as to preserve the situation of the affected parties pending appeals to domestic or international bodies should be exercised.

- iii. When a SCC judge is confronted with a definition of a crime under domestic law that is also defined under an applicable international treaty or customary international law, and the national law definition appears inconsistent with international law, the judge should determine whether the domestic definition can be interpreted and applied consistently with the definition applicable under international law. If it is not possible to apply the domestic definition consistently, the judge should consider whether the specialised provisions of Tunisian law applicable to the SCC and transitional justice allow the SCC to apply instead the elements of the crimes under international law.
- iv. When a SCC judge is confronted with the absence of a definition of an offence under domestic law that codified courses of conduct as crimes at the time of commission, the judge should examine whether the conduct concerned was considered a crime under international law at the time it occurred. In so doing, the judge should establish whether, at the time of commission, the conduct was criminalized by virtue of an applicable treaty or, if the conduct was not explicitly established in the provisions of an international treaty, under customary international law. If so, the judge should consider whether the specialized provisions of Tunisian law applicable to the SCC and transitional justice allow the SCC to apply the definition of the crime under international law in the case at hand to determine whether the accused person is responsible for their conduct (whether by act or omission).
- v. If neither of the above approaches are available in order to apply the international definition of a crime under international law, the SCC should determine whether other "common" criminal offences that were in national law at the time would in principle apply to the same conduct, and if so, seek to apply the national law offence most similar to the crime under international law in the manner that best avoids or minimizes impunity.
- vi. When a SCC judge is confronted with a definition of a mode of liability under domestic law that is also defined under an applicable international treaty or customary international law, the judge should determine whether the domestic definition can be interpreted and applied consistently with the definition applicable under international law. If it is not possible to apply the domestic definition consistently, the judge should consider whether the specialised provisions of Tunisian law applicable to the SCC and transitional justice allow the SCC to apply instead the definition of the mode of liability set forth in international law.
- vii. When a SCC judge is confronted with the absence of a definition of a mode of liability under domestic law that codified individual criminal responsibility at the time of commission, the judge should examine whether the conduct concerned was considered a mode of liability under international law at the time it occurred. In so doing, the judge should establish whether, at the time of commission, the conduct was criminalized as a mode of liability by virtue of an applicable treaty or, if the conduct was not explicitly established in the provisions of an international treaty, under customary international law. If so, the judge should consider whether the specialized provisions of Tunisian law applicable to the SCC and transitional justice allow the SCC to apply the definition of the mode of liability under international law in the case at hand to determine whether the accused person is responsible for their conduct (whether by act or omission).

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- viii. With respect to conduct such as corruption, or economic or electoral crimes, that do not necessarily constitute crimes under international law (or did not at the relevant time), the SCC should determine whether or not the conduct charged constituted a crime under international law at the relevant time and, assuming it did not, should seek to give effect to the prohibition on retroactivity under article 15(1) of the ICCPR.
 - ix. When a SCC judge is required to determine a sentence, the judge should determine whether the provisions under the Tunisian Criminal Code defining the power of Tunisian courts to impose penalties allow it to ensure sentences comply with Tunisia's international legal obligations, including the principles of legality and non-retroactivity, whether he or she may only impose penalties specifically and explicitly prescribed for each offence as defined in Tunisian statute law, or whether another approach to sentencing, consistent with Tunisian and international law, may be available to avoid or minimize impunity.
 - x. Consistent with the Tunisian Constitution and international law, SCC judges, while adjudicating crimes under international law, should not apply statutes of limitations so as to impede the prosecution and punishment of those responsible for crimes under international law, including in particular extrajudicial, arbitrary or summary executions, torture and other ill-treatment, enforced disappearance, rape and sexual assault and crimes against humanity.
 - xi. SCC judges, in their respective roles as guarantors of human rights, should as appropriate promote or support ratification of or accession to and domestic implementation of international instruments for the protection of human rights and the amendment and/or enactment of laws to bring Tunisian law in line with international law and standards.

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