

Enhancing the Rule of Law and guaranteeing human rights in the Constitution

A report on the constitutional reform process in Tunisia



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**Enhancing the Rule of Law and guaranteeing human rights
in the Constitution**

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

Following the ouster of President Ben Ali, the Tunisian transitional authorities have engaged in a comprehensive transition process with a view to meeting the democratic aspirations of the Tunisian population and adopting a constitution that establishes the rule of law and protects human rights.

To achieve these objectives, a National Constituent Assembly (NCA) was elected in October 2011. A Provisional Constitution was also adopted in order to organize the work of public authorities in the transitional period.

The legal framework relating to and the process of electing the NCA, in spite of the shortcomings detailed in this report, have been clear, certain and transparent. This has allowed for a largely peaceful transition process and represents a clear break with the constitutional and institutional legacy of President Ben Ali's regime.

However, in order to enhance the legitimacy of this process, the NCA should reach out to all sectors of the Tunisian population, and in particular the marginalized sectors that were at the heart of the uprising against President Ben Ali's regime.

The NCA should overcome the limitations of the Provisional Constitution and the NCA's own bylaws by initiating a comprehensive participatory process that ensures the rights of all Tunisians and their representatives, including civil society organizations, to take part in the conduct of public affairs and in the drafting of the Constitution.

By holding public hearings and events as well as media activities, and by accepting submissions from different actors, the NCA can reinforce the sense of ownership of the Tunisian population over the Constitution. This is particularly important in the final stages of the drafting of the Constitution in order to allow people to make informed decisions about the various constitutional provisions and options discussed by the NCA.

This sense of ownership will also be reinforced if the NCA ensures that the Constitution reflects the views of all Tunisians, not only the majority of the NCA's members. Achieving this objective will bring the process fully in line with international standards of inclusive participation. Most importantly, it will bring it in line with the democratic aspirations of all Tunisians expressed in the strongest way during the uprising against President Ben Ali's regime.

The NCA should also, as a matter of urgency, enforce all the provisions of and establish all the institutions provided for by the Provisional Constitution, in particular those relating to the judiciary. In the absence of such institutions, the executive continues to exercise comprehensive control over the work of the judiciary, including the dismissal of judges without due process guarantees.

This situation highlights the importance of the rule of law, and the challenges relating to it, in times of transition and beyond. Unfortunately, the draft Constitution, published by the NCA on 15 December 2012 (the Draft Constitution), fails to ease the various concerns about these challenges.

The Draft Constitution broadens the content of the provisions relating to the rule of law, separation of powers and the independence of the judiciary. The importance of

these provisions can be appreciated in light of the shortcomings of the 1959 Constitution detailed in this report.

For example, the Draft Constitution limits the powers of the President of the Republic, not only in favour of the Parliament but also the government. Indeed, as provided for by Article 86, it is the Prime Minister who sets the general policy of the State and ensures its application. In addition, the Draft Constitution reinforces the role of the Parliament, ensures its independence and consolidates its legislative powers.

However, the Draft Constitution should be amended to fully comply with international rule of law standards, including by ensuring a clearer attribution of competences and separation of powers between the legislature, the executive and the judiciary.

The Constitution should ensure the supremacy of law and the accountability of all individuals and institutions to the law. It should therefore provide for formal, regular, accessible and transparent processes of law enforcement and adjudication in order to limit the powers of the State, thereby ensuring that such powers are not exercised arbitrarily.

The Draft Constitution should also be amended with a view to reinforcing the mandate of the Electoral Commission, including by empowering it with comprehensive investigatory powers to curb electoral fraud and ensuring that its decisions are binding on all authorities. Further, the Constitution should detail the mechanism for electing or selecting the members of the Commission and the conditions and guarantees for exercising their mandate.

In addition, the Constitution should define and limit the role of the armed and security forces and ensure that they are fully and effectively accountable to relevant national civilian authorities, including the People's Assembly. For decades, the security services have been responsible for gross human rights violations, including cases of torture and other-ill treatment, unlawful killing and arbitrary arrest and detention. Even after the ouster of President Ben Ali, the security services have continued to enjoy effective impunity for these human rights violations.

Moreover, while the provisions regarding the judiciary are a step towards ensuring its independence and ending executive interference in judicial matters, the wording of the Draft Constitution remains ambiguous as regards guarantees of irremovability for judges and the competences of the High Judicial Council (HJC).

The Constitution should guarantee the principle of the irremovability of judges and unequivocally ensure that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their judicial duties. The Constitution should also ensure that the HJC is the body in charge of the career of judges, including their selection, appointment, promotion and all disciplinary procedures against them.

Moreover, the Constitution should guarantee the independence of the Office of the Public Prosecutor (OPP), define its mandate and competences and ensure that it acts in defence of human rights by protecting the rights of victims and by holding the perpetrators of human rights abuses to account. The lack of independence of the OPP has contributed to creating a climate of impunity surrounding the widespread human rights violations committed under President Ben Ali's regime.

Furthermore, the Constitution should unequivocally prohibit the use of military courts

to try civilians. It should also prohibit the use of military courts to try military and security personnel in cases of human rights violations.

In addition to reinforcing rule of law guarantees, the Draft Constitution must be amended in order to fully meet international human rights standards. To this end, the Constitution should unequivocally recognise the supremacy of international law over domestic law and ensure that international human rights treaties to which Tunisia is a party are enforceable in national courts. Therefore, Article 15 of the Draft Constitution, which provides that "*[i]nternational treaties shall, where no contradiction with the provisions of the present Constitution exists, be respected*", should be fully amended. This article, if adopted, would violate Tunisia's obligations under international law under which States may not invoke their Constitution, or other aspects of domestic law, in order to evade obligations incumbent upon them under international law, including treaties they are party to and are in force.

The Constitution should also provide for a comprehensive Bill of Rights in full conformity with universally accepted human rights. A Bill of Rights will provide individuals with a set of rights that can be used to hold public authorities to account when they fail to respect, protect and fulfil these rights. National courts, which have been reluctant to apply international human rights norms and standards that have not been fully incorporated into national law, can also refer to and enforce the rights recognized by the Bill of Rights.

To this end, provisions relating to the principle of legality need to be amended in order to ensure their full compliance with international standards. The Constitution should also provide that this principle must not be used to prevent retroactive prosecution and punishment of serious human rights violations that amount to crimes under international law. By ensuring such prosecution and punishment, Tunisia will fully comply with its obligations under international law to investigate, prosecute and punish serious human rights violations and to combat impunity.

The Constitution should also criminalize war crimes, crimes against humanity, genocide, enforced disappearances and other crimes under international law. To this end, the definition of torture in the Draft Constitution should be amended to ensure its full compliance with Article 1 of the Convention Against Torture (the CAT), to which Tunisia is a party.

The provisions relating to equality should also be amended to ensure that all individuals under the jurisdiction of Tunisian law and courts are equal before the law. However, it is equally important that equality provisions do not prohibit or exclude legislative and other measures designed to protect or advance persons, or categories of persons, subjected to or disadvantaged by unfair discrimination.

The Constitution should ensure that non-derogable rights are absolute rights from which no derogation is accepted, including in times of emergency. These rights include, among others: the right to life; the right to be free from torture or other ill-treatment; the right not to be subjected to enforced disappearance; the right to a fair trial; and the principle of legality.

To this end, the provision relating to the right to life should be amended as it does not specify which cases can legitimize infringements to the right to life and under what conditions. Allowing the Parliament to define these cases, without any safeguards, might undermine the very essence of the right to life. The Tunisian Constitution

should therefore recognize the right to life as an absolute right from which no derogation is accepted. It should consequently abolish the death penalty.

The provisions relating to the right to a fair trial must also be amended to include the right of individuals: to be informed promptly and in detail of the nature and cause of the charge against them; to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing; to be tried without undue delay; to equality of arms; and to not to be compelled to testify against themselves or to confess guilt.

Further, it is equally important to ensure that all human rights are universal, indivisible and interdependent. To this end, the Constitution should ensure that civil, political, economic, social and cultural rights (ESCR) are all recognized, guaranteed and protected on an equal footing.

The provisions on ESCR need to be amended in order to meet Tunisia's obligations under international law, including under the International Convention on Economic Social and Cultural Rights (ICESCR). Consequently, they should recognize the right to an adequate standard of living, food, housing and sanitation. Minimum guarantees for workers should also be recognised.

In addition to recognising these rights, the Constitution should provide for effective mechanisms to enforce human rights, including an independent human rights institution with a comprehensive mandate, an Ombudsman and unrestricted access to the Constitutional Court. In this regard, the establishment in the Draft Constitution of a Constitutional Court with sufficient guarantees of independence and with a comprehensive mandate to protect human rights and guarantee the separation of powers is a step towards establishing effective democratic institutions.

Enhancing the Rule of Law and guaranteeing human rights in the Constitution, a report by the International Commission of Jurists (ICJ), examines the process of constitutional reform taking place in Tunisia following the ouster of former President Ben Ali on January 2011. In particular, it examines the transition process to date as well as the drafting procedure for, and the content of, the Constitution. It also analyses whether this process conforms to international rule of law and human rights standards and addresses the challenges that must be overcome in order to tackle the legacy of the former regime with due regard for the rule of law and human rights. In so doing, it examines the provisions relating to human rights and rule of law issues in the 1959 Constitution, the Provisional Constitution and the Draft Constitution, and assesses them in light of international law and standards. Where applicable, the report also refers to international and regional mechanisms and standards, some of which are not directly binding on Tunisia but provide authoritative guidance as to the best legal standards and practices available and from which Tunisian authorities can seek inspiration.

The report sets out urgent institutional and legal reforms that, together with sufficient political will, may help to ensure that the Constitution is fully in line with international rule of law and international human rights law and standards.

Through this report, the ICJ urges the Tunisian authorities, and in particular the NCA, to:

- i) **Adopt a constitution that represents the views of all Tunisians, not only the majority of the NCA's members and, to this end, ensure the rights of all Tunisians to participate in the constitution-making process, to be consulted on the content of the Constitution and to take part fully in the conduct of public affairs;**
- ii) **Reinforce the mandate of the Electoral Commission and guarantees for its independence, including by providing in the Constitution for sufficient safeguards for electing or selecting the Commission's members as well as the conditions of their tenure;**
- iii) **Ensure that the powers of the State are not exercised arbitrarily and are limited by formal, regular, accessible and transparent processes of law enforcement and adjudication;**
- iv) **Ensure the supremacy of the Constitution over other aspects of domestic law and the accountability of all individuals and institutions to the Constitution;**
- v) **Ensure in the Constitution that the role of the security services and armed forces is adequately defined, and that they are accountable and subordinated to a legally constituted civilian authority;**
- vi) **Ensure that the Constitution fully guarantees the principle of separation of powers and, to that end, outlines clearly the respective duties of the executive, judiciary and legislature;**
- vii) **Ensure that the Constitution enables judicial review over the compliance of legislative and executive acts with the Constitution and, to this end, unequivocally affirms that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal and are binding on and must be enforced by all public authorities;**
- viii) **Bring the whole judicial system in line with international standards of independence, impartiality and accountability;**
- ix) **Guarantee the principle of the irremovability of judges and unequivocally ensure, in the Constitution, that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their judicial duties;**
- x) **End the use of military courts to try civilians and exclude all cases involving human rights violations from the jurisdiction of military tribunals, including those involving military and security personnel;**
- xi) **Ensure the supremacy of international law over domestic law and that international human rights treaties to which Tunisia is a state party are enforceable in national courts;**
- xii) **Incorporate in the Constitution a comprehensive Bill of Rights in accordance with international human rights law and standards;**
- xiii) **Prohibit, in the Constitution, serious crimes under international law, including, among others, war crimes, crimes against humanity, genocide, torture and enforced disappearance;**
- xiv) **Ensure that the principle of legality is not used to prevent retroactive prosecution and punishment of serious human rights violations that amount to crimes under international law;**
- xv) **Ensure that any limitation on human rights is permissible under international law and is in full conformity with international standards. In particular, any limitation must not be arbitrary or unreasonable but rather clear, precise, accessible and**

- capable of being demonstrably justified in a free and democratic society;
- xvi) **Ensure that non-derogable rights, including, among others, the right to life, the right to be free from torture or other ill-treatment, the right not to be subjected to enforced disappearance, the right to a fair trial, the application of the principle of legality and the right to challenge the lawfulness of detention (*habeas corpus*), are rights from which no derogation is accepted, including in times of emergency; and**
 - xvii) **Provide for effective and independent mechanisms to protect human rights against any abuse, including a transitional justice mechanism and a human rights institution with a comprehensive mandate and sufficient guarantees of independence.**

This report is compiled on the basis of findings from a high-level mission the ICJ conducted in Tunisia, from 27 November to 4 December 2011, and two follow-up missions carried out in 2012, to assess the constitutional reform process in Tunisia and its compliance with international standards of human rights and the rule of law.¹ The ICJ delegation was led by Justice Jose Antonio Martin Pallin, Emeritus Judge of the Spanish Supreme Court and ICJ Commissioner, Gustavo Gallon, Executive Director of the Colombian Commission of Jurists and ICJ Commissioner, Said Benarbia, ICJ Senior Legal Adviser for the Middle East and North Africa (MENA) Programme, Laura Torre, ICJ Programme Officer for the MENA Programme, and Arwa Shobaki, ICJ Legal Researcher for the MENA Programme. The delegation met with a range of actors, including the then Prime Minister, Beji Caïd Essebsi; the President of the NCA, Mustapha Ben Jafaar; the First President of the Court of Cassation, Farid Sekka, as well as judges, lawyers and representatives of national human rights NGOs. The report is also based on field research carried out by ICJ staff in Tunisia.

¹ *The Reform of the Judiciary in Tunisia*, ICJ legal memorandum, September 2012, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/09/TUNISIALegalmemoENGLISHfinal.doc.pdf> last accessed 24 January 2012

CHRONOLOGY

2011

- 14 January 2011 President Ben Ali forced from office
- 18 February 2011 Law-Decree No. 2011-6 establishing the High Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition
- 23 March 2011 The 1959 Constitution is suspended by Law-Decree No.2011-14 on the provisional organisation of public authorities, issued by Interim President, Fouad Mbazaa
- 18 April 2011 Law-Decree No. 2011-27 establishing the Higher Independent Authority for the Elections
- 10 May 2011 Law-Decree No. 2011-35 on the election of the National Constituent Assembly
- 23 October 2011 Election of the National Constituent Assembly
- 22 November 2011 National Constituent Assembly convenes for the first time
- 11 December 2011 The National Constituent Assembly approves the Provisional Constitution
- 12 December 2011 The National Constituent Assembly elects human rights activist Moncef Marzouki as interim President
- 14 December 2011 President Marzouki appoints Hamadi Jebali as Prime Minister
- 16 December 2011 Internal regulations of the NCA are passed

2012

- 13 February 2012 The process of drafting the Constitution begins
- 8 August 2012 The first draft of the Constitution is published
- 15 December 2012 The second draft of the Constitution is published

GLOSSARY

CAT	Convention Against Torture
CCP	Code of Criminal Procedure
CEDAW	Convention on the Elimination of Discrimination Against Women
CMJ	Code of Military Justice
ESCR	Economic, Social, and Cultural Rights
HJC	High Judicial Council
HMI	High Magistrates Institute
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISIE	Higher Independent Authority for the Elections
MJC	Military Judicial Council
NCA	National Constituent Assembly
OPP	Office of the Prosecutor
RCD	Constitutional Democratic Rally
UDHR	Universal Declaration of Human Rights

I. THE CONSTITUTION-MAKING PROCESS

The process of elaboration and adoption of a constitution must observe several requirements in order to legitimise the Constitution as the basic framework of governance and the law of the land. It must be inclusive, transparent and participative.

On 25 March 1956, five days after Tunisia achieved its independence from France, a Constituent Assembly was elected. All 98 members of the Assembly were elected from the Neo-Dostour party, led by former President Habib Bourguiba.² On 1 June 1959, the Constituent Assembly adopted a constitution that laid the foundations for a centralized presidential system, which lasted until the toppling of President Ben Ali.

Following President Ben Ali's ouster, the transitional authorities, including the High Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition (the High Authority), adopted a specific legal framework organizing and setting out the rules for the election of the National Constituent Assembly (NCA). Upon its election, the NCA adopted a Law on the Interim Organisation of Public Powers of Tunisia. It also adopted its internal regulations, which defined the rules and modalities of the constitution-drafting process.

1. The NCA election process

a. The institutional framework

In the aftermath of the ousting of President Ben Ali, the 1959 Constitution was suspended by virtue of a Presidential Decree of 23 March 2011, a new legal framework for the election of the NCA was adopted, and several transitional institutions were established to break with the constitutional legacy of the old regime.³

One of the first measures taken by the transitional authorities was the adoption of Law-Decree No. 2011-6 of 18 February 2011 establishing the High Authority.⁴ The High Authority was empowered to supervise the transition process and, under Article 2 of the Law-Decree, to initiate reforms, including legislative ones, in order to realise the "revolution's" objectives.

Although the High Authority was not an elected body, and despite the fact that its legitimacy was challenged by several political parties, it proved to be largely inclusive in its membership⁵ and worked to reach consensus in its decision-making. The role of the High Authority also proved to be key, by initiating several Bills that shaped the transition process, including Law-Decree No. 2011-27 of 18 April 2011 establishing

² Histoire de la Tunisie Contemporaine: De Ferry à Bourguiba 1881-1956- Jean-François Martin p. 232

³ Law-Decree No. 14-2011 dated 23 March 2011, issued by interim President Fouad Mbazzaa, on the Provisional Organization of the Public Authorities. Article 1 states: "*Until a National Constituent Assembly [is] elected, (...) public powers of the Tunisian Republic will be temporarily organized according to the provisions of this Law-Decree*" (unofficial translation)

⁴ *Instance Supérieure pour la Réalisation des Objectifs de la révolution, de la réforme politique et de la transition démocratique*. The High Authority was created by merging the *Political Reform Commission*, one of three commissions created by the first interim Prime Minister Ghannouchi, and the *Council for the Protection of the Revolution (Conseil de Sauvegarde de la Révolution)* created on February 11, 2011.

⁵ Law Decree No.2011-6 of 18 February 2011 establishing the High Authority, Article 3

the Higher Independent Authority for the Elections (the ISIE),⁶ Law-Decree No. 2011-35 of 10 May 2011 on the election of a National Constituent Assembly, as well as the laws on political parties, on associations and on the media.⁷

Under Law-Decree No. 2011-27 of 18 April 2011, the ISIE was established as an independent public authority, financially and administratively autonomous, with a mandate to prepare, supervise and monitor the elections of the NCA and ensure “*democratic, pluralistic, fair and transparent*” elections.⁸ The ISIE enjoyed broad powers covering all aspects of the electoral process, including: preparing the electoral schedule; establishing the lists of voters and guaranteeing the right to vote; receiving requests for candidature and ensuring eligibility according to the relevant legal criteria; and “*ensuring equality among all the candidates*”.⁹

The establishment of the mandate of the ISIE appears to constitute an effective discharge of Tunisia’s international legal obligations, in particular under Article 25 of the International Covenant on Civil and Political Rights (ICCPR), to which Tunisia is a party.¹⁰ In its General Comment No.25 on the right to participate in public affairs and voting rights, the UN Human Rights Committee, the supervisory authority of the ICCPR, affirmed the need for States to establish an independent electoral authority “*to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant*”.¹¹

Given Tunisia’s history of manipulated elections and the previous absence of any independent structure to supervise the elections under President Ben Ali’s regime, the establishment of the ISIE, even on a temporary basis,¹² with a large mandate and sufficient guarantees of independence, was instrumental in ensuring that the elections of the NCA were free and transparent.

The Draft Constitution reflects the importance of the role played by the ISIE in providing, under Article 127, for the establishment of an “*electoral instance*” in charge of the organisation of local, regional and national elections and referendums. Under this article, the electoral instance is to ensure the integrity and the transparency of the electoral process, and declares the results. Article 127 also provides that the electoral instance will be composed of nine competent, independent and impartial members.

The NCA should build on Law-Decree No. 2011-27 of 18 April 2011 and draft Article 127 in order to reinforce the mandate of the Electoral Commission. These amendments should be directed at: ensuring greater participation in the electoral process by, among other things, improving electoral registration; regulating the financing of political parties, including in respect of external donations; empowering the Electoral Commission with comprehensive investigatory and enforcement powers to curb electoral fraud; and ensuring that its decisions are binding on all authorities.

⁶ Instance Supérieure Indépendante pour les Elections

⁷ Law-Decree No.2011-87 on political parties, Law-Decree No.2011-88 on associations, Law-Decree No.2011-115 on the freedom of the media

⁸ Law-Decree No.2011-27 of 18 April 2011, Article 2

⁹ *Ibid*, Article 4

¹⁰ “*Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community*”, Human Rights Committee, General Comment No.25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), doc CCPR/C/21/Rev.1/Add.7 of 12 July 1996, para.11.

¹¹ *Ibid*, para.20

¹² Article 1 of Law-Decree No.2011-27, *supra*, stipulates that the mission of ISIE will end with the announcement of the final results.

The Constitution should also prescribe the mechanism for electing or selecting the members of the Commission and guarantee the effective and independent exercise of their mandate.

b. The NCA elections' legal framework

The right to vote and the right to be elected are both guaranteed under international law. Article 25 of the ICCPR provides that *"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors"*. The UN Human Rights Committee has explained that for this guarantee to be effective, the right to vote should be established by law and can only be subjected to reasonable restrictions such as a minimum age limit.¹³

After the ouster of President Ben Ali, Law-Decree No. 2011-35 of 10 May 2011 on the Election of the National Constituent Assembly (the Electoral Law) established the election rules and procedures. These include: voter registration, eligibility, campaigning, election-day procedure, and the announcement of results. The Electoral-Law also defines "electoral crimes", such as attempts to intimidate voters, destruction of voter lists or ballot boxes, falsification of ballot records, and infringements of the right to vote by using actual or threatened violence.¹⁴

While Article 2 of the Electoral Law emphasizes the rights of all Tunisians, who are at least 18 years old, to enjoy their full civil and political rights, Article 5 prevents various individuals from voting: those convicted of a crime, sentenced to more than six months in jail and who have not been rehabilitated; those who are under guardianship; and persons whose goods have been confiscated after 14 January 2011.

The wording of Article 5 is vague and does not specify, for example, whether the confiscation of goods had to result from a criminal conviction or another kind of sanction. Therefore, the prohibitions contained at Article 5 cannot be considered sufficiently objective and reasonable. The Human Rights Committee has pointed out that the grounds for depriving citizens of their right to vote should be *"objective and reasonable"* and, *"[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence"*.¹⁵

The establishment of transparent and accurate voter lists is also an important requirement to ensure that the right of each citizen to vote is guaranteed. Since the Electoral Law provides that voters can exercise their right to vote by using their identity documents (IDs),¹⁶ the electoral lists were established by local authorities, under the supervision of the ISIE, through the national IDs database. However, it was pointed out that an estimated *"400 000 Tunisian citizens were not recorded on the database as their national identity cards were issued before 1993"* and that *"individuals' addresses referenced in the database contained errors and did not enable*

¹³ *Ibid*, para.10

¹⁴ Law-Decree No.2011-35 of 10 May 2011, Chapter V

¹⁵ Human Rights Committee, General Comment No. 25, *supra*, para.14

¹⁶ Law-Decree No. 2011-35, *supra*, Article 3

a reliable allocation of voters to polling station".¹⁷ The difficulties encountered in the registration process may have prevented a large number of individuals from exercising their right to vote and from taking part in the conduct of public affairs, in accordance with international law and standards.

The Human Rights Committee has stressed that: "*States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced*".¹⁸

In addition to the right to vote, Article 25 of the ICCPR guarantees the right "*to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors*".

The Electoral Law provides that anyone who is at least 23 years of age and has the status of a voter can run for NCA elections.¹⁹ The principle of gender parity on candidate lists and the participation of women in public affairs were also recognized by compelling political parties to include an equal number of men and women on candidate lists and compelling them to list male and female candidates alternately.²⁰ However, in practice, only seven per cent of the lists were headed by female candidates, which reduced their chances of being elected.

Further, Article 15 of the Electoral Law prevents various Tunisians from running for election. The first two categories refer to those who held government responsibilities under President Ben Ali's regime and within his political party, the Constitutional Democratic Rally (RCD).²¹ The third category disqualifies individuals who signed a petition in August 2010 calling for President Ben Ali to run for presidency in 2014.

By enlarging the list of people who are prohibited from running for office to include those who held government responsibilities under President Ben Ali's regime, without specifying what responsibilities they held and how they exercised them, and those who signed a petition calling for President Ben Ali to run in 2014, without taking into consideration the conditions under which the petition was signed, goes far beyond the legitimate reasons that may justify limitations on the right to stand for election.²² Indeed, the Commission established to implement Article 15 concluded that many people who signed the petition on the re-election of President Ben Ali did not do so willingly. In fact many signatures were falsified and many others were obtained under pressure.²³ Even where the petition was not signed under pressure, this cannot, of itself, constitute a legitimate reason for limiting the right to stand for election.

¹⁷ The Carter Center, Final Report National Constituent Assembly in Tunisia, 23 October 2011, p 29

¹⁸ Human Rights Committee, General Comment No. 25, *supra*, paragraph 11

¹⁹ Law-Decree 2011-35, *supra*, Article 15

²⁰ *Ibid*, Article 16

²¹ Also known as the *Rassemblement Constitutionnel Démocratique*

²² Although Decree 2011-1089 delimited certain categories of prohibited individuals, these categories are not sufficiently specific

²³ La liste des interdits des élections rendue publique, Tuniscope, 26 July 2011, available at <http://www.tuniscope.com/index.php/categorie/actualites/politique/listte-230016> last accessed 17 January 2013

In its General Comment No.25, the Human Rights Committee emphasized that: "Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation".²⁴

c. Electoral dispute resolution

The Electoral Law provides for electoral dispute mechanisms in cases of disputes arising from a decision taken by the ISIE on the registration of voters, the admissibility of candidates or the proclamation of the results. Under Article 12, electoral disputes should be submitted to the competent sub-commission for elections, which decides on the matter within a maximum of 8 days. The decisions of the sub-commission can be challenged before the Court of First Instance in that region, which shall decide the matter within 5 days.²⁵ The Court's decisions are deemed final.

The law also provides for the possibility of challenging the preliminary results of the election before the general assembly of the Administrative Court, within forty-eight hours of their announcement. However, the assembly's decisions are final and cannot be challenged.²⁶ This leaves out the possibility of judicial review, which is essential, at least to determine whether the Administrative Court and other executive authorities had appropriately discharged their review functions.

In addition, where the challenge concerns alleged violations of human rights, such as Article 25 of the ICCPR, persons must be afforded access to an effective remedy. The Human Rights Committee has made clear that the right to an effective remedy under Article 2(3) of the ICCPR: "requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. (...) The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law."²⁷

While the process of electing the NCA in Tunisia was largely hailed as fair, transparent and inclusive, serious political and legal challenges need to be addressed in order to adopt a constitution that breaks with the legal and political systems inherited from the old regime, guarantees the rule of law, and protects human rights.

²⁴ Human Rights Committee, General Comment No.25, *supra*, para.15

²⁵ Article 14 of the Electoral Law stipulates that: "The concerned parties and the public administration can appeal against the decisions of the Subsidiary Commission for Elections before the Court of First Instance that is territorially competent in its tripartite structure within 5 days as of the date of notifying the concerned persons with these decisions. The Court of First Instance that is responsible for appeals shall examine the case according to the procedures listed in articles 43,46,47, 48 (last paragraph), 49 and 50 from the Code of Civil and Commercial Pleadings. The Court can authorize the immediate pleadings without any further procedures. The Court of First Instance shall issue its decision within 5 days as of the date of filing the appeal. Its decision shall be deemed final".

²⁶ Law-decree No.2011-35, *supra*, Article 72

²⁷ Human Rights Committee, General Comment No.31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para.15

2. The constitution-making process

To ensure a successful transition to democracy, the drafting and adoption process of a constitution needs to be, in accordance with international standards, transparent, inclusive, participatory, and consensual.

After its election, the NCA approved, on 11 December 2011, a Provisional Constitution consisting of 27 articles (the Provisional Constitution), with the purpose of providing a basic law and structure for State powers during the transitional process. It therefore outlines the functions of the executive, legislature, and judiciary. Under this provisional framework, the NCA is empowered to draft a new constitution, exercise legislative power, elect the President of the Republic and supervise the government's work.²⁸

Together with the Provisional Constitution, in early December 2011 the NCA adopted its internal regulations, which determine its competences and working methods as well as the procedure for the drafting of the Constitution. Pursuant to Article 64 of the internal regulations, six Permanent Constituent Commissions were established to discuss and draft different sections of the Constitution. These sections include: the preamble, basic principles and constitutional amendment provisions; rights and freedoms; legislative and executive powers and their relationship; the ordinary, administrative, financial and constitutional judiciary; constitutional bodies; and State, regional and local authorities. In order to coordinate the work of these commissions, a Joint Coordinating and Drafting Committee was set up to prepare a general report on the Constitution and to establish the final version of the Draft Constitution.²⁹ Eight Permanent Legislative Commissions were also set up to study and examine bills submitted to the NCA as well as any question within their competences submitted by the plenary or the President of the NCA.

For decades, the decision making process in Tunisia lacked transparency. While the internal regulations provide that plenary sessions of the NCA are public and should be announced by several means, including announcing the dates of the debates and associated agenda, broadcasting the deliberations of plenary sessions or updating the NCA website,³⁰ it is unfortunate that neither the Provisional Constitution nor the internal regulations give the people the right to meaningfully participate, directly or indirectly, in the drafting process. No reference is made to the possibility of holding consultations on specific issues with the relevant stakeholders or the public. The NCA should therefore ensure that, in accordance with international standards, a variety of sectors of society are consulted both on the drafting procedure and on the content of the Constitution.

The Human Rights Committee has affirmed that Article 25 guarantees that: "*peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.*"³¹ The committee concluded:

²⁸ Provisional Constitution, Article 2

²⁹ NCA Internal Regulations, December 2011, Article 104, states: "*The Joint Coordinating and Drafting Committee is responsible for: the immediate and ongoing coordination of the work of the standing committees of the NCA; preparation of a general report on the Constitution before its submission to the plenary session; the establishment of the final draft of the Constitution in conformity with the resolutions of the plenary*" de coordination et de rédaction est chargé de: *La coordination immédiate et continue des travaux des commissions permanentes Constituantes ; Préparation du rapport général sur la Constitution avant sa soumission à la séance plénière ; L'établissement de la version définitive du projet de la Constitution en conformité avec les résolutions de la séance plénière »*

³⁰ NCA Internal Regulations, Article 76

³¹ *Ibid*, para.2

*"Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process."*³²

These principles are well established in regional systems as well. For example, Article 2 of the Inter-American Democratic Charter, the instrument that contains the collective commitment to maintaining and strengthening the democratic systems in the Americas, recognises that: *"Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order."*³³

II. CONSTITUTION, RULE OF LAW AND SEPARATION OF POWERS

The rule of law, including adherence to the principle of the separation of powers, is an indispensable condition to ensure the protection of human rights and the effectiveness of democratic institutions. After decades of disregard for the most basic principles of the rule of law, the current transitional period in Tunisia represents a unique, historic opportunity to ensure domestic practices and laws, including the Constitution, conform to the rule of law and international human rights law and standards.

The interdependent and mutually reinforcing nature of human rights, the rule of law and democracy has been confirmed by the UN Commission on Human Rights (the predecessor body to the Human Rights Council),³⁴ the UN Human Rights Council³⁵ and the UN General Assembly, with the latter affirming: *"human rights, the rule of law and democracy are interlinked and mutually reinforcing and they belong to the universal and indivisible core values and principles of the United Nations."*³⁶

Under the rule of law, the existence and effectiveness of fair, formal, regular, accessible and transparent processes of law enforcement and adjudication significantly contribute to the limitation of the powers of the State and consequently that such powers are not exercised arbitrarily. The rule of law is *"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."*³⁷

A main pillar of the rule of law is the principle of separation of powers as among the executive, legislative, and judicial branches of government. Pursuant to this principle, a system of checks and balances prevent abuses by any of the three branches. As the

³² *Ibid*, para.6

³³ Inter-American Democratic Charter, Lima, 11 September 2001.

³⁴ In Resolution 1999/57 on the "Promotion of the right to democracy", the Commission on Human Rights *"affirms that democracy fosters the full realization of all human rights, and vice versa"*, E/CN./RES/1999/57, 28 April 1999, para. 1.

³⁵ In Resolution 19/36 on "Human rights, democracy and rule of law", the Human Rights Council *"stresses that democracy includes the respect for all human rights and fundamental freedoms, [...] as well as respect for the rule of law, the separation of powers, the independence of the judiciary"*, UN Doc A/HRC/RES/19/36 of 19 April 2012, para. 1.

³⁶ General Assembly, Resolution 61/39 on "The rule of law and the national and international levels", A/RES/61/39, 18 December 2006, Preamble.

³⁷ Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies", S/2004/616, 23 August 2004, para. 6.

UN Special Rapporteur on the independence of judges and lawyers affirmed, "*Separation of powers, the rule of law and the principle of legality are inextricably linked in a democratic society.*"³⁸

In addition, in the aftermath of a conflict, crisis, or fundamental change of governance, the establishment of the rule of law and separation of powers is crucial to rebuild trust in the State's institutions and to ensure the effective protection of human rights. As noted by the UN Special Rapporteur on the independence of judges and lawyers, "*understanding of, and respect for, the principle of the separation of powers is a sine qua non for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy – which heretofore have been typically characterized by precisely the absence of a separation of powers.*"³⁹

1. Rule of law and separation of powers under the 1959 Constitution

Article 5 of the 1959 Constitution provides that the Republic of Tunisia "*shall be founded upon the principles of the rule of law and pluralism and shall strive to promote human dignity and to develop the human personality.*"⁴⁰ However, despite this formal recognition, rule of law and separation of powers principles were constantly undermined under President Ben Ali's regime by the disproportionate concentration of powers in the President of the Republic, the marginalization of the legislature and the interference of the executive in judicial affairs.

a. The supremacy of the executive and the concentration of powers in the hands of the President of the Republic

In Tunisia, the executive has systematically exercised comprehensive control over the legislature and the judiciary. Within the executive, most powers were concentrated in the hands of the President.

The President of the Republic exercised executive power "*assisted by a government headed by a Prime Minister.*"⁴¹ Pursuant to Article 49 of the 1959 Constitution, the President of the Republic "*directs the general policy of the State, defines its basic options and informs the Chamber of Deputies accordingly.*"⁴² He appointed the Prime Minister and the members of the government, upon considering proposals submitted by the Prime Minister, and presided over the Cabinet.⁴³

Under Article 41, the President of the Republic is identified as "*the guarantor of national independence, of territorial integrity, and of respect for the Constitution and the laws as well as the execution of treaties. He sees to the proper functioning of the constitutional public powers and assures the continuity of the State.*" Under Article 44 of the 1959 Constitution, he was also empowered to serve as the Commander-in-Chief of the armed forces. He concluded treaties and declared war and peace, with the approval of the Chamber of Deputies.⁴⁴

³⁸ Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/14/26, 9 April 2010, para.17. See also the former Commission on Human Rights, Resolution 2002/46 on "Further measures to promote and consolidate democracy", E/CN.4/RES/2002/46, 23 April 2002, para.1.

³⁹ Report of the Special Rapporteur on the independence of judges and lawyers, E/CN.4/1995/39, 6 February 1995, para. 55.

⁴⁰ 1959 Constitution, Article 5, as amended by Constitutional Law No. 2002-5 of 1 June 2002.

⁴¹ *Ibid*, Article 37

⁴² *Ibid*, Article 49

⁴³ *Ibid*, Article 50

⁴⁴ *Ibid*, Article 48

Under the institutional architecture outlined by the 1959 Constitution, the Prime Minister and cabinet were granted merely accessory powers.⁴⁵ The government was responsible for the implementation of the national policy, as defined by the President.⁴⁶ The President could also put an end to the functions of the government or a member thereof at his own initiative.⁴⁷ The government, stripped of any meaningful power, was accountable to both the President and to the Chamber of Deputies. The government was accountable to the President for its management,⁴⁸ while, most importantly, the Chamber of Deputies was empowered to vote on a motion of censure to question the responsibility of the government if the latter was departing from the general State policy, as defined by the President.⁴⁹

Unlike the government, the President was not accountable to any other power. Neither the Parliament nor the Constitutional Council was able to initiate any impeachment procedure against him. In addition, he was granted immunity from judicial proceedings both during the exercise of his duties and after the end of his Presidential term, for "*all acts executed as part of the office*".⁵⁰ Even though functional immunity may be granted to State officials, no official status may shield from criminal jurisdiction those accused of gross human rights violations and crimes under international law, even if acting as a Head of State or a member of the government.⁵¹ After his ouster, President Ben Ali was subject to various judicial proceedings for his presumed responsibility for serious human rights violations committed during his rule and the uprising.

The President also enjoyed sweeping powers in times of public emergency. Under Article 46 of the 1959 Constitution, the President was entitled to take exceptional measures in cases of imminent peril threatening the institutions of the Republic and the security and independence of the country and obstructing the proper functioning of public powers. The 1959 Constitution provided only two restrictions in this respect: the President was not allowed to dissolve the Chamber of Deputies; and the deputies were not empowered to present a motion of censure against the government.⁵²

The framework relating to the state of emergency was problematic in a number of respects. First, it did not provide any safeguards for the protection of human rights in times of emergency, including those contained in Article 4, paragraph 2 of the ICCPR.⁵³ Second, it did not provide for any system of checks and balances to counter the President's emergency powers. In order to end the abusive use of emergency provisions, the Parliament should be actively involved either in its proclamation or in its confirmation, once announced by the executive. Third, under Article 46 of the 1959 Constitution, the measures taken pursuant to a state of emergency "*cease to bear effect as soon as the circumstances that produced them come to an end.*" Under international standards, the state of emergency must strictly be limited in time, and if the exceptional circumstances for its declaration continue to exist, the Parliament

⁴⁵ "*The executive power is exercised by the President of the Republic, assisted by a government headed by a Prime Minister.*" *Ibid*, Article 37

⁴⁶ *Ibid*, Article 58.

⁴⁷ *Ibid*, Article 51.

⁴⁸ *Ibid*, Article 59.

⁴⁹ *Ibid*, Article 62.

⁵⁰ *Ibid*, Article 41.

⁵¹ Human Rights Committee, General Comment No. 31, *supra*, para.18; see also Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 27.

⁵² 1959 Constitution, Article 46.

⁵³ Article 4(2) of the ICCPR states: "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."

should be empowered to vote on its renewal. As affirmed by the UN Human Rights Committee, "*measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.*"⁵⁴

b. Parliament dispossessed of legislative power

The Tunisian Parliament, dominated by President Ben Ali's RCD party, was unable or unwilling to effectively counter-balance the pervasive power of the executive, concentrated in the hands of the President of the Republic. Indeed, the Parliament has always been a façade, as the President *de facto* took virtually all major political decisions. This situation was facilitated by a weak legal framework, which vested the legislature with an insufficient mandate and lacked the clarity to ensure the adequate separation of powers.

The 1959 Constitution, as amended in 2002, conferred legislative power on two parliamentary chambers, the Chamber of Deputies and the Chamber of Counsellors.⁵⁵ While the members of the Chamber of Deputies were elected by universal suffrage,⁵⁶ the Chamber of Counsellors consisted of both indirectly elected members and presidential appointees.⁵⁷ Article 28 affirmed that: "*the Chamber of Deputies and the Chamber of Advisors exercise the legislative power, in accordance with the provisions of the Constitution.*" However, in practice, Parliament was dispossessed of its legislative powers, as various other provisions of the 1959 Constitution vested the President of the Republic with broad legislative powers. For example, Article 28 of the 1959 Constitution gave priority to bills submitted by the President of the Republic.⁵⁸ In addition, Article 31 gave the President the power to issue laws by decree when the Chambers were not in session. Even though Presidential decrees and bills presented by the President were later submitted to the Chambers,⁵⁹ a genuine review was absent due to the predominance of President Ben Ali's RCD party in Parliament.

The lack of free and fair elections also contributed to the weakening of the legislature. Indeed, one of the basic guarantees of an independent legislature is to ensure fair and transparent elections for all members of Parliament. In Tunisia, despite the formal recognition by the 1959 Constitution as well as the 1969 Tunisian Electoral Code that "*the members of the Chamber of Deputies are elected by universal, free, direct, and secret vote*",⁶⁰ elections were carried out in an atmosphere of repression and attacks on opposition candidates, as well as under the severe curtailment of freedom of expression, the press and assembly.⁶¹ In addition, the Ministry of Interior exercised overall control over the whole electoral process.

Moreover, although political pluralism and freedom of association were included in the 1959 Constitution,⁶² these principles were widely disregarded under President Ben Ali's regime. A number of political parties were banned and President Ben Ali's RCD

⁵⁴ Human Rights Committee, General Comment No.29 on "State of Emergency (Article 4)", CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 1 and 2.

⁵⁵ 1959 Constitution, Articles 18 and 28, as amended by Constitutional Law No. 2002-51 of 1 June 2002.

⁵⁶ *Ibid*, Article 18.

⁵⁷ *Ibid*, Article 19.

⁵⁸ *Ibid*, Article 28.

⁵⁹ *Ibid*, Articles 28, 31 and 33.

⁶⁰ *Ibid*, Article 18 and the Tunisian Electoral Code of 1969, as amended, Article 1.

⁶¹ See *inter alia* the provision at Article 62-III of the Electoral Code, added by Article 3 of the Organic law No. 2003-58 of 4 August 2003, prohibiting the use of private or foreign radio or television channels or on broadcasting from abroad during elections.

⁶² 1959 Constitution, Articles 5 and 8.

party, in power from 1988 to 2011, dominated the Parliament as well as all aspects of public life, making Tunisia a *de facto* single party regime.

Under international standards, including Article 25 of the ICCPR, every citizen has a right to “*vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors*”. The UN Commission on Human Rights, in 2000 called upon States to “*consolidate democracy through the promotion of pluralism, [...] maximizing the participation of individuals in decision-making and the development of competent and public institutions, including an independent judiciary, effective and accountable legislature and public service and an electoral system that ensures periodic, free and fair elections*”.⁶³ Such consolidation takes the form of limiting the powers of the executive in controlling the electoral process. The UN Human Rights Committee has underscored that Article 25 of the ICCPR requires that: “*an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant*.”⁶⁴

In addition, Parliament plays a crucial role in controlling the executive, scrutinising the work of the government and holding its members to account. However, under Article 62 of the 1959 Constitution, the Chamber of Deputies was empowered to vote on a motion of censure to question the responsibility of the government only where the latter was departing from the general State policy, as defined by the President of the Republic.⁶⁵ Moreover, the motion of censure was only admissible if signed by at least one-third of the deputies, a high threshold in an RDC-dominated Parliament. Under Article 63, if the Chamber of Deputies adopted a second motion of censure concerning the same legislation, the President of the Republic was able to decide whether to accept the government’s resignation or to dissolve the Chamber. Finally, the Parliament did not have any power of impeachment over the President.

Under this framework, the independence and proper functioning of the Tunisian Parliament has been severely undermined by the predominance of executive power, concentrated in the hands of the President.

2. Rule of law and separation of powers in the transitional period

During the transition period, the transitional authorities have introduced a constitutional framework, which contains significant developments in terms of the rule of law.

Constitutional Law No. 2011-6 of 16 December 2011, also called the Provisional Constitution, regulates the temporary organization of public powers until the adoption of the new Constitution. It assigns the competences of each branch of government and empowers the NCA with both constituent and legislative powers,⁶⁶ including controlling, under Article 2, the actions of the government.

The Provisional Constitution significantly weakens the role of the President in favour of the Prime Minister, thereby providing for a more balanced separation of powers

⁶³ Commission on Human Rights, Resolution 2000/47 on “Promoting and consolidating democracy”, E/CN/4/RES/2000/47, 25 April 2000, para. 1(a).

⁶⁴ Human Rights Committee, General Comment No.25, *supra*, para.20.

⁶⁵ 1959 Constitution, Article 62.

⁶⁶ Constituent Law No.2011-6 of 16 December 2011 (Provisional Constitution), Articles 3 and 4.

within the executive between the President and the Prime Minister, and also between the executive and other branches of government.

Under the Provisional Constitution, the President nominates as Prime Minister the candidate of the party that obtained the largest number of seats in the NCA.⁶⁷ There is a more balanced division of competences between the President of the Republic and the Prime Minister on foreign policy and on the nomination of high-level officials to the Ministry of Foreign Affairs and to diplomatic missions.⁶⁸ Senior military officials are appointed and dismissed by the President, in agreement with the Prime Minister. Moreover, even in cases of emergency, while the President remains responsible for taking exceptional measures to deal with such situations, emergency measures have to be agreed upon by the Prime Minister and the President of the NCA.⁶⁹ According to Article 7 of the Provisional Constitution, the NCA may decide under exceptional circumstances to delegate all or part of its legislative competencies to the NCA President, the President of the Republic and the Prime Minister, who may temporarily exercise legislative power through law-decrees. When the circumstances allow it, the NCA meets at the request of its President or of a third of its members and examines the law-decree enacted under the exceptional circumstances.

The role of the government and Prime Minister was also amended in favour of granting greater responsibility to the head of the government and more independence from the President. Accordingly, the Prime Minister forms and presides over the government,⁷⁰ which should be confirmed by an absolute majority of the NCA.⁷¹ The government also exercises executive power, including through the enforcement of the laws.⁷²

The Provisional Constitution also reinforces the role of the legislature in the form of the NCA. Indeed, the NCA elects the President of the Republic and can also remove him from his position, following a motion submitted to the President of the NCA by a third of its members and the approval of the motion by an absolute majority of its members.⁷³ In addition, the government and each individual Minister is accountable to the NCA, which may pass a vote of no confidence against the whole government or against individual Ministers after a request to this effect has been presented to the President of the NCA by at least a third of its members.⁷⁴ If the NCA passes the vote of no confidence, the government has to resign. It is worth highlighting that, under the 1959 Constitution, a vote of no confidence by the Parliament was restricted to situations where the government departed from the general policy of the State, as defined by the President.⁷⁵

Another significant rule of law development in the Provisional Constitution is the position of the judiciary. Article 22 reaffirms the independence of the judiciary. It also requires the NCA to adopt an organic law establishing a temporary body in charge of overseeing the judiciary, as a substitute for the HJC. Additionally, the NCA must adopt organic laws aimed at re-organizing the justice system and laying down the

⁶⁷ Provisional Constitution, Articles 11 and 15.

⁶⁸ *Ibid*, Article 11, para.13.

⁶⁹ *Ibid*, Article 11, para.7.

⁷⁰ Under the 1959 Constitution, the Prime Minister was only able to recommend the other members of the government, who were then appointed by the President of the Republic.

⁷¹ Provisional Constitution, Article 15, paragraph 4.

⁷² *Ibid*, Article 17, para.2. within comparison, see the 1959 Constitution, Article 53.

⁷³ *Ibid*, Article 13.

⁷⁴ *Ibid*, Article 19.

⁷⁵ 1959 Constitution, Article 62.

foundations for the reform of the judiciary *"in conformity to international standards on the independence of the judiciary."*⁷⁶

3. Rule of law and separation of powers in the Draft Constitution

On 15 December 2012, the NCA made public the Draft Constitution, which aims in its preamble to build *"a republican, democratic and participative system under which the State is civil and is based on institutions where sovereignty belongs to the people on the basis of peaceful alternation in power and through free elections; and where government is based on separation and balance of powers, pluralism, the neutrality of the administration, the respect of human rights and freedoms, the supremacy of the law, the independence of the judiciary, justice and equality."* The Draft Constitution includes separate sections on the legislative, executive and judicial branches, which provide further guarantees for the separation and balance of powers, in particular in comparison to the 1959 Constitution. However, the Draft Constitution should be amended to include a clearer attribution of competences and separation of powers, between the legislature, the executive and the judiciary, as well as within the executive, between the President and the Prime Minister. As the Human Rights Committee has noted, a *"lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the rule of law and a consistent human rights policy"*.⁷⁷

a. Reinforcing the role of the Parliament

The Draft Constitution includes provisions that ensure greater independence for and effectiveness of the Parliament. Article 44, in the section on the legislature, affirms: *"The people exercise legislative power through their representatives at the People's Assembly or by referendum."* In order to strengthen the legislature's independence, Article 52 guarantees the administrative and financial autonomy of the People's Assembly, while Article 51 requires that each Member of Parliament enjoy the necessary resources and budget needed to perform his/her functions. The Draft Constitution also provides for more guarantees for the independence of the Members of Parliament, in particular by ensuring, under Article 53, *"their immunity against any civil or criminal proceedings, arrest or trial for any opinion or proposition they might make while carrying out their duties"*.

Another improvement in the Draft Constitution, in relation to the composition of the Parliament, is that it will consist of a single body, the People's Assembly, which will be elected by universal suffrage in a free, direct and secret ballot.⁷⁸ The interference of the executive in the composition of the Parliament, in particular the Chamber of Counsellors, permitted by the 1959 Constitution, is therefore curtailed.

In addition, the Draft Constitution shifts the balance of legislative power towards the Parliament. According to draft Article 55, the government or a proportion of the members of the People's Assembly may submit bills. The various versions of Article 55 set this proportion at a minimum of 10 members, five per cent of members or 10 per cent of members. Article 56 provides that the People's Assembly may authorize the Prime Minister to issue law-decrees for specific purposes and for limited periods of time. These decrees must be approved by the Parliament during the following session. Further, in a new and positive development, 10 per cent of the members of the

⁷⁶ Provisional Constitution, Article 22(3).

⁷⁷ Concluding Observations of the Human Rights Committee on Slovakia, CCPR/C/79/Add.79, para.3.

⁷⁸ Draft Constitution, Articles 44 and 45.

People's Assembly can seize the Constitutional Court if it appears that, based on the purpose and length of these law-decrees, they undermine the separation of powers.

In addition, under the Draft Constitution, the People's Assembly may elect and establish permanent and special investigative commissions. The independence of these commissions is recognized under the Draft Constitution.⁷⁹

Oversight of the executive by the People's Assembly is also guaranteed by various articles. For example, according to Article 85, the affirmation of one-third of the members of the People's Assembly is needed to initiate a charge of "*high-treason*" against the President of the Republic. However, a decision to formally charge the President and refer the case to the Constitution Court is not issued unless it is affirmed by two-thirds of the People's Assembly. If the Constitutional Court finds the President guilty, the sole action it can take is to remove the President from office. Under the same Article, high treason is defined as a "*flagrant abuse of power, intentional violation of the Constitution or intentional abandonment of office, which results in threatening the integrity of the State or the proper functioning of constitutional institutions*".

Furthermore, Article 88 affirms that the government is accountable to the People's Assembly, while under Article 91 the latter may summon the members of the government and present a motion of censure against the government.

According to the Inter-Parliamentary Union's Universal Declaration on Democracy, "*democracy [...] requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action*".⁸⁰ The African Charter on Democracy, Elections and Governance also recognizes that: "*in order to advance political, economic and social governance, State Parties shall commit themselves to: 1. Strengthening the capacity of parliaments and legally recognized political parties to perform their core functions.*"⁸¹

The Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government reinforce the importance of accountability mechanisms. Principle VII (a) states: "*Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.*"⁸²

The Draft Constitution should therefore be amended by bolstering the functions of the People's Assembly to enable it to oversee the actions of the executive, with a view to holding the executive accountable. The People's Assembly should also be empowered

⁷⁹ Draft Constitution, Article 60.

⁸⁰ Inter-Parliamentary Union (IPU), Universal Declaration on Democracy, adopted by the Inter-Parliamentary Council at its 161st session, Cairo, 16 September 1997, Article 11

⁸¹ African Charter on Democracy, Elections and Governance, adopted by the Eighth ordinary session of the African Union Assembly, Addis Ababa, 30 January 2007, Article 27. Article 32 also states that: "*State Parties shall strive to institutionalize good political governance through: [...] 2. Strengthening the functioning and effectiveness of parliaments.*"

⁸² Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003, Principles VII (a). See also the Latimer House Guidelines for the Commonwealth, 19 June 1998 at Guideline VI 2.(a), which lists various mechanisms for ensuring executive accountability to Parliament.

to confirm the appointment of high-ranking civilian and military officials, including through public hearings. The People's Assembly's committees should also be empowered to reach out to the numerous sectors of the population to collect and analyse information relating to legislative and government policy initiatives.

In addition, the Draft Constitution should be amended in order to reinforce the role of the opposition in the People's Assembly, including by providing for sufficient venues and opportunities to challenge government policies, and allowing for members of the opposition to both lead and meaningfully contribute to the work of committees. Under these conditions, better legislation is likely to be adopted and the People's Assembly can become a democratic forum that represents the views and interests of the wider public, not only those of the government and political parties.

b. Limiting the powers of the President and reinforcing the role of the government

Article 68 of the Draft Constitution provides that the President of the Republic is the head of the State; he represents its unity, guarantees its independence and continuity and ensures respect for the Constitution, treaties and human rights. The President of the Republic enjoys judicial immunity in the exercise of presidential functions. The same article provides that the President "*enjoys such judicial immunity after the presidential term for all acts executed as part of the office*". However, this article should be amended to clarify the extent of the President's immunity and what constitutes an act executed as part of the office. It must unequivocally exclude from such immunity serious crimes under international law, including, among others, war crimes, crimes against humanity, genocide, torture and enforced disappearance.

In addition, according to Article 71, the President is empowered to: represent the State; appoint the Mufti; be the head of the armed forces and the internal security forces; declare war and peace, following the approval of the People's Assembly; declare a state of emergency; appoint senior military and security officials, including the head of the general intelligence service; and appoint senior officials at public institutions. Under the same article, the President can also dissolve the People's Assembly, in conformity with the Constitution's provisions.

Although Article 68 confers on the President important powers, the Draft Constitution also considerably limits the powers of the President of the Republic not only in favour of the Parliament but also the government.

Under Article 87, the President of the Republic must entrust the candidate of the political party or coalition with the majority of seats in the People's Assembly to form the government, and it is the Prime Minister who, as provided for by Article 86, sets out the general policy of the State and ensures its application.

In addition, while the members of the cabinet are sworn in before the President of the Republic, under Article 88, the government is accountable to the People's Assembly only.

Various other constitutional provisions limit the powers of the President. For example, under Article 66, the President of the Republic is elected by universal suffrage for a period of five years. The same article sets a two-term limit for the Presidency, and provides that this provision cannot be amended. Regarding states of emergency, the competences of the President are also considerably reduced: he or she may adopt the necessary measures after consultation with the Prime Minister, the Constitutional

Court and the President of the People's Assembly (Article 73). The same article provides that the President of the People's Assembly or thirty of its members may, thirty days after the beginning of the state of emergency, seize the Constitutional Court, which shall verify whether the exceptional circumstances are still in place.

These provisions are a step towards ensuring a comprehensive system of checks and balances. The Constitution should reinforce these provisions, including by providing for effective judicial review of the actions of the legislature and the executive

c. Establishing a Constitutional Court with a comprehensive jurisdiction

The Draft Constitution provides for the establishment of an independent Constitutional Court with a comprehensive mandate to protect human rights and to uphold the rule of law and the separation of powers, including by determining conflicts of competence between the legislative and executive powers and between the President of the Republic and the Prime Minister.⁸³

i. Supremacy of the Constitution over other aspects of national law

The supremacy of the Constitution in matters of domestic law and the competency of the judiciary to uphold and enforce the provisions of the Constitution is a fundamental underpinning of the rule of law and separation of powers. In particular, through its supremacy, the Constitution, as the highest law of the land and the embodiment of the will of the people, is elevated above other laws and consequently above the legislator. Unfortunately, neither the 1959 Constitution nor the Draft Constitution explicitly provides for the supremacy of the Constitution.

In order to guarantee the integrity of the Constitution, it is important that the Constitution itself clearly and unambiguously recognizes the supremacy of the Constitution in areas of domestic law. The Constitution should also provide that its provisions be read consistently with Tunisia's international legal obligations. In addition, in order to ensure the separation of powers and that all legislative and executive acts are in accordance with the Constitution, it is equally important that the body charged with ensuring these functions is fully independent.

Article 72 of the 1959 Constitution provided for a Constitutional Council,⁸⁴ which was established by a Presidential Decree in 1987 and was governed by Articles 72 to 75 of the 1959 Constitution as well as organic law No. 2004-52 of 12 July 2004. This framework empowered the Constitutional Council with the review of bills submitted to it by the President of the Republic to ensure their conformity with the Constitution.⁸⁵ Under Article 72 of the 1959 Constitution, in addition to treaties and organic laws, numerous other laws relating to nationality, crimes, judicial procedures, education and public health, among others, had to be referred to the Constitutional Council. The Council was also empowered to consider appeals relating to the election of the Members of Parliament, under Article 72, and on the validity of candidates running for the presidency, under Article 40. Under Article 73 of the 1959 Constitution, the Constitutional Council was also required to consider all bills proposed by the President before they were submitted to the Chamber of Deputies and after submission, if changes had been made.

⁸³ Draft Constitution, Article 117.

⁸⁴ Article 72 provides that "*The Constitutional Council looks into bills submitted to it by the President of the Republic to ensure their conformity with the Constitution*".

⁸⁵ *Ibid.*

In addition, while the decisions of the Council regarding elections were deemed final,⁸⁶ other decisions were to be “*respected by all public authorities*” unless they related to issues stipulated in paragraph 3 of Article 72 of the 1959 Constitution, which concerned the organization and functioning of the country’s institutions.⁸⁷

Despite its mandate, the Council failed to prevent the adoption of laws contravening various fundamental provisions of the Constitution. It therefore failed to act as an effective check on the executive or the legislature and on their actions. Several elements contributed to this situation.

First, the Constitutional Council was solely charged with examining the constitutionality of laws *ex ante*. It was not a judicial body tasked with ruling on constitutional issues *ex post*.

Second, access to the Constitutional Council was limited to the President and neither the Members of Parliament nor individuals were allowed to challenge the constitutionality of acts taken by the executive and legislature before the Council.

Third, ambiguity regarding the binding nature of the decisions of the Constitutional Council also undermined its effectiveness and the compliance of public authorities with its decisions.

Fourth, the role of the Constitutional Council was also undermined by the lack of guarantees for its independence. Indeed, the executive firmly controlled the composition of the Council. In particular, the President of the Republic was entitled to directly appoint four of the nine Council members, including its President.⁸⁸ In addition, the three members appointed by right to the Council, including the President of the Court of Cassation, the Audit Court, and the Administrative Court, were each appointed to their judicial posts by the President of the Republic or the Prime Minister.

After the ouster of President Ben Ali, the Constitutional Council was dissolved by Law-Decree No. 2011-14 of 23 March 2011.

ii. The Constitutional Court in the Draft Constitution

In order to guarantee the rule of law and separation of powers, including judicial independence, and to protect the supremacy of the Constitution and the rights embodied in it, the composition and jurisdiction of, and access to, the Constitutional Court should be thoroughly addressed in the Constitution.

Under Article 117 of the Draft Constitution, the newly introduced Constitutional Court will be competent to assess, *ex ante*, the compliance of laws with the Constitution. Referral of draft laws to the Court by the President is mandatory for laws amending the Constitution, laws relating to the ratification of international conventions and draft organic laws.⁸⁹ When the referral is not mandatory, it can be exercised by the President of Republic, the President of the People’s Assembly, the Prime Minister or by one-fifth of the members of People’s Assembly. Under the same article, the Court can

⁸⁶ 1959 Constitution, Article 75.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ An “organic law”, common in civil law systems, is a law provided for by the Constitution to complement general provisions of the Constitution. It has a higher status than other laws and requires approval from the Constitutional Court before it is adopted.

also assess laws referred to it by other courts, where these courts decide of their own accord to refer the case or where the parties to a conflict request a referral. In addition, the Constitutional Court must review the constitutionality of the internal regulations of the People's Assembly and can receive and examine disputes concerning the conflict of competences between the legislative and executive power, and between the President of the Republic and the Prime Minister. Moreover, the Court is also competent to examine matters relating to states of emergency and exception as well as charges brought against the President of the Republic for high treason and violation of the Constitution. Finally, the Court is competent to review final judicial decisions violating the rights and freedoms recognised by the Constitution and after exhausting all other form of review.

In addition to this comprehensive jurisdiction, the Draft Constitution provides for meaningful guarantees for the independence of the Constitutional Court, mainly by limiting the role of the executive in nominating its members and President. Under Article 118, the court is composed of 12 members, each of whom must have at least 20 years of senior legal expertise. The members are elected by a two-thirds majority of the People's Assembly on the basis of a list of candidates, four of whom are recommended by the President of the Republic, four by the Prime Minister, eight by the President of the People's Assembly and eight by the HJC. The elected members of the Court elect the President and Vice-President of the Court. Article 119 provides that the members of the Constitutional Court are judges and are subject to the same constitutional provisions relating to the rest of the judiciary.

Indeed, Constitutional Courts are judicial bodies, governed by the same standards relating to independence as any other member of the judiciary. For example, the Council of Europe, in its recommendation on judicial independence, efficiency and responsibilities states: "*This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters.*"⁹⁰ Similarly, the Inter-American Court has upheld the importance of guarantees of independence for Constitutional Court judges.⁹¹

The Constitution should also ensure that the decisions of the Constitutional Court are binding on other branches of government and are enforced. Under Article 124 of the Draft Constitution, the decisions of the Constitutional Court should be reasoned and are binding on all authorities. While the wording of this provision significantly improves Article 75 of the 1959 Constitution, it should be further amended to unequivocally affirm that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal, and are binding on, and must be enforced by all public authorities, including judicial ones.

d. Civilian oversight over the security services and armed forces

The 1959 Constitution contained few provisions relating to the security services and armed forces. Under Article 44, the President was the Commander-in-Chief of the armed forces. He also appointed senior military officials, on the recommendation of the government.⁹² Subsidiary legislation provides more detailed provisions on civilian oversight of the armed forces and security services. According to Law-Decree No. 75-671 of 25 September 1975, the armed forces are placed under the authority of the

⁹⁰ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010, Chapter 1, para.1.

⁹¹ *Case of the Constitutional Court v. Peru*, Inter-American Court of Human Rights, Judgment of 31 January 2001, para.64(a)-(b).

⁹² 1959 Constitution, Article 55.

Minister of Defence.⁹³ Under Law No. 82-70 of 6 August 1982, members of the internal security forces are supervised by the Minister of Interior and placed under the authority of the President of the Republic.⁹⁴ The internal security forces include the police, the National Guard, the Judicial Police and the Presidential Guard Forces.

This limited framework did not prevent the security services from becoming pivotal to President Ben Ali's regime in practice, including by designing and executing the regime's repressive policies. Indeed, for decades, the security services have been responsible for serious gross human rights violations, including cases of torture and other-ill treatment, unlawful killing and arbitrary arrest and detention. In his report, the Special Rapporteur on torture observed, "*during the period from 1999 to 2009 (September), 246 police officers were prosecuted for ill-treatment and misconduct. Out of 246 initiated prosecutions, 228 final judgments were handed down during the same period. Reportedly, only seven criminal convictions for acts of torture and ill-treatment were handed down against law-enforcement and prison officials under article 53 of the statute of the Internal Security Forces.*"⁹⁵

Even after the ouster of President Ben Ali, security services have continued to enjoy effective impunity for these human rights violations. The lack of judicial independence as well as the lack of Parliamentary control mechanisms over the work of security services has exacerbated such impunity.

The uprising that led to the toppling of President Ben Ali was centred on the ideal of ensuring the accountability of all State institutions and their compliance with universally recognized rule of law principles. The drafting of the Constitution offers a unique opportunity to meet these principles and fully confront the issue of civilian control over, and the accountability of, the security services and armed forces.

Under Article 95 of the Draft Constitution, the armed and security services are to be governed by the following principles: subordination to the executive; complete impartiality; only the State can establish the armed forces and national security services; security services act and train their members according to the Constitution, laws and conventions; and members are prohibited from applying orders that are, prima facie, illegal. A parliamentary commission ensures that these principles are protected.

Article 96 provides that the national army is a military armed force constituted and organised, in terms of hierarchy and discipline, according to the law. It is obliged to be politically neutral and to defend the State, as well as the State's independence and territorial integrity.

While these provisions significantly improve the current legal framework governing the security services and armed forces, they should be further amended to provide for comprehensive parliamentary mechanisms that are empowered to oversee and scrutinize the work of these services and forces and to hold them to account, including by ensuring that they are acting in accordance with the law in carrying out their prescribed functions.

⁹³ Decree No.75-671 of 25 September 1975 establishing the attributions of the Ministry of Defence, Article 4.

⁹⁴ Law No.82-70 of 6 August 1982, Article 2 as amended by Law 2000-58 of 13 June 2000.

⁹⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum: Mission to Tunisia, 2 February 2012, A/HRC/19/61/Add.1, para.33.

Under international standards, the armed forces, the police and other security agencies shall be under the authority of legally constituted civilian authorities and accountable to a democratically elected power. The UN Human Rights Council recently established, in Resolution 19/36, the need to ensure that *"the military remains accountable to relevant national civilian authorities"*.⁹⁶ The UN Human Rights Committee has also persistently pointed out the need to subject the armed forces to effective control by civilian authorities. The Committee has previously expressed its concerns at *"the lack of full and effective control by civilian authorities over the military and the security forces"*,⁹⁷ as well as *"the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them"*.⁹⁸

From a comparative perspective, Article 4 of The Inter-American Democratic Charter states that the *"constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the Rule of Law on the part of all institutions and sectors of society are equally essential to democracy"*.⁹⁹ The General Assembly of the Organization of American States has also highlighted that *"the system of representative democracy is fundamental for the establishment of a political society wherein human rights can be fully realized and that one of the fundamental components of that system is the effective subordination of the military apparatus to civilian power"*.¹⁰⁰ In this light, the Inter-American Commission on Human Rights has long recognized the importance of placing the armed forces under the control of a democratically accountable authority. For example, in its reports on Venezuela, the Commission expressed *"extreme concern at reports of undue influence of the armed forces in the country's political affairs, as well as excessive involvement by the armed forces in political decision-making"*.¹⁰¹ The Inter-parliamentary Union also *"urges all parliaments and governments to ensure that bodies responsible for security, particularly the security forces, are accountable both to elected civil authorities and to civil society, and that they operate in accordance with the rule of national and international law"*.¹⁰²

III. CONSTITUTIONIONAL GUARANTEES OF JUDICIAL INDEPENDENCE

⁹⁶ Human Rights Council, Resolution 19/36 on "Human Rights, democracy and the rule of law", A/HRC/Res/19/36, 19 April 2012, para.16(j)(vi).

⁹⁷ Concluding Observations of the Human Rights Committee: El Salvador, doc CCPR/C/79/Add. 34, 18 April 1994; part 4.

⁹⁸ Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add. 11, 29 July 1999, para.9

⁹⁹ The Inter-American Democratic Charter, 11 September 2001

¹⁰⁰ Preamble of resolution AG/RES. 1044 (XX-0/90) adopting the Annual Report of the Inter-American Commission of Human Rights, June 8, 1990. See also Annual report of the IACHR for 1990-1991 available at: <http://www.cidh.org/annualrep/90.91eng/chap.4d.htm> last accessed 12 October 2012

¹⁰¹ *Report on the Situation of Human Rights in Venezuela, State Security*, Inter-American Commission on Human Rights, 29 December 2003, OEA/Ser.L/V/II.118, para.280. See also comments made by the Commission in the case of Guatemala, Inter-American Commission on Human Rights, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala, General Conclusions on the Rule of Law in Guatemala*, doc. 5 rev. 10EA/Ser.L/V/II.118, 29 December 2003.

¹⁰² Inter-Parliamentary Union, Resolution on "The prevention of military and other coups against democratically elected government and against the free will of the peoples expressed through direct suffrage, and action to address grave violations of the human rights of parliamentarians", adopted by consensus by the 104th Inter-Parliamentary Conference, Jakarta, 20 October 2000, para.9.

Under international law, States must guarantee the independence of the judiciary. This principle is affirmed in the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), which provide that it is the responsibility of all institutions, governmental and others, to respect and observe the independence of the judiciary.¹⁰³ It is also reflected in Article 14 of the ICCPR, to which Tunisia is a party, which guarantees the right to a fair trial by a competent, independent and impartial tribunal established by law.

1. The judiciary in the 1959 Constitution and the Judicial Authority Law

Despite the recognition of the principles of separation of powers and the independence of the judiciary in the 1959 Constitution, judicial independence has been undermined for many years by the executive's systematic and arbitrary interference in judicial matters. In addition, although the 1959 Constitution provided that judges were subject to the sole authority of the law, in practice, independent judges who challenged the subordination of the judiciary to the executive branch have long been exposed to pressure, intimidation and reprisals, including being subjected to abusive transfers of jurisdiction.

The 1959 Constitution dedicated only four Articles to the judiciary. None of them guaranteed the irremovability of judges. Article 65 affirmed that: "*The judicial authority is independent. In exercising their functions, judges are subject only to the authority of the law.*" Article 66 provided that judges are "*appointed by Presidential decree on the recommendation of the High Judicial Council*".

In the absence of comprehensive constitutional provisions and guarantees for the independence of judges and the functioning of the judiciary, Law No. 67-29 of 14 July 1967 on the Organization of the Judiciary, the HJC and the Statute of Magistrates, provides more details on both the functioning of the judiciary and on the conditions governing the careers of judges. It also provides more details about the control exercised by the executive over the judiciary.

For example, Article 42 of Law No. 67-29 provides that "*The rules applicable to civil servants regarding leave, secondment, redundancy, and termination of service shall apply to magistrates, when they are not inconsistent with the provisions of this law*". This provision establishes a system under which judges are subject to the supervision and authority of their hierarchical superior, the Minister of Justice. This subordination of the judiciary to the executive represents a permanent threat to the independence of judges in clear violation of international standards on the separation of powers and judicial independence.

Under these standards, judges must enjoy full protection when exercising their duties, particularly in terms of tenure. The UN Basic Principles state that "*Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists*" and that "*The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law*".¹⁰⁴ Similarly, the Principles and Guidelines of the African Union on the right to a fair trial and legal assistance in Africa (the African Union Principles) provide that "*Judges or members of*

¹⁰³ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1.

¹⁰⁴ *Ibid*, Principles 12 and 11.

*judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office” and require that “tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers, shall be prescribed and guaranteed by law”.*¹⁰⁵

In addition, while Article 10 of law No. 67-29 provides for judges to be appointed by Presidential Decree, upon a recommendation by the HJC, in practice, the Minister of Justice controls the selection process. In particular, the Minister: oversees the High Magistrates Institute (HMI), which is attached to the Ministry of Justice;¹⁰⁶ sets, by decree, the criteria for judges’ selection as well as the programme of studies at the HMI;¹⁰⁷ and, after the completion of training at the HMI, presents the list of graduates that can be appointed as a judge to the HJC and the President.¹⁰⁸

This framework gives the Minister of Justice broad powers over the selection, training and appointment of judges, to the detriment of the HJC in this area, thereby potentially enabling appointments for improper reasons. Under international standards, *“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.”*¹⁰⁹ On a number of occasions, the UN Human Rights Committee has expressed concern at the manner in which judges were appointed and recommended a more transparent procedure. The Committee has recommended that States establish an independent mechanism responsible for the recruitment and disciplining of judges to ensure judicial independence.¹¹⁰

The 1959 Constitution provided for the establishment of such mechanisms in the form of a HJC empowered, under Article 67, to *“ensure respect of the guarantees granted to judges regarding appointment, promotion, transfer and discipline”*. However, the 1959 Constitution did not provide for any specific guarantees for the independence of the HJC itself. Under Article 6 of Law No. 67-29, the President of the Republic served as the President of the HJC and the Minister of Justice served as the Vice President.¹¹¹ In total, no less than 11 of its 15 members were representatives of the executive or appointed to their positions by Presidential Decree.¹¹² As the President and Vice President of the HJC, the executive was able to effectively control the functioning of this body, including the convening of meetings and, through the casting of votes by the President and Vice President, in decision-making.

In addition, although Law No. 67-29 of 14 July 1967 determines the framework for the functioning of the HJC and the rules applicable to judges regarding their recruitment,¹¹³ promotion¹¹⁴ and discipline,¹¹⁵ the executive has also exercised effective control over the career of judges.

¹⁰⁵ Principles and Guidelines on the right to a fair trial and legal assistance in Africa, Adopted as part of the African Commission’s activity report at 2nd Summit and meeting of heads of State of AU held in Maputo from 4-12 July 2003, Article 4(l) and (m).

¹⁰⁶ Law No.85-80 of 11 August 1985, Article 2.

¹⁰⁷ Law No. 67-29 of 14 July 1967, Article 29.

¹⁰⁸ *Ibid*, Article 31.

¹⁰⁹ UN Basic Principles, *supra*, Principle 10.

¹¹⁰ Concluding Observations of the Human Rights Committee on the second periodic report of the Congo, UN document CCPR/C/79/Add.118, para. 14.

¹¹¹ Law No.67-29, Article 6.

¹¹² *Ibid*, Article 7 bis.

¹¹³ Law No.67-29, Chapter 4, Articles 29–32.

¹¹⁴ *Ibid*, Chapter 4, Articles 33–36.

¹¹⁵ *Ibid*, Chapter 7, Articles 50–54.

For example, even though the HJC had sole competence to discipline judges, under Article 56 of Law No. 67-29, the Minister of Justice is empowered to intervene and influence disciplinary proceedings in several ways: the Minister may seize the disciplinary council,¹¹⁶ issue warnings to judges¹¹⁷ and, upon receiving a complaint, suspend a judge pending a disciplinary hearing.¹¹⁸ Article 14 of Law 67-29 also gives the Minister of Justice the power to decide, during the judicial year, to transfer a magistrate "for necessity of service" and, under Article 20, to control short-term assignments.¹¹⁹ The right of judges to leave Tunisia during their period of leave is also strictly controlled by the Minister of Justice and requires prior approval from the latter.¹²⁰

These provisions paved the way for political interference in judicial matters and were used as a means of subjecting judges to undue pressure and influence. Under President Ben Ali, many judges were subject to disciplinary transfers and in some cases were dismissed for having expressed their views on the lack of independence of the judiciary, or for having publicly denounced the lack of proper administration of justice.¹²¹ Under international standards, suspensions and dismissals of judges may be imposed only after a fair, transparent and impartial procedure, guaranteeing the rights of judges to the presumption of innocence, the right of defence and the right to appeal the decisions taken against them. Any decision to dismiss a judge must be subject to judicial review. The African Union Principles provide that "*Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings*".¹²² In addition, the UN Basic Principles provide that decisions in disciplinary, suspension and removal proceedings should be subject to independent review.¹²³ The Universal Charter of the Judge offers additional requirements.¹²⁴ It states, at Article 8: "*A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure. A judge must be appointed for life or for such other period and conditions,*

¹¹⁶ *Ibid*, Article 56.

¹¹⁷ *Ibid*, Article 51.

¹¹⁸ *Ibid*, Article 54.

¹¹⁹ Law No.67-29, Article 14, stipulates that "*necessity of service*" is the necessity that arises from the need to deal with a vacancy, to appoint judges to new judicial functions, to cope with an apparent rise in the volume of work in a court or to fill new courts with judges.

¹²⁰ *Ibid*, Article 39. See also Article 21, which requires judges to reside in the seat of their jurisdiction to which they have been assigned. Exemptions to this requirement must be obtained from the Minister of Justice.

¹²¹ *Attacks on Justice - Tunisia*, 2005, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Tunisia-Attacks-on-Justice-2005-Publications-2008.pdf>, last accessed 16 January 2013. In this report, the ICJ documented the case of former judge Mokhtar Yahyaoui, then President of the 10th Civil Chamber of the Tribunal of First Instance of Tunis, who was dismissed as a judge on 29 December 2001 for having written an open letter to President Ben Ali lamenting executive interference in the work of the judiciary. Similarly, in July 2004, the executive board of the Association of Tunisian Magistrates (AMT) planned a press conference in Tunis to discuss judges' right to improved working conditions (including improved status, fairer representation of judges on the HJC and security of tenure). However, the authorities banned it and the police dispersed journalists who had been invited and were attending. Following condemnation by the AMT for police raids on the Tunis law Courts in March 2005, the offices of AMT were also raided by police with Justice Kalthoum Kennou, a member of the AMT and present at the time, subjected to intimidation and telephone harassment.

¹²² The African Union Principles, *supra*, Principle 4(q).

¹²³ UN Basic Principles, *supra*, Principle 20.

¹²⁴ The Universal Charter of the Judge, approved by the International Association of Judges, 17 November 1999, Taipei.

that the judicial independence is not endangered. Any change to the judicial obligatory retirement age must not have retroactive effect."

The Tunisian legal framework governing the judiciary has had an adverse impact on the administration of justice as a whole. Unfortunately, this impact has continued to have an effect in the transitional period.

2. The judiciary in the transitional period

a. The judiciary in the Provisional Constitution

The popular uprising that led to the ouster of President Ben Ali provides a unique opportunity to break with the practices of the former regime and to establish an independent and impartial judicial system in accordance with international standards.

The NCA tried to lay the foundations for such a system in Articles 22 and 23 of the Provisional Constitution. Both articles respectively affirm that the judiciary shall act in complete independence and that the NCA shall adopt organic laws on the HJC and on the reform of the justice system. Paragraph 2 of Article 22 provides: "*After consultation with judges, the National Constituent Assembly shall issue an organic law establishing and defining the composition, prerogatives and formation mechanisms of a provisional representative body to oversee the courts of justice and to replace the High Judicial Council.*"

Following the adoption of the Provisional Constitution, the HJC was suspended with a view to establishing a temporary judicial authority. The establishment of this body, as well as the reform of Law No. 67-29, is essential for reforming the judiciary and for putting an end to its subordination to the executive.

However, since the suspension of the HJC, and despite repeated calls from organizations representing the judiciary and civil society for the implementation of Article 22, no temporary judicial authority has been created. Indeed, the legal framework governing the judiciary under President Ben Ali's regime is still in force as no bills concerning the reform of the judiciary were passed by the NCA.

In the absence of these bills, the executive is likely to fill the vacuum and to perpetuate problematic policies and practices of the old regime.

In July 2012, the Minister of Justice dismissed 70 judges suspected of corruption and "loyalty" to the old regime, without any guarantees of due process, including providing information about the legal grounds for the decision, factual evidence on which the decision was based and a fair procedure under which they could challenge both the decision and the evidence used against them. This decision maintains the improper interference of the executive in judicial affairs and shows a lack of political will to put an end to the practices of the past.¹²⁵ The Tunisian authorities should ensure a full review of the cases of the dismissed judges in accordance with international standards of due process. Only an independent body can ensure the fairness of the review proceedings. In addition, the authorities, in particular the NCA,

¹²⁵ For further information see *Executive control over judiciary persists in Tunisia*, ICJ 6 August 2012, available at <http://www.icj.org/executive-control-over-judiciary-persists-in-tunisia/> last accessed 16 January 2013; and *The Reform of the Judiciary in Tunisia*, ICJ, September 2012, available at <http://icj.wpenline.netdna-cdn.com/wp-content/uploads/2012/09/TUNISIALegalmemoENGLISHfinal.doc.pdf> last accessed 16 January 2012

should, as a matter of urgency, establish the temporary judicial authority and end the executive's control over judges' careers.

b. The use of military courts in the transitional period

Another source of concern regarding the administration of justice in the transitional period is the widespread use of military tribunals in cases involving human rights violations.

The 1959 Constitution did not include any provision on the use of military courts. However, under President Ben Ali's regime military courts were widely used to try political opponents as well as suspected "terrorists".¹²⁶

In the transitional period, while the Provisional Constitution does not contain any provision relating to military justice, two decrees were adopted on 29 July 2011 amending the framework governing military courts and, in particular, increasing their jurisdiction.¹²⁷

For example, Law-Decree No. 2011-69 of 29 July 2011 amended the Code of Military Justice of 1957 (the CMJ) to allow victims of cases before military courts to bring a civil claim for compensation before the court¹²⁸ and to appeal the decisions of the court.¹²⁹ However, the law broadens the jurisdiction, *ratione materiae* and *ratione personae*, of these tribunals beyond permissible limits. Indeed, Articles 5 and 8 of the CMJ allow for military tribunals to have jurisdiction over "ordinary crimes" (*crimes de droit commun*) involving civilians.¹³⁰ In addition, under Article 22 of Law No. 82-70 of 6 August 1982,¹³¹ military jurisdiction extends to members of the Internal Security Forces.

Under this framework, military tribunals have jurisdiction over almost all cases of human rights violations committed under President Ben Ali's regime and during the uprising, including cases of unlawful killing, torture and other ill treatment involving military and security personnel. Most of these cases, initially brought before ordinary

¹²⁶ Article 123 of the CMJ gives military tribunals jurisdiction over civilians charged with serving a terrorist organization that operates abroad. See also, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, A/HRC/19/61/Add.1, para.30.

¹²⁷ Law-Decree No.2011-69 of 29 July 2011 amending the Code of Military Justice and Law Decree No.2011-70 of 29 July 2011 amending to amend the Law-Decree on the Organisation of Military Justice and on the Statute of Military Judges

¹²⁸ New Article 7 of the CMJ, as amended by Law- Decree No.2011-69.

¹²⁹ Article 28bis of Law-Decree No.2011-69 provides for the creation of a Court of Military Appeal and the right to lodge an appeal against judgments of the Military Court of First Instance in correctional or criminal matters. Article 30 also identifies those entitled to appeal to the Cassation Court against final judgments and decisions rendered on the merits, notably the victim of civil damage but only with respect to his or her civil interests.

¹³⁰ Former Article 5(6) of the CMJ, which contained an explicit limitation on the jurisdiction of military courts with respect to civilians, was abolished by Law-Decree No. 2011-69. Article 6 of the CMJ, also as amended by Law-Decree No.2011-69, provides: "*In case of a prosecution for a criminal offence committed by military personnel while off duty and where one party is not military, the public prosecutor or the investigating judge relieves himself of the charges against the military part in favour of the military court of first instance.*"

¹³¹ Article 22 of Law No. 82-70 of 6 August 1982, on the general statute of the Internal Security Forces, establishes the jurisdiction of military tribunals in "*cases involving agents of the Internal Security Forces for facts that took place in, or on the occasion of, the exercise of their functions when the alleged facts are related to their responsibility in the areas of internal and external security of the State, or to the maintenance of order on the public roads and in public places and in public or private businesses, and during or following public meetings, processions, parades, demonstrations and gatherings.*"

courts, have been transferred to military tribunals, pursuant to Article 22 of Law No. 82-70.

Under international law and standards, the jurisdiction of military tribunals must be limited to cases involving military personnel and military offences, which predominantly include disciplinary proceedings. It must exclude cases of gross violations of human rights committed by military personnel and other law enforcement officers or officials.

The UN Commission on Human Rights asserted, in its resolution on Civil Defence Forces, that "*offences involving human rights violations by such forces shall be subjected to the jurisdiction of the civilian courts*".¹³² Numerous Special Rapporteurs and independent experts of the United Nations, including the independent expert on impunity, have also recommended that serious violations of human rights should not be brought before military tribunals but before civilian courts.¹³³ The UN Principles Governing the Administration of Justice through Military Tribunals (the Decaux Principles) also concur in affirming that: "*In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.*"¹³⁴

The systematic use and broad jurisdiction of military tribunals in Tunisia is even more problematic considering the failure of these tribunals to meet international standards of due process. Indeed, proceedings before these courts have failed so far to meet international fair trial standards, including the right of defence. Access to the case files by lawyers is often limited, as many files involving senior security officials remain confidential and inaccessible. Furthermore, various sentences imposed by these tribunals have not been commensurate to the seriousness of the crime committed, which has contributed to reinforcing the impunity that prevailed under the old regime.¹³⁵

Military courts also fail to meet international standards of independence and impartiality. This lack of independence assumes several forms. First, Article 2 of Law-Decree No.70 of 29 July 2011 provides that military judges are appointed by decree at the instigation of the Minister of Defence.¹³⁶ Second, although Law-Decree No.70 provides that military judges are independent of the military in carrying out their duties and are only subject to the supremacy of the law, it also provides that military judges are subject to general disciplinary rules.¹³⁷ These rules are largely based on the concept of subordination to superior commanders. Finally, although the composition of military tribunals comprises both military and civilian judges, it should be noted that military judges hold a majority in district military tribunals, which are

¹³² UN Commission on Human Rights, Resolution 1994/67 on Civil Defence Forces, E/CN.4/RES/1994/67, 9 March 1994, para.2(f).

¹³³ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, *supra*, Principle 29

¹³⁴ UN Principles Governing the Administration of Justice through Military Tribunals, the Decaux Principles, E/CN.4/2006/58. 13 January 2006, at Principle 9

¹³⁵ In the case of *Barakat Essahel* (First Instance, No. 74937/2011; Appeal No. 334/2012) which concerned acts of torture carried out in 1991 by the military against members of the armed forces suspected of involvement in a coup attempt and was brought before the Military Tribunal of Tunis, the sentence against some of the accused at first instance (4 years imprisonment) was reduced to 2 years by the Military Court of Appeal of Tunis.

¹³⁶ Law-Decree No.2011-70 of 29 July 2011, Article 2

¹³⁷ *Ibid*, Article 19

composed of a civilian President and two military judges, and in criminal military tribunals, which are composed of a civilian President and four military judges.¹³⁸

The lack of guarantees of independence for military tribunals is also reflected in the composition and operating procedures of the Military Judicial Council (MJC). Although the composition of the MJC is divided equally between military and civilian judges and prosecutors, the President of the MJC is the Minister of Defence.¹³⁹ This is even more significant given that the President has the casting vote. Furthermore, when the MJC sits as a disciplinary board, only military members take part in the vote.¹⁴⁰ In addition, discussions and deliberations of the MJC are kept secret, since its members are bound by professional confidentiality during and after the exercise of their functions.¹⁴¹

These provisions highlight the inherent incompatibility between military tribunals and the principles of an independent judiciary. In this regard, the European Court of Human Rights and the Inter-American Commission on Human Rights have both stressed the fact that military judges cannot be considered independent and impartial because they are part of the hierarchy of the army.¹⁴²

Military prosecutors also form part of the hierarchy of the armed forces. Under the CMJ, the prosecutor's duties are performed by the public prosecutor of the Permanent Military Tribunal of First Instance or by one of his deputies.¹⁴³ The Prosecutor's duties include the exercise of "*public action*", notably through the initiation of criminal proceedings, but they also include, according to the principle of discretionary prosecution, the decision to close a file, even when the alleged facts would constitute a criminal offence.

However, under international standards, for an investigation to be effective it must be conducted by an independent and impartial prosecutorial authority. This independence may be compromised where the investigation of violations perpetrated by members of the armed forces or security forces is carried out by those responsible for the violations. The European Court of Human Rights in its case law affirmed that "*military prosecutors were (...) active military personnel and they were members of the military structure based on the principle of hierarchical subordination*" and that "*this institutional link has resulted (...) in a lack of independence and impartiality of the military prosecutor in the carrying out of the investigation*".¹⁴⁴ The Human Rights Committee has expressed the view that cases of human rights violations must be removed from military courts' jurisdiction and investigations carried out by civilian prosecutors.¹⁴⁵

¹³⁸ Law-Decree No.2011-69 of 29 July 2011, Article 10

¹³⁹ Law-Decree No.2011-70 of 29 July 2011, Article 14.

¹⁴⁰ *Ibid*, Article 17.

¹⁴¹ *Ibid*, Article 18.

¹⁴² *Findlay v. United Kingdom*, 110/1995/616/706, European Court of Human Rights, Judgment of 25 February 1997, and *Incal v. Turkey*, 41/1997/825/1031, European Court of Human Rights, Judgment of 9 June 1998. Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter V. para.1.

¹⁴³ New Article 10 and 14 of the CMJ as amended by Law-Decree-Law No.2011-69.

¹⁴⁴ *Case Voiculescu c. Roumanie*, Request No. 5325/03, Judgment of 3 February 2009, Final judgment, 3 May 2009, in French, para.35. Also see, *mutatis mutandis*, *Barbu Anghelescu c. Roumanie*, No. 46430/99, para 67, 5 October 2004; *Bursuc c. Roumanie*, No. 42066/98, para 107, 12 October 2004 ; et *Mantog c. Roumanie*, No. 2893/02, para. 69-70, 11 October 2007.

¹⁴⁵ Human Rights Committee, Concluding Observations on Colombia, CCPR/C/79/Add.76, para.34.

3. The Judiciary in the Draft Constitution

a. *Constitutional guarantees for the independence of the judiciary*

The Draft Constitution contains a detailed section on the judiciary, which aims to improve the guarantees for its independence. Article 100 provides "*the judiciary is an independent power that ensures justice, guarantees the supremacy of the Constitution and the rule of law, and protects human rights and freedoms*". Further, Article 106 provides that "*any interference in the judiciary is a crime punishable by the law*".

However, various provisions relating to the judiciary in the Draft Constitution need to be amended in order to fully comply with international standards. For example, Article 103 provides that judges are "*irremovable except in the cases, and within the guarantees, provided for by the law.*" This provision still falls short of international standards on the irremovability of judges, which provide that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties.¹⁴⁶ Security of tenure is the cornerstone for the independence of judges at the individual level as it provides them with full protection when exercising their duties. The Constitution should therefore, unequivocally, recognise the irremovability of judges as set forth in international standards.¹⁴⁷

The Draft Constitution dedicates various articles to the HJC with a view to reinforcing its independence and competence. Article 110 provides that half of the HJC's members will consist of judges, while the other half will consist of appointed individuals who are not judges. Half of the judges will be appointed, while the other half will be elected. All members of the HJC will elect its President from among the members who are judges. Article 111 also guarantees the autonomy of the HJC and its administrative and financial independence. With regard to the HJC's competences, under Article 108, the HJC oversees "*the proper-functioning of the judiciary and respect for its independence, proposes reforms, expresses its views about the draft bills relating to the judiciary and is the only body responsible for the professional career and the discipline of judges.*" Furthermore, Article 103 provides that judges "*cannot be suspended or dismissed or subject to any disciplinary sanction without a reasoned decision from the Higher Judicial Council.*"

These provisions significantly improve the current legal framework governing the Tunisian judiciary. They must be amended however to explicitly empower the HJC, in accordance with international standards, to fully oversee the selection, appointment, promotion according to objective criteria, and transfer of judges. The UN Basic Principles stipulate: "*Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.*"¹⁴⁸

The provisions of the Draft Constitution relating to the judiciary should also be amended to limit the jurisdiction of military tribunals to military personnel and military offences only. Article 105 prohibits the establishment of exceptional courts and refers to an organic law on the competences, composition, organisation and the procedures before military jurisdiction. However, the Draft Constitution does not address the use of military tribunals under the current legal framework, nor does it ensure the necessary limitations on the scope of military jurisdiction. The Constitution

¹⁴⁶ UN Basic Principles, *supra*, Principle 18

¹⁴⁷ UN Basic Principles, *supra*, Principle 13

¹⁴⁸ *Ibid*

should expressly ensure that military tribunals have no jurisdiction to try civilians or to try military and other law enforcement officers for violations of human rights.

b. Constitutional guarantees for the independence of the Office of the Public Prosecutor

Prosecutors play a crucial role in the administration of justice and in the proper functioning of the criminal justice system. They must ensure that public order is protected while fully respecting the rights of the accused and victims at all stages of criminal proceedings. Only an independent and impartial prosecutor may perform such duties fairly. The UN Guidelines on the Role of Prosecutors encourage States to “ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability”.¹⁴⁹

In Tunisia, the OPP has always been under the authority of the Minister of Justice.

Under Article 15 of Law No. 67-29, “public prosecutors are placed under the direction and control of their superiors and under the authority of the Minister of Justice”. The Code of Criminal Procedure (CCP) also allows the Minister of Justice to exercise effective control over the OPP.¹⁵⁰ According to Article 21 of the CCP, “The public prosecutor is required to make written submissions in accordance with instructions given to him under the conditions set out in Article 23”. Article 23 provides: “The Minister of Justice may report to the Public Prosecutor the violations of criminal law within his knowledge, may require him to initiate, or ask someone to initiate, the prosecution or to seize the competent jurisdiction with the written submissions considered desirable.”

These provisions establish a system under which prosecutors are subordinated to the executive. This subordination also assumes other forms by virtue of various provisions of Law No. 67-29 relating to the recruitment, promotion, discipline and transfer of prosecutors. Indeed, the executive has overall control over the careers of prosecutors, who are considered to be judges under the judicial authority law, either directly or through its control over the HJC.

The structure of the Tunisian OPP is modelled on the French system. In this respect, it is important to note that the European Court of Human Rights criticized this system by stating that: “the public prosecutor was not a “competent legal authority” within the meaning the Court’s case-law gave to that notion [...] he lacks the independence in respect of the executive to qualify as such.”¹⁵¹ The Inter-American Commission on Human Rights has stressed the need to ensure the independence of public prosecutors: “the Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch.”¹⁵² The UN Guidelines on the Role of Prosecutors also encourage States in “securing and

¹⁴⁹ UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Guideline 4.

¹⁵⁰ Code of Criminal Procedure, Law No. 68-23 of 24 July 1968.

¹⁵¹ *Case of Medvedyev and Others v. France*, European Court of Human Rights, Request No. 3394/03, Judgement of 10 July 2008, para. 61.

¹⁵² Inter-American Commission on Human Rights, Report on the situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, para.372.

promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".¹⁵³

Under President Ben Ali's regime, the lack of independence of the OPP in Tunisia led to an almost total absence of investigations and prosecutions in cases of gross violations of human rights. Indeed, the UN Special Rapporteur on torture pointed to "a pattern of a lack of timely and adequate investigation of torture allegations by prosecutors or investigative judges", and stressed that: "complaints of torture were rarely investigated under the Ben Ali regime. [...] In the majority of cases, the investigating judge would refuse to register complaints of torture out of fear of reprisals, and complaints lodged by victims to the prosecutors were almost always dismissed immediately."¹⁵⁴ It is important to note that under Tunisian law the Prosecutor has a discretionary power to assign a criminal file to the investigating judge of his choice.¹⁵⁵

Moreover, when deciding how to proceed in relation to complaints and allegations, the OPP has tended, in cases of corruption and other offences and crimes involving State officials, to systematically file the cases without pursuing them. According to international standards and practices, decisions by prosecutors to close a case should be subject to judicial review. In addition, the UN Guidelines provide that "Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences".¹⁵⁶

The Draft Constitution fails to comprehensively address the situation of the OPP. Article 114 provides that the OPP is part of the judiciary and that prosecutors enjoy the same guarantees as sitting judges. Members of the OPP exercise their duties in accordance with the guarantees and procedures provided for by the law. Despite these provisions, the Draft Constitution should be amended in order to lay the foundation for a full reform of the status and structure of the OPP in Tunisia, including the consolidation of its powers to protect the rights of defendants and victims, and the strengthening of its role in the fight against impunity for serious violations of human rights. The Constitution should therefore recognise the OPP as an independent body from the executive and enhance the guarantees of security of tenure of prosecutors, in particular by ending the authority and the control of the Minister of Justice over the OPP and the interference of the executive in prosecutorial decisions.

¹⁵³ UN Guidelines on the Role of Prosecutors, *supra*, Preamble.

¹⁵⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, A/HRC/19/61/Add.1, paras.29 and 32.

¹⁵⁵ Code of Criminal Procedure, *supra*, Article 28.

¹⁵⁶ UN Guidelines on the Role of Prosecutors, *supra*, Guideline 15.

IV. CONSTITUTION AND HUMAN RIGHTS

The transitional period and the constitution-making process offer unprecedented opportunities to consolidate and strengthen the protection of human rights in Tunisia. The 1959 Constitution recognized various human rights, and Tunisia acceded to numerous international and regional human rights instruments prior to the toppling of President Ben Ali.¹⁵⁷ However, these obligations were undermined by the widespread, and often systematic, human rights violations committed under the rule of both President Bourguiba and President Ben Ali. The violations included, among others, torture, unlawful killings, arbitrary arrests and detention, and unfair trials.

The Tunisian authorities, especially the NCA, should ensure that the shortcomings of the 1959 Constitution are addressed and that the Constitution incorporates a comprehensive Bill of Rights, which contains guarantees for the principal universal human rights and fundamental freedoms and ensures effective protection mechanisms.

1. Human rights in the 1959 Constitution

The 1959 Constitution guaranteed a range of human rights and freedoms, including equality of all citizens before the law (Article 6); freedom of conscience, opinion, expression, assembly and association (Article 8); and the right to not to be detained arbitrarily and to be presumed innocent (Article 12). However, the list of rights contained in the 1959 Constitution was not comprehensive nor did these rights consistently meet, in their definitions and purposes, international human rights standards.

For example, while the 1959 Constitution, amended on several occasions after Tunisia acceded to the UN Convention against Torture (CAT), guaranteed the "*inviolability of the human person*"¹⁵⁸ it failed to prohibit torture as defined in Article 1 of the CAT.¹⁵⁹

In addition, Article 6 of the 1959 Constitution recognized that "*All citizens have the same rights and obligations. All are equal before the law.*" However, this article does not fully comply with international standards and fails to prohibit discrimination based

¹⁵⁷ Instruments ratified by Tunisia before the uprising include: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in January 1967; International Covenant on Economic, Social, and Cultural Rights (ICESCR) ratified in March 1969; International Covenant on Civil and Political Rights (ICCPR) ratified in March 1969; Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified in September 1985 and the Optional Protocol-CEDAW in June 2008; Convention Against Torture (CAT) ratified in September 1988; Convention on the Rights of the Child (CRC) ratified in January 1992; Convention on the Rights of Persons with Disabilities (CRPD) ratified in 2008 and the Optional Protocol-CRPD April 2008. Following the uprising, the transitional authorities ratified the following: International Convention for the protection of all persons from Enforced Disappearance (ICED) ratified in June 2011; Rome Statute for the International Criminal Court, June 2011; the first Optional Protocol to the ICCPR in June 2011; and the Optional Protocol to the CAT in June 2011. In addition, reservations to the CEDAW were withdrawn

¹⁵⁸ 1959 Constitution, Article 5.

¹⁵⁹ Article 1 of the CAT states: "*the term "torture" means any 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.*"

on the grounds mentioned in Article 26 of the ICCPR, which specifies that all persons are equal before the law without discrimination between them based on “*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*” The 1959 Constitution also did not recognize equality between men and women in the enjoyment of all the rights, such as provided for by Article 3 of the ICCPR and Article 15 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).¹⁶⁰

Similarly, Article 12 of the 1959 Constitution provided that “*An accused person is presumed innocent until his guilt has been proven through a procedure that offers him the guarantees that are indispensable for his defence.*” However, this wording falls short of international standards, in particular, Article 14 of the ICCPR.¹⁶¹ The provision did not provide for comprehensive guarantees for the rights of the accused and consequently undermined the right to a fair trial.

The 1959 Constitution also referred to the principle of legality in Article 13 of the Constitution, which states: “*sentences are personal and shall be pronounced only by virtue of a law issued prior to the punishable act, except in the case of a more favourable law.*” However, this provision falls short of international standards, including Article 15 of the ICCPR, which provides “*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*”. Similarly, the African Charter on Human and Peoples’ Rights (the African Charter) provides that “*No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed*”.¹⁶²

In addition to the above, the 1959 Constitution failed to prohibit serious crimes under international law, including, war crimes, crimes against humanity, torture, and enforced disappearance. The 1959 Constitution also failed to recognise economic social and cultural rights (ESCR). Most importantly, the 1959 Constitution did not provide for any effective mechanisms to enforce human rights, including an independent human rights institution or an independent Constitutional Court.

2. Human rights in the Draft Constitution

The shortcomings of the 1959 Constitution highlight the need to ensure effective constitutional guarantees to protect and enforce human rights, in accordance with

¹⁶⁰ Article 3 of the ICCPR provides that “*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*”

¹⁶¹ Article 14(3) of the ICCPR provides for the following guarantees: “(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.

¹⁶² African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU, Article 7(2)

international human rights standards. In acceding to various international human rights instruments after the ouster of President Ben Ali, the Tunisian authorities opted for the reinforcement of human rights' guarantees in Tunisia.¹⁶³ However, the Constitution should unequivocally recognise the supremacy of international law over domestic law and ensure that international human rights treaties to which Tunisia is a party are directly applicable by national courts. To this end, Article 15 of the Draft Constitution, which provides that "[i]nternational treaties shall, where no contradiction with the provisions of the present Constitution exists, be respected," should be fully amended. This article, if adopted, would violate Tunisia's obligations under international law, under which States may not invoke their Constitution or other aspects of domestic law in order to evade obligations incumbent upon them under international law, including treaties they are party to and are in force. The Vienna Convention on the Law of Treaties provides that, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."¹⁶⁴ Along the same lines, the UN Human Rights Committee stressed "Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty."¹⁶⁵

The recognition of the supremacy of international law over domestic law is particularly important given that, while the Draft Constitution broadens the wording of the human rights provisions of the 1959 Constitution, it still falls short of Tunisia's obligations under international human rights law. In particular, as detailed below, various rights in the draft constitution are either inadequately defined or subjected to limitations inconsistent with international standards.

a. Human rights in the Draft Constitution

i. The right to life

Article 16 of the Draft Constitution provides, "the right to life is sacred, and it cannot be infringed except in specific cases provided for by the law". The wording of this article is vague in that it does not specify which cases can legitimise infringements of the right to life and under what conditions. Allowing Parliament to define these cases without any safeguards might undermine the very essence of the right to life.

As a result, Article 16 falls short of Tunisia's obligations under international law, in particular Article 6 of the ICCPR, which provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. In countries which have not abolished the death penalty sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime (...)". The ICCPR, under Article 4, enumerates the right to life as a right which allows for no derogation, even in times of public emergency.

¹⁶³ Tunisia ratified the *Rome Statute for the International Criminal Court*, the *Convention against Enforced Disappearances*, the *Optional Protocols to the Convention against Torture and the International Covenant on Civil and Political Rights*, and reservations to the *UN Convention on the Elimination of all Forms of Discrimination Against Women* were withdrawn.

¹⁶⁴ Vienna Convention on the Law of Treaties, 23 May 1969, Article 26 of which states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Tunisia acceded to the Vienna Convention on 23 June 1971.

¹⁶⁵ UN Committee on Human Rights, General Comment No.31, the nature of the general legal obligations imposed on States parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para.4.

The Tunisian Constitution should therefore be amended to recognise the right to life as an absolute right from which no derogation is accepted.

It should consequently abolish the death penalty, in line with General Assembly resolutions, which call upon all states to establish an immediate moratorium on the death penalty and act expeditiously towards full abolition.¹⁶⁶ These resolutions include Resolution 67/176 of 20 December 2012, which Tunisia voted in favour of.

The ICJ calls on the Tunisian authorities, in particular the members of the NCA, to translate this vote into legal reality and abolish the death penalty in the Constitution. The ICJ considers the death penalty to constitute a violation of the right to life and the right to be free from cruel, inhuman or degrading punishment.

Although the death penalty has not been carried out in Tunisia since 1991, and there is a *de facto* moratorium on executions, death sentences continue to be imposed on a regular basis.¹⁶⁷ The imposition of such sentences has resulted in various human rights violations, including violations arising out of the detention conditions of death row inmates.

These conditions have long been denounced, especially since death row prisoners do not enjoy the same rights as other prisoners, including the right to have access to their family members. In 2011, the Special Rapporteur on Torture raised his concerns about this situation, including the case of a death row prisoner who was held in solitary confinement for 8 months following a hunger strike he had initiated to demand that he be allowed visitors.¹⁶⁸

ii. *The prohibition of torture and other ill-treatment and the principle of legality*

The Draft Constitution fails to prohibit most crimes under international law, including, among others, war crimes, crimes against humanity, and enforced disappearance.

In addition, Article 17 provides that "*the State guarantees the physical integrity and dignity of the human person. All forms of physical or moral torture are prohibited. The crime of torture is imprescriptible. No one can be exempt of responsibility for ordering or carrying out this crime.*" This article is a step towards criminalizing torture and ensuring accountability for it. However, it still falls short of international standards, in particular Article 1 of the CAT. Indeed, the wording of Article 17 of the Draft Constitution provides for a narrow definition of torture, and leaves a large margin of

¹⁶⁶ Resolution 62/149 of 18 December 2007; Resolution 63/168 of 18 December 2008; Resolution 65/206 of 21 December 2010; and Resolution 67/176 of 20 December 2012.

¹⁶⁷ *Fighting against Death Penalty in the Arab World*, World Coalition against Death Penalty, February 2010, p.24, available at: <http://www.worldcoalition.org/media/resourcecenter/WCADP-ArabWorldReport2010-en.pdf>, last accessed 17 January 2013. According to this report, Saber Ragoubi and Imed Ben Ameer were prosecuted for their involvement in armed incidents in December 2006 and January 2007 south of Tunis, causing 14 deaths, according to the authorities. They were sentenced to death on 30 December 2007. They claim they were tortured by the police to make them confess. In January 2008 the death penalty was confirmed for Saber Ragoubi while the sentence of Imed Ben Ameer was commuted to life imprisonment.

¹⁶⁸ Special Rapporteur on Torture, Mission to Tunisia, *supra*, para.66. See also, Human Rights Committee, Communication No.606/1994, CCPR/C/54/D/606/1994, para.9.1, where the Committee concluded that the "*death row phenomenon*" can constitute cruel, inhuman and degrading treatment "*bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned*"

appreciation to the legislature when adopting subsidiary legislation. As the supreme law of the country, the Constitution should incorporate a definition of torture fully consistent with Article 1 of the CAT in order to ensure that the State's obligations under the Convention are respected. In this regard, the Committee against Torture pointed out that *"serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the convention for the purpose of defining the obligation of the State."*¹⁶⁹ Further, the Draft Constitution should also prohibit *"cruel, inhuman and degrading treatment or punishment"* not amounting to torture.

In addition, the Draft Constitution reproduces similar wording to Article 13 of the 1959 Constitution relating to the principle of legality, which states that *"sentences are personal and shall be pronounced only by virtue of a law issued prior to the punishable act, except in the case of a more favourable law"*.

Indeed, as noted above, under international standards, a person may only be convicted and punished for conduct that was a crime under the applicable law at the time it occurred. The principle of non-retroactivity of criminal law protects individual rights against the arbitrariness of the State by prohibiting both retroactive offences (*nullum crimen sine lege*) and retroactive penalties (*nulla poena sine lege*). As such, the *nullum crimen, nulla poena sine lege* principle is referred to as non-derogable in the main international human rights treaties.¹⁷⁰

However, Article 15 of the ICCPR also entails that a person may be held accountable for an act that was not punishable by the applicable national law at the time the offence was committed, provided this act was punishable under international treaty law or customary international law in force at the time the offence was committed.¹⁷¹ This reference was introduced in order to prevent a person from escaping punishment for an international crime by pleading that his offence was not punishable under the national law of his State.¹⁷²

As enshrined in Article 15(2), the non-retroactivity principle allows for *"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 recognized by the community of nations."* This exception to the principle of non-retroactivity provides that the principle is not violated when an act, even though it was not punishable under criminal law at the time when it was performed, was nevertheless criminalized under the general principles of international law.¹⁷³

¹⁶⁹ Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, para.9

¹⁷⁰ Article 4(2) of the ICCPR includes Article 15 among the rights that cannot be subject to derogation. Equally, Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not allow derogation from Article 7 (No punishment without law), and Article 27(2) of the American Convention on Human Rights (ACHR) does not allow derogation from Article 9 (Freedom from Ex Post Facto Laws).

¹⁷¹ *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, M. Nowak, 1993, Strasbourg, Engel Publisher, p. 276.

¹⁷² *Ibid*, p.276.

¹⁷³ *Ibid*, p.281.

The fact that Article 11(2) of the Universal Declaration of Human Rights (UDHR)¹⁷⁴ does not contain such an exception, later introduced in the ICCPR, shows an evolution of the international understanding of the non-retroactivity principle since 1948. The *travaux préparatoires* of the ICCPR indicates that Article 15(2) intended to provide a justification to the Nuremberg Charter and judgments, directly addressing the possibility of punishing international crimes with a retroactive domestic criminal law.¹⁷⁵

This is particularly relevant in the case of Tunisia. During the transitional period, it was argued that the very serious crimes committed under President Ben Ali's regime could not be prosecuted and punished because they were not properly criminalised under national law. In the well-known Barraket Essahel case¹⁷⁶, where a number of high ranking officials were accused of acts of torture committed in 1991 against more than 240 military personnel, the defence lawyers argued that torture was not a crime under Tunisian law at the time of the events. The crime of torture was only introduced in the Tunisian Criminal Code in 1999, by Law No. 99-89 of 2 August 1999 (Article 101bis).¹⁷⁷ The Military Court of Appeal of Tunis confirmed this argument, convicting the perpetrators for the minor offence of "violence against the person" (Article 101 of the Criminal Code) and sentencing them to prison terms varying from 2 to 5 years.

Such a sentence violates Tunisia's obligations under international law to prevent and prosecute the crime of torture. It also violates Tunisia's obligations to punish torture with sentences commensurate with the gravity of the crime committed. Under Article 4(2) of the CAT "*Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*" In the *Guridi v. Spain* case, where police officers found guilty of torture were punished with a four-year sentence reduced to one on appeal, the Committee against Torture concluded that "*the absence of appropriate punishment is incompatible with the duty to prevent acts of torture*"¹⁷⁸ and that "*the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment.*"¹⁷⁹

The obligation to investigate and punish gross violations of human rights and international crimes is also included in other international law instruments. The Human Rights Committee consistently interpreted Article 2 of the ICCPR as implying the right to bring perpetrators of gross violations of human rights to justice.¹⁸⁰

¹⁷⁴ Article 11(2) of the Universal Declaration of Human Rights (UDHR) contains the same wording of the first part of Article 15(1) of the ICCPR: "*No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed.*"

¹⁷⁵ M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, M. Nowak, *supra*, p. 281.

¹⁷⁶ *Barakat Essahel* (First Instance, No. 74937/2011; Appeal No. 334/2012)

¹⁷⁷ Article 101bis of the Criminal Code defines torture as being "*any 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 when such pain or suffering is inflicted for any other reason based on discrimination of any kind.*"

¹⁷⁸ Decisions of the Committee Against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guridi v. Spain*, Communication No. 212/2002, 24 May 2005, CAT/C/34/D/212/2002, para.6.6.

¹⁷⁹ *Ibid*, para.6.7.

¹⁸⁰ Human Rights Committee, General Comment No. 31, *supra*, para.18.

The Tunisian Constitution should therefore guarantee the principle of *nullum crimen, nulla poena sine lege* in accordance with international standards. It should also ensure that this principle is not used to shield perpetrators of serious crimes under international law from prosecution. Consequently the Constitution should provide for a general provision that allows for the prosecution and punishment of serious human rights violations retroactively and in accordance with international standards.

iii. Freedom of freedom of opinion, expression, association, assembly and information

Article 25 of the Draft Constitution recognises that “[t]he right to peaceful assembly and demonstration shall be guaranteed. This right shall be practiced according to the procedures provided for by law without prejudice to the very essence of this right”.

Article 24 guarantees the freedom to establish associations and states: “In their formation, the parties, syndicates and associations shall respect the legal procedures without prejudice to the very essence of this freedom. The statutes and activities of parties, syndicates and associations shall be governed by the provisions of the Constitution and the general principles thereof, and financial transparency.”

In addition, Article 36 of the Draft Constitution provides, “freedom of opinion, expression, information and creation is guaranteed and can only be limited by laws intended to protect the rights of others, their reputation, security and health”.

These Articles broaden the wording of the rights to the freedom of opinion, expression, association and assembly, and recognise that any limitation on them shall not prejudice the very essence of these rights. However, these articles should be amended to ensure the limitations on these rights are in full compliance with international standards.

For example, in its General Comment No.34, the Human Rights Committee emphasized that “when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself”.¹⁸¹ Further, “restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”¹⁸²

(See also section 3 below, “Limitations and derogations to human rights”).

iv. The right to a fair trial

Article 20 of the Draft Constitution provides that “any accused is presumed innocent until the establishment of his guilt through a fair trial offering him all the necessary guarantees of defence during all the investigation and trial stages”. This provision falls short of international standards, in particular Article 14 of the ICCPR, which provides for comprehensive guarantees for the right to a fair trial.

¹⁸¹ Human Rights Committee, General Comment No.34 on Article 19, 12 September 2011, CCPR/C/GC/34, para.21

¹⁸² *Ibid*, para.22

Given Tunisia's history of unfair trials and disregard for basic due process guarantees, and taking into consideration the shortcomings of the Draft Constitution relating to the independence of the OPP and the use of military courts, Article 20 should be amended so as to provide comprehensive guarantees for the right to a fair trial by a competent, independent and impartial tribunal established by law. Key elements of this include the right:

- To be informed promptly and in detail of the nature and cause of the charge against him;
- To have adequate time and facilities for the preparation of his defence;
- To be tried without undue delay;
- To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;
- To be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him, in any case where the interests of justice so require;
- To equality of arms through examining, or having examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and
- Not to be compelled to testify against himself or to confess guilt.¹⁸³

v. *The right to liberty and security of person*

Although the 1959 Constitution prohibited placing any individual arbitrarily in police custody or preventive detention, the systematic use of arbitrary arrests and detentions was common practice under President Ben Ali's regime. To overcome such practices, Article 22 of the Draft Constitution provides that "*A person cannot be arrested except in cases of flagrante delicto or upon judicial authorization. The person should be immediately informed of his rights and of the charges against him and has the right to access a lawyer. The duration of police custody detention is limited by law.*" The wording of this provision is consistent with Article 9 of the ICCPR on the right to liberty and security, which stipulates: "*everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charge against him.*"

The Draft Constitution also contains an article on detention conditions. Article 23 guarantees "*the right of the detainee to be treated humanely and in a way that preserves his dignity. The State, in enforcing sanctions, should take into account the detainee's family interests and its unity, and works towards the rehabilitation and reintegration of prisoners.*" However, this article should be amended to ensure minimum safeguards are guaranteed in cases of deprivation of liberty, such as the obligation to separate accused persons from convicted persons or accused juveniles from adults, as required by international human rights law.¹⁸⁴

vi. *Non-discrimination and gender equality*

¹⁸³ ICCPR Article 14(3).

¹⁸⁴ Article 10(2) of the ICCPR provides that "(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication".

Article 5 provides that *"all citizens, men and women, have equal rights and duties and are equal before the law without any discrimination of any sort."* The wording of this article is similar to Article 6 of the 1959 Constitution. Both fall short of Article 26 of the ICCPR, which specifies that all persons are equal before the law without discrimination between them based on *"race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."* Article 2 of the ICCPR also requires that each State Party to the Covenant undertakes to respect and to ensure for all individuals *"the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*.

Article 5 excludes non-citizens who are under the jurisdiction of Tunisian law and courts. Other provisions in the Draft Constitution further undermine the equality of citizens before the law. For example, Article 67, relating to Presidential candidature requirements, provides that such candidacy *"is a right to every voter with a Tunisian nationality by birth only, and whose religion is Islam."* This article is discriminatory against non-Muslim citizens. Under the ICCPR, *"every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without restrictions: to take part in the conduct of public affairs (...); to vote and to be elected at genuine periodic elections (...)"*.¹⁸⁵

With regard to gender equality, in addition to Article 5, Article 7 provides that *"the State guarantees the protection of women's rights and supports their advances."* Article 37 also provides that *"the State guarantees equal opportunity between men and women to assume responsibilities. The State guarantees the elimination of all forms of violence against women"*.

These provisions partially entrench the principle of equality between women and men provided for by Article 2 of CEDAW, to which Tunisia acceded in 1985. Article 2 requires that States Parties *"embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle"*. In addition, Article 5 (a) of the CEDAW encourages States to *"take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."* In its General Comment No.19, the Committee on the Elimination of Discrimination against Women recommended States to take *"preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women"*.¹⁸⁶

Articles 5, 7 and 37 should therefore be amended to provide effective measures and mechanisms and to detail the steps the Tunisian authorities need to take in order to ensure gender equality and eliminate all forms of discrimination against women.

vii. Economic Social and Cultural Rights

Civil, political, economic, social and cultural rights should be recognised, guaranteed and protected by the Tunisian Constitution on an equal footing. Under international law *"[a]ll human rights are universal, indivisible and interdependent and interrelated."*

¹⁸⁵ ICCPR, Article 25

¹⁸⁶ Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (11th session, 1992).

*The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.*¹⁸⁷

Tunisia became a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1969 and must therefore comply with its obligations to respect, protect and fulfil the rights guaranteed in the Covenant. In this regard, the Draft Constitution includes a number of ESCR and protections that relate to them. This is a welcome step towards establishing a legal framework that conforms to Tunisia’s obligations under international law. However, certain gaps remain and further clarity is needed in relation to specific provisions.

In particular, various rights enshrined in the ICESCR are absent from the Draft Constitution. These include the right to an adequate standard of living, food, housing and sanitation (Article 11 of the ICESCR). These rights must be explicitly guaranteed in the Constitution.

Furthermore, while draft Article 26 recognizes the right to work and the duty of the State to take the necessary steps to guarantee decent and just working conditions, draft Article 26 should be amended to ensure its full conformity with Tunisia’s international obligations under the ICESCR, and in particular key elements of the normative content of both the right to work under Article 6 and the right to just and favourable conditions of work under Article 7 of the ICESCR. Consequently, draft Article 26 should include provisions to guarantee non-discriminatory access to *“technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”*¹⁸⁸ Furthermore, draft Article 26 should also include guarantees concerning the right to:

- Remuneration that provides all workers, at a minimum, with: i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work that are not inferior to those enjoyed by men, with equal pay for equal work; and ii) a decent living for themselves and their families, in accordance with the provisions of the ICESCR;
- Safe and healthy working conditions;
- Equal opportunity for everyone to be promoted to an appropriate higher level, subject to no considerations other than those of seniority and competence; and
- Rest, leisure, reasonable limitations of working hours and periodic holidays with pay, as well as remuneration for public holidays.¹⁸⁹

The uprising that led to the toppling of President Ben Ali was articulated around popular demands for economic and social justice. The NCA should therefore meet the aspirations of the Tunisian population, especially the most marginalized individuals and groups, and consequently recognise and guarantee the legal and in particular judicial protection of ESCR. The NCA and other Tunisian authorities should be inspired by the authoritative interpretation of rights and obligations under the ICESCR, especially those established by the UN Committee on Economic, Social and Cultural

¹⁸⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5

¹⁸⁸ ICESCR, Article 6(2)

¹⁸⁹ ICESCR, Article 7

Rights (CESCR). In particular, General Comment No.3 of the CESCR details the obligations of States parties to implement the ICESCR in good faith, including by:

- Taking all necessary measures (not restricted to legislative measures only);
- Foreseeing a judicial remedy where policies relevant to the realization of ESCR are set out in a legislative text; and
- Adopting targeted, effective and low-cost programmes, even in instances of limited resources, to protect populations most at risk.¹⁹⁰

b. Towards a comprehensive Bill of Rights

As analysed above, most of the provisions of the Draft Constitution relating to human rights fall short of international human rights law and standards. These standards include not only the content or substance of the rights but also their scope, including permissible limitations or restrictions on a particular right imposed by the State and the circumstances in which these restrictions can or cannot be imposed.

The Constitution should therefore provide for a comprehensive Bill of Rights in accordance with universally recognised human rights standards. This is necessary to:

- i) Provide groups and individuals with a comprehensive set of written rights that are safeguarded in the Constitution, which they can use to hold public authorities to account;
- ii) Provide Courts with specific constitutional and legal grounds to protect human rights when authorities abuse their powers by unlawfully restricting the enjoyment of human rights, by violating them or by failing to respect, protect, and fulfil them; and
- iii) Contribute to bringing the Tunisian legal framework, including the Constitution, in line with international human rights standards.

The Bill of Rights should therefore guarantee civil, political, economic, social and cultural rights for all, without distinction or exclusion, in accordance with Tunisia's obligations under international law.

3. Limitations and derogations to human rights

a. Permissible limitations of human rights

Certain rights under the Bill of Rights may be subject to lawful, reasonable and justifiable limitations. These limitations must be necessary and capable of being demonstrably justified in a free and democratic society. In addition, there are a number of requirements that such derogations must respect in order not to jeopardize the essence of the rights concerned. For example, while the ICCPR provides that some of the rights enshrined in the Covenant may be restricted, including the right to liberty of movement;¹⁹¹ the right to freedom of thought, conscience and religion;¹⁹²

¹⁹⁰ Committee on Economic, Social and Cultural Rights, General Comment No.3: The nature of states parties obligations, (Art. 2, par.1), 14 December 1990

¹⁹¹ "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." Article 12 of the ICCPR

¹⁹² "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or

the right to hold opinions and to freedom of expression;¹⁹³ the right to peaceful assembly;¹⁹⁴ and the right to freedom of association,¹⁹⁵ it also provides that the rights should suffer no restrictions except those prescribed by law and consistent with the Covenant.

In Tunisia, the enjoyment of the rights and freedoms recognized in the 1959 Constitution was subjected to several limitations.¹⁹⁶ Article 7 provided that "*Citizens exercise all their rights in the forms and according to the terms provided for by law. The exercise of these rights can be limited only by laws enacted to protect the rights of others, the respect of public order, national defence, the development of the economy and social progress*". The vague wording of this provision led to the imposition of various illegitimate restrictions on the enjoyment of human rights, including on the right to freedom of expression, association and assembly, which curbed all forms of opposition.

The Constitution should break with such practices and ensure that any limitation on human rights is in full conformity with international standards. The Siracusa Principles on the limitation and derogation of provisions in the ICCPR specifies that limitations imposed on human rights shall not be "*arbitrary or unreasonable*" but, rather, clear and accessible to everyone.¹⁹⁷ In particular, any limitation must be necessary and capable of being demonstrably justified in a free and democratic society.

The limitation must also provide for the nature of the right to be limited, the nature and the extent of the limitation, the relation between the limitation and its purpose, and why it is necessary to limit the exercise of the right instead of a less restrictive means to achieve the purpose.

belief in worship, observance, practice and teaching. (...) 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Article 18 of the ICCPR

¹⁹³ "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." Article 19 of the ICCPR

¹⁹⁴ "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." Article 21 of the ICCPR

¹⁹⁵ "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right." Article 22 of the ICCPR

¹⁹⁶ For example, the practice of religious beliefs is guaranteed provided it does not disturb public order. According to Article 8, freedom of opinion, expression, the press, publication, assembly and association are guaranteed and exercised according to the terms defined by the law. The right to establish political parties and their organization is governed by the law.

¹⁹⁷ Siracusa Principles on the Limitation and Derogation of provisions in the ICCPR, UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/1984/4 (1984); paras.15-17

In its General Comment No.31 on the nature of the general legal obligation imposed on States parties to the covenant, the Human Rights Committee acknowledged that *"any restrictions on any of those rights [i.e. Covenant rights] must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take measures as are appropriate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may restrictions be applied or invoked in a manner that would impair the essence of a Covenant right"*.¹⁹⁸

b. Derogations from Human rights

In Tunisia, Article 46 of the 1959 Constitution provided that in cases of *"imminent peril"* menacing the institutions of the Republic, threatening the security and independence of the country and obstructing the proper functioning of public powers, *"the President of the Republic may take the exceptional measures necessitated by the circumstances."* The Draft Constitution perpetuates the same wording and provides that the President can take, in times of public emergency, the necessary measures, after consulting with the Prime Minister, the Constitutional Court and the President of the Parliament.

The lack of clear restrictions on the President's powers in such times, combined with the vague wording of these provisions, represent a permanent threat against the protection of human rights.

Indeed, states of emergency are often used by authoritarian regimes to curb human rights and fundamental freedoms. This is why constitutions should firmly limit powers granted to the executive in times of emergency and bring them in line with international standards. Under these standards, states of emergency, and limitations or derogations of rights in times of emergency, must be of an exceptional and temporary nature.

Article 4 of the ICCPR provides *"in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."*

Although Article 4 of the ICCPR recognizes that States may take measures derogating from their obligations under the Covenant, it also explicitly prescribes that no derogation may be made to: Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), Article 8 (prohibition of slavery, the slave-trade and servitude), Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Article 15 (the principle of legality), Article 16 (the recognition of everyone as a person before the law), and Article 18 (freedom of thought, conscience and religion).

Furthermore, according to the Human Rights Committee, *"the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of*

¹⁹⁸ Human Rights Committee, General Comment No.31, *supra*, para.6

*international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.*¹⁹⁹

A number of other rights, while not explicitly designated under conventions as non-derogable, have attained that status. In particular, the right to challenge the lawfulness of detention, *habeas corpus*, is widely regarded as non-derogable.²⁰⁰ The Human Rights Committee has also said that the right to be tried by an independent and impartial tribunal "*is an absolute right that may suffer no exception,*"²⁰¹ and most components of the right to a fair trial are also widely regarded as non-derogable.²⁰²

Other rights may be derogated from but only in certain circumstances and providing certain requirements are met. As the Human Rights Committee, in its General Comment No.29 on Article 4, states of emergency, has stated: "*The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists.*"²⁰³ Consequently, "*measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.*"²⁰⁴

In addition, once a state of emergency has been validly declared, any measure undertaken that derogates from a provision must not impair the essence of the right. It may only reduce the scope of application of the right to the extent strictly necessary to meet a threat to the life of the nation. As the Committee has stated: "*the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.*"²⁰⁵

The Constitution should therefore ensure that non-derogable rights mentioned above are absolute rights from which no exception is permitted, including in times of emergency. It must also ensure that legitimate limitations on other rights do not impair the essence of these rights.

4. Remedy and reparation for human rights violations

Under the rule of President Ben Ali, serious human rights abuses were widespread, and often systematic. These abuses included, among others, cases of torture and other ill treatment, arbitrary arrest and detention, unlawful killing, unfair trials and violations of the right to freedom of assembly, association and expression. The vast majority of these violations remained unpunished and the victims rarely, if ever, obtained effective remedies and reparation.

Under international standards, the right to a fair and effective remedy is the right to vindicate one's rights before an independent and impartial body, with a view to

¹⁹⁹ Human Rights Committee, General Comment No. 29, *supra*, para.11

²⁰⁰ *Ibid*, paras.15-16

²⁰¹ Views of 28 October 1992, Communication No. 263/1987, *M. Gonzalez del Río v. Peru*, CCPR/C/46/D/263/1987, para. 5.2.

²⁰² Human Rights Committee, General Comment No. 29, *supra*, para.16.

²⁰³ *Ibid*, para.6

²⁰⁴ *Ibid*, para.2

²⁰⁵ *Ibid*, para.4

obtaining recognition of the violation, cessation of the violation if it is continuing, and full reparation.²⁰⁶ In 2005, the General Assembly, by consensus of all States adopted the UN Basic Principles and Guidelines on the Right to a Remedy and reparation which provide, under Article 3, that: *"The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation..."*²⁰⁷

The Human Rights Committee reaffirmed that States Parties have an obligation to establish appropriate judicial and administrative mechanisms to address claims of rights violations under domestic law.²⁰⁸ As such, the right to an effective remedy encompasses other rights, including:

- i) The right to a prompt, thorough, independent and impartial investigation. Principle 19 of the Set of Principles to combat impunity states that, *"States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished"*.²⁰⁹
- ii) The right to reparation. Reparation includes, as necessary and appropriate, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.²¹⁰
- iii) The right to know the truth, which is a principle that *"lies both at the root and at the outcome of a right to a remedy and to investigation"*.²¹¹ Under the Set of Principles to Combat Impunity, *"Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the*

²⁰⁶ For example, paragraph 3 of article 2 of the ICCPR guarantees the right to an effective remedy: *"3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.*

²⁰⁷ General Assembly Resolution 60/147 of 16 December 2005, 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, Article 3

²⁰⁸ Human Rights Committee, General Comment No.31, *supra*, para.15

²⁰⁹ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, *supra*

²¹⁰ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra*, Articles 18-23

²¹¹ International Commission of Jurists, *The right to a remedy and to reparation for gross human rights violations*, A Practitioners' Guide, Series No. 2, Ediciones Antropos, 2006, Bogotá, p 81

*perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations”.*²¹²

Separate from the rights enumerated above, States also have the obligation to prosecute and punish perpetrators of gross human rights violations.²¹³ For decades, Tunisian authorities have failed to meet and respect this obligation. They must therefore address the legacy of human rights violations by effectively investigating and prosecuting cases of gross human rights violations committed under the rule of President Ben Ali, including by ensuring criminal accountability for these violations and establishing an independent and impartial transitional justice mechanism. They should also ensure that the Constitution fully guarantees the rights of victims of human rights violations to effective remedies and to reparation in accordance with international standards.

The Constitution should also provide for effective and independent mechanisms to protect human rights against any abuse, including a human rights institution. In its Concluding Observations in 2008, the Human Rights Committee expressed concern over the fact that Tunisia had still not established a national institution with competence in the area of human rights, in accordance with the Paris Principles.²¹⁴ The UN General Assembly has reaffirmed on many occasions the importance of developing effective, independent and pluralistic national institutions for the promotion and protection of human rights in accordance with the Paris Principles.²¹⁵ The General Assembly has also acknowledged the role of national institutions in strengthening the rule of law and the promotion and protection of human rights in all sectors²¹⁶ and encouraged them to continue playing an active role in preventing and combating all violations of human rights.²¹⁷

V. RECOMMENDATIONS

The ICJ calls on the Tunisian authorities, including the members of the NCA, to adopt a constitution that represents the views of all Tunisians, not only the majority of the NCA's members and, to this end, to ensure the rights of all Tunisians to participate in the constitution-making process, to be consulted on the content of the Constitution and to fully take part in the conduct of public affairs.

The members of the NCA should ensure that the Constitution:

- i) Reinforces the mandate of the Electoral Commission and the guarantees for its independence, including by providing for sufficient safeguards for electing or selecting its members as well as the conditions of their tenure;**

²¹² Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Principle 2, doc E/CN.4/2005/102/Add.1 of 8 February 2005. See also, UN Human Rights Council, Resolution 18/7 adopted by the Human Rights Council. A/HRC/18/L.22, 29 September 2011; and Human Rights Council Resolution 9/11, Right to the truth

²¹³ Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, *supra*, recommended by the Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 1 and Principle 19. See also, Security Council Resolution on the question concerning Haiti, S/RES/1529 of 29 February 2004, para.7; Resolution on the situation in Côte d'Ivoire, S/RES/1479 of 13 May 2003, para.8

²¹⁴ Human Rights Committee concluding observations on Tunisia, CCPR/C/TUN/CO/5, 23 April 2008, para.8.

²¹⁵ UN General Assembly resolution 60/154 (para.2) and 63/172 (para.2)

²¹⁶ UN General Assembly resolution 63/172 (para.12)

²¹⁷ UN General Assembly resolution 64/161 (para.8)

- ii) **Provides for the supremacy of the Constitution over other aspects of domestic law, and the accountability of all individuals and institutions to the Constitution;**
- iii) **Provides that the powers of the State are not exercised arbitrarily and are limited by formal, regular, accessible and transparent processes of law enforcement and adjudication;**
- iv) **Adequately defines the role of the security services and armed forces and provides that they are accountable and subordinated to a legally constituted civilian authority;**
- v) **Provides for comprehensive parliamentary mechanisms to oversee the work of the security services and armed forces and to hold them to account, including by ensuring that they are acting in accordance with the law in carrying out their prescribed functions;**
- vi) **Fully guarantees the principle of the separation of powers and, to that end, outlines clearly the respective duties of the executive, judiciary and legislature;**
- vii) **Includes a comprehensive system of checks and balances;**
- viii) **Provides for a People's Assembly that is a democratic forum which represents the views and interests of the people, including by bolstering the functions of the People's Assembly to enable it to scrutinize, investigate and inquire into the actions of the executive;**
- ix) **Enables judicial review over the compliance of legislative and executive acts with the Constitution and, to this end, unequivocally affirms that the decisions of the Constitutional Court are final, cannot be subject to any form of review or appeal, and are binding on, and must be enforced by all public authorities;**
- x) **Brings the whole judicial system in line with international standards of independence, impartiality and accountability;**
- xi) **Guarantees the principle of the irremovability of judges and unequivocally ensures, in the Constitution, that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their judicial duties;**
- xii) **Empowers the HJC, in accordance with international standards, to fully oversee the selection, appointment and transfer of, and disciplinary proceedings against, judges;**
- xiii) **Ends the use of military courts to try civilians;**
- xiv) **Limits the jurisdiction of military tribunals to military personnel and military offences only and, to this end, excludes all cases involving human rights violations from the jurisdiction of military tribunals, including those involving military and security personnel;**

- xv) **Lays the foundations for the full reform of the status and structure of the OPP, including by ending its subordination to the executive, consolidating its powers to protect the rights of defendants and victims, and strengthening its role in the fight against impunity for serious violations of human rights;**
- xvi) **Incorporates a comprehensive Bill of Rights in accordance with international human rights law and standards;**
- xvii) **Defines the content and substance of these rights as well as their scope, in full conformity with universally accepted human rights norms and standards;**
- xviii) **Prohibits serious crimes under international law, including, among others, war crimes, crimes against humanity, genocide, torture and enforced disappearances;**
- xix) **Incorporates a definition of torture that is fully consistent with Article 1 of the CAT;**
- xx) **Recognizes the right to life as an absolute right from which no derogation is accepted, and consequently abolishes the death penalty;**
- xxi) **Provides that individuals may only be convicted and punished for conduct that was a crime under applicable law at the time it occurred;**
- xxii) **Provides that this principle of legality is not used to prevent retroactive prosecution and punishment of serious human rights violations that amount to crimes under international law;**
- xxiii) **Through the amendment of draft Article 20, provides for comprehensive guarantees for the right of individuals to a fair trial, including, among others, the right to be informed promptly and in detail of the nature and cause of the charge against them; to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing; to be tried without undue delay; to equality of arms; and not to be compelled to testify against themselves or to confess guilt;**
- xxiv) **Provides effective measures and mechanisms the Tunisian authorities should take and establish in order to ensure gender equality, and eliminates all forms of discrimination against women;**
- xxv) **Recognizes that no one is to be subjected to arbitrary arrest or detention, and provides for minimum safeguards that must be guaranteed in cases of deprivation of liberty;**
- xxvi) **Includes provisions relating to economic, social and cultural rights that are fully in line with Tunisia's obligations under international law, in particular the ICESCR, and to this end recognises, among others, the right to an adequate standard of living, food, housing, sanitation and minimum guarantees that should be granted to workers;**

- xxvii) Restricts any limitation on human rights to restrictions that are permissible under international and to those that are in full conformity with international standards and do not impair the essence of these rights. In particular, any limitation must be necessary and permissible under international law. It must not be arbitrary or unreasonable but rather clear, precise, accessible and capable of being demonstrably justified in a free and democratic society;**
- xxviii) Provides that non-derogable rights, including, among others, the right to life, the right to be free from torture or other ill-treatment, the right not to be subject to enforced disappearance, the right to a fair trial, the application of the principle of legality, and the right to challenge the lawfulness of detention (*habeas corpus*), are rights from which no derogation is accepted, including in times of emergency;**
- xxix) Provides for the right to a fair and effective remedy to address human rights abuses, including the right to a prompt, thorough, independent and impartial investigation, to know the truth, and to reparation; and**
- xxx) Provides for effective and independent mechanisms to protect human rights against any abuse, including a transitional justice mechanism and a human rights institution with a comprehensive mandate and sufficient guarantees for its independence.**

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