

The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future



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Introduction

Overview

This report by the International Commission of Jurists (ICJ) on independence of the judiciary in Tunisia examines the country's new Constitution and other laws, institutions, and policies that impact on the independence of the judiciary in light of international and regional standards, including those treaties to which Tunisia is a party.¹ In particular, the ICJ analyses the High Judicial Council, the Statute for Judges, judicial accountability, the military courts, and the Office of the Public Prosecutor and assesses how they either safeguard or fail to safeguard independence of the judiciary and respect for the rule of law and human rights.

It is the duty of all governmental and other institutions "to respect and observe the independence of the judiciary".² An independent judiciary is the foundation of the rule of law and democratic governance. Tunisia ratified the *International Covenant on Civil and Political Rights* (ICCPR) in 1969. Article 14 of the ICCPR guarantees the right to equality before courts and tribunals and to a fair and public hearing by a competent, independent and impartial tribunal established by law. This is "an absolute right that is not subject to any exception".³ As a party to the ICCPR, Tunisia is obligated to respect this right as well as to provide the necessary safeguards to secure its realization.⁴

Tunisia is a country in transition. The one-party rule of President Zine El Abidine Ben Ali consolidated power in the hands of the executive and failed to guarantee the independence of the judiciary either in law or in practice.⁵ There was a systematic failure to investigate or prosecute allegations of serious human rights violations.⁶

In the three years since the popular uprising that toppled President Ben Ali, the transitional authorities have begun to reform the country's political and legal system. In January 2014, the National Constituent Assembly (NCA) approved by an overwhelming majority a new Constitution. Drafting this constitution had been the main task of the NCA, which was elected in October 2011 in Tunisia's first free and fair elections. The ICJ views the Constitution as the result of an inclusive democratic process and welcomes it as a

¹ Tunisia has ratified the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR), the Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of People with Disabilities, and the Convention on the Rights of the Child. In addition, it has accepted individual complaint procedures for the CAT, the ICCPR, CEDAW, and the Convention on the Rights of People with Disabilities.

² UN 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 November 1985 and 40/146 of 13 December 1985 ("UN Basic Principles on the Independence of the Judiciary"), Principle 1.

³ Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial ("General Comment No. 32"), UN Doc. CCPR/C/GC/32, para. 19.

⁴ ICCPR, article 2.

⁵ See, for example, ICJ, *Attacks on Justice – Tunisia*, 2005; Amnesty International, *Independent voices stifled in Tunisia*, July 2010; IFEX Tunisia Monitoring Group, *Judges who call for independent judiciary targeted for speaking out*, September 2010; Human Rights Committee, Concluding Observations on Tunisia, UN Doc. CCPR/C/TUN/CO/5 (2008), para. 17.

⁶ Human Rights Committee, Concluding Observations on Tunisia, UN Doc. CCPR/C/TUN/CO/5 (2008), para. 11; Juan Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1 (2012), paras. 29 & 32.

first step towards establishing the rule of law and protecting human rights in Tunisia. In particular, the new Constitution expands on the rights provided for by the 1959 Constitution. It also provides for strong guarantees for the establishment and enforcement of the rule of law, including by establishing a more balanced separation of powers within the executive and ending the sweeping powers that were concentrated in the hands of the President under the 1959 Constitution. The new Constitution also recognizes the institutional and individual independence of the judiciary and of members of the judiciary and establishes an independent High Judicial Council, empowered to oversee judges' careers, thereby marking an important step towards ending the executive's interference in judicial affairs.

In certain key areas, however, the Constitution falls short of international law and standards and in other areas it is silent.⁷

What is needed now is implementing legislation that will bring Tunisia fully into compliance with its human rights obligations and establish and enforce the rule of law.

In terms of ensuring the independence of the judiciary, recent events are cause for concern. In July 2012 the Minister of Justice summarily dismissed more than 70 judges and prosecutors accused of corruption or loyalty to the former President. These dismissals were arbitrary, without any semblance of a fair procedure, and were contrary to international standards on due process. They recalled the days of President Ben Ali, when judges were dismissed or transferred on the basis of executive whim. In October 2013, the Minister of Justice ordered the transfer of two judges without their consent and in disregard of applicable laws. A further source of concern for the independence of the judiciary and its role in combatting impunity, is the fact that the transitional authorities have resorted to the widespread use of military courts to adjudicate allegations of human rights violations committed by military and security personnel. It is clear that unless Tunisia adopts measures to safeguard the independence of the judiciary and the protection of human rights, including by limiting the jurisdiction of military courts in line with international standards and ending undue and unwarranted interference by the executive in judicial matters, the promise of the Tunisian uprising will remain unfulfilled.

Summary of Key Findings and Recommendations

The key findings and recommendations of each chapter are summarized here. Additional detailed recommendations are found in the individual chapters.

I. The High Judicial Council

In order to safeguard the independence of both the judiciary as an institution and individual judges, judicial councils that are charged with the appointment, management and disciplining of judges must themselves be independent in composition and granted the necessary powers. Thus, for example, the Committee of Ministers of the Council of Europe recommends: "The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers".⁸

⁷ See, ICJ Position Paper, *The Tunisian Constitution in light of International Law and Standards*, 31 January 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/01/ICJ-Tunisian-Constitution-Position-Paper-31-01-14.pdf> last accessed 25 April 2014.

⁸ Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para. 46.

Under President Ben Ali, the body supervising the judiciary, the *Conseil Supérieur de la Magistrature* (CSM), was firmly under the control of the executive branch. It was presided over by the President and the Minister of Justice was its vice-president. Most of its members were appointed by the Executive. The CSM was suspended in December 2011 with the adoption of the Provisional Constitution. In mid-2013 a temporary judicial authority was established called the *Instance Provisoire de la Justice Judiciaire* (IPJJ).

In composition and competences, the current IPJJ is a marked improvement over its predecessor. A majority of its members are judges, half of whom are elected by their peers, and neither the Minister of Justice nor the President has a seat. Organic Law No. 2013-13, which governs the IPJJ, reduces the power of the Ministry of Justice to transfer judges arbitrarily and grants judges the right to appeal promotion and transfer decisions to the IPJJ. Disciplinary decisions of the IPJJ can now be appealed to the Administrative Tribunal.

The 2014 Constitution requires the establishment of a new high judicial council, composed of four separate bodies, to oversee the judiciary. It provides that two-thirds of the membership will be composed of judges, both elected and appointed, of whom elected judges will constitute the majority. The remaining members will be non-judges who are appointed by the Executive. The Constitution grants the High Judicial Council financial and administrative independence and states that it shall function independently. The High Judicial Council is due to be established following legislative elections at the end of 2014.

In order to ensure that the majority of the High Judicial Council's members are judges chosen by their peers, the ICJ recommends that three-fourths of the judicial members be elected. The new law on the High Judicial Council should also set out clear, objective criteria for both electoral and appointed candidates. There should be a fair, inclusive and transparent procedure for both the election and appointment of members. Candidates for election or appointment should not be subject to categorical bars on the basis of political opinion or expression.

The High Judicial Council should be fully empowered to take decisions with regards to all matters relating to the career of judges, including selection, appointment, training, assessment, promotion, transfer, discipline, and tenure. There should be no substantive role for the executive or legislative branches. Furthermore, decisions of the High Judicial Council relating to the transfer, promotion, and termination of tenure of judges, must be subject to independent judicial review or appeal.

Although the Constitution guarantees the financial independence of the High Judicial Council, the implementing law should grant the Council the power to develop the budget for the judiciary, in consultation with parliament.

II. Statute for Judges

Under the former regime, Law No. 67-29 governed the organization of the judiciary, the CSM, and the statute for judges. Judges were subject to the authority of the Minister of Justice, who controlled the selection process as well as the judicial training institute. Decisions concerning the careers of judges, including their assignment, transfer and dismissal, were often based on political considerations. Performance assessments were not discussed with the judge concerned and promotions appeared to be based on regime loyalty. Judges who spoke out on issues of judicial independence were subject to arbitrary and punitive transfers and the activities of judges' associations were restricted.

Yet the requirement of independence under article 14 of the ICCPR comprises not only the actual independence of the judiciary from interference by the executive branch and the legislature, but extends also to the procedures for the appointment of judges and guarantees relating to their security of tenure as well as conditions governing their promotion, transfer, suspension and cessation of functions.⁹ There must be “clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”.¹⁰

Under the 2014 Constitution, there will be a new Statute for Judges. The ICJ recommends that the new law sets out fair and transparent procedures and objective criteria for the selection and appointment of judges. The judicial training institute should be under the supervision of the High Judicial Council rather than the Minister of Justice and the law should ensure that judges are provided with adequate and appropriate initial and in-service training. Assessments of judges must be performed by judges and should include consultations with the judge concerned and the right to challenge any assessment before the High Judicial Council. Promotions should similarly be based on objective criteria and fair and transparent procedures. Transfers of judges should not happen without their consent and all decisions concerning transfers should be vested in the High Judicial Council.

The new Statute for Judges should furthermore guarantee the security of tenure for members of the judiciary, by setting out guaranteed tenure until a stated age of retirement or for an adequate fixed term. The instances in which a judge may be removed from office should be limited to the following: reaching retirement age, if applicable, or the end of a fixed period of tenure; resignation; being medically certified as unfit; or as a result of the imposition of a lawful and proportionate sanction of dismissal imposed following a full and fair disciplinary procedure. The law should also guarantee conditions of tenure for judges, including adequate working conditions and remuneration, provision for health and other social benefits, and a pension on retirement.

Finally, the Statute for Judges must expressly guarantee the rights of judges to freedom of association, assembly and expression, including their right to form and join associations aimed at representing their professional interests.

III. Judicial Accountability

While the judiciary as an institution and individual judges must be independent of any outside influence, judicial independence should not be equated with a lack of accountability for misconduct. Judicial independence is founded on public trust and, to maintain that trust, judges must hold themselves to the highest standards of integrity. These standards should be enshrined in a code of conduct that is itself consistent with international standards and judges should be held accountable for breaches.

The UN Basic Principles on the Independence of the Judiciary provide, “All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct”.¹¹ Tunisia currently lacks a comprehensive code of conduct. Law No. 67-29 provides that the “failure of the duties of the status, honour or dignity of a judge or prosecutor is a disciplinary offence”.¹² This provision is vague and subject to

⁹ General Comment No. 32, para. 19.

¹⁰ *Id.*

¹¹ UN Basic Principles on the Independence of the Judiciary, Principle 17.

¹² Law No. 67-29, article 50.

arbitrary interpretation. It fails to give due notice of what conduct is prohibited and therefore gives the executive broad discretion to decide what constitutes a disciplinary offence.

The ICJ recommends that Tunisian authorities ensure that a sufficiently detailed and comprehensive code of conduct is developed by the members of the judiciary or in close consultation with them and that this code of conduct is established in law as the basis on which judges will be held to account professionally. The disciplinary system must guarantee judges the right to a fair hearing before an independent and impartial body. The High Judicial Council should supervise the disciplinary process, including the General Inspection Service, and decisions of the High Judicial Council must be appealable to a higher independent body or court.

The law must also be amended to ensure that judges enjoy personal immunity from civil suits for monetary damages or from criminal prosecution for improper acts or omissions in the exercise of their judicial functions, provided that such immunity is subject to waiver by a court if it determines that the immunity would impede the course of justice and the waiver would not prejudice the exercise of judicial functions, such as in cases of alleged corruption. In cases in which there is reasonable suspicion of criminal responsibility for a gross human rights violation or crime under international law, however, the law should be amended to ensure that there is no immunity.

Furthermore, the law should clarify that the State guarantees compensation for any harm suffered by individuals as a result of acts or omissions by judges in the improper or unlawful exercise of their judicial functions.

IV. Military Tribunals

Prior to the popular uprising, Tunisian law gave military tribunals jurisdiction over non-military offences, including human rights violations, committed by members of the armed and security forces. In addition, military courts were used to try political opponents under anti-terrorism legislation. During the transition period, the jurisdiction of military courts has actually been expanded. These courts now have jurisdiction over ordinary crimes committed jointly by military and non-military personnel. Cases involving human rights violations committed during the uprising that led to the toppling of President Ben Ali have been transferred from ordinary courts to military tribunals. In addition, judgments and sentences imposed by military courts are not subject to full review by a civilian appellate court.

The trial of civilians and the trial of military officers for human rights violations run counter to principles of international law. There is a growing consensus, attested to by UN treaty bodies, special rapporteurs and working groups as well as regional human rights courts such as the Inter-American Court of Human Rights and the European Court of Human Rights, that the jurisdiction of military courts must be limited to trials of military personnel for breaches of military discipline.¹³ For example, the African Commission on Human and Peoples' Rights has stated: "The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel".¹⁴ Thus military courts "should not in any circumstances whatsoever have

¹³ See, e.g., Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2004/60 (2003), para. 60; UN Principles on the administration of justice through military tribunals ("Decaux Principles"), UN Doc. E/CN.4/2006/58 (2006), Principle 5.

¹⁴ ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("ACHPR Principles and Guidelines"), Principle L(a).

jurisdiction over civilians”.¹⁵ The Human Rights Committee has frequently called on States parties to prohibit the trial of civilians before military courts.¹⁶ As for the jurisdiction of military courts over human rights violations, the UN Principles Governing the Administration of Justice through Military Tribunals (“Decaux Principles”) provide: “In all circumstances, the jurisdiction of military courts should be set aside in favor of the jurisdiction of the ordinary courts”.¹⁷

The ICJ recommends that Tunisian authorities amend the Code of Military Justice and Law No. 82-70 on the General Statute of the Internal Security Forces to restrict the jurisdiction of military courts to the trial of members of the military for alleged breaches of military discipline. Military courts should have no jurisdiction over crimes under international law or human rights violations. Nor should they in any circumstances have jurisdiction over civilians, even where the alleged offence involves a member of the military as a victim or where the civilian is charged with committing an offence together with a member of the military.

Where military courts try members of the military for offences related to military discipline, the law must ensure a full right of appeal to a civilian court. Moreover, the judges who sit on military courts must be independent and impartial. In particular, they must remain outside the military chain of command and not be subject to military discipline for any exercise of judicial functions.

V. Office of the Public Prosecutor

Prosecutors play an essential role in the administration of justice. They must be independent and autonomous in their decision-making.¹⁸ The UN Guidelines on the Role of Prosecutors provide that, in the performance of their duties, prosecutors must “carry out their functions impartially” and “protect the public interest”. They shall not initiate or continue prosecutions “when an impartial investigation shows the charge to be unfounded”. Furthermore, they must 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”.¹⁹

In Tunisia prosecutors are part of the judicial corps. The law makes few distinctions between “*magistrats du parquet*” and “*magistrats du siege*” and prosecutors are subject to the same appointment, transfer, promotion and disciplinary system as judges. Under President Ben Ali, the executive branch exercised the same degree of control over the careers of prosecutors as it did over judges.

¹⁵ ACHPR Principles and Guidelines, Principle L(c).

¹⁶ Concluding Observations of the Human Rights Committee on Slovakia, UN Doc. CCPR/C/79/Add.79, para. 20; Concluding Observations of the Human Rights Committee on Chile, UN Doc. CCPR/C/CHL/CO/5, para. 12; Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 18; Concluding Observations of the Human Rights Committee on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 14; Concluding Observations of the Human Rights Committee on Ecuador, UN Doc. CCPR/C/ECU/CO/5, para. 5.

¹⁷ Decaux Principles, Principle 9.

¹⁸ Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Judges and Prosecutors in a Democratic Society, CM(2009)192 (“Bordeaux Declaration”), para. 6.

¹⁹ UN Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 (1990), Guidelines 13(a) & (b); 14 & 15.

By virtue of Law No. 67-29, the Office of the Public Prosecutor (OPP) was under the authority of the Minister of Justice. In addition, the Code of Criminal Procedure granted the Minister of Justice a range of powers relating to the investigation and prosecution of cases. The Minister of Justice also had the power to appoint investigating judges for particular cases. This lack of independence of the OPP from the executive branch of government led to an almost total absence of investigations and prosecutions in cases of gross violations of human rights and directly contributed to the climate of impunity that continues to prevail in Tunisia. Indeed, the UN Special Rapporteur on torture reported that 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".²⁰

The ICJ believes that enhancing the respect for human rights and the rule of law necessitates a full reform of the status and structure of the OPP. In particular, the ICJ recommends that Tunisian authorities ensure that laws on the organization of the judiciary, the Statute for Judges, the High Judicial Council and the Code of Criminal Procedure require prosecutors to carry out their functions independently and impartially and recognize a clear separation between the role and functions of judges and prosecutors. The Minister of Justice should no longer have the ability to make decisions concerning the careers of individual prosecutors. Rather, all decision-making power in this regard should be entrusted to the High Judicial Council. The High Judicial Council should also oversee the disciplinary procedure applicable to prosecutors, which must include the right to a fair hearing and appeal to an independent body.

Moreover, all assignments of investigating judges to particular cases should be made by judges themselves and not by either the Minister of Justice or the OPP.

If the Minister of Justice continues to exercise the power to issue instructions in individual cases, the law should define the nature and scope of this power, require that instructions be in writing, and should preclude the possibility of instructions either to prosecute or not prosecute particular cases. Any decision by a prosecutor not to prosecute a case must be reviewable by a court.

In addition, the law should guarantee adequate remuneration, security and conditions of tenure for prosecutors and sufficient human and financial resources for the OPP to enable it to function effectively.

About this Report

This report was written on the basis of findings from missions carried out by the ICJ to Tunisia in July 2012 and January 2013, as well as field research carried out by ICJ staff in Tunisia throughout 2013. Field research included comprehensive meetings with, and interviews of, Tunisian judges, many of whom were removed from office in July 2012 by a decision of the Minister of Justice. During the 2012 and 2013 missions, the ICJ met with a range of officials, including the President of the Constituent Assembly, Mr. Mustapha Ben Jaafar, the then Minister of Justice, Mr. Nouredine Bhiri, the then Minister of Human Rights and Transitional Justice, Mr. Samir Dilou, the then Minister in charge of relations with the Constituent Assembly, Mr. Abderrazak Kilani, the President of the Permanent Commission on the Judiciary of the National Constituent Assembly, M. Mohamed Elarbi Fadhel Moussa, the Prosecutor-General Director of Judicial Services, M. Mohamed Affès, as well as judges, lawyers and representatives of national human rights NGOs.

²⁰ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1 (2012), para. 32.

The Report analyses provisions of the 2014 Constitution and institutions it establishes, as well as existing laws and mechanisms that impact on the independence of the judiciary in Tunisia, in light of international human rights standards. The report makes a range of specific recommendations that aim to contribute to ensure that law and institutional reform are introduced to enhance the independence of the judiciary and correspondingly increases respect for human rights and the rule of law in the country.

This report builds on two earlier reports published by the ICJ, *Reform of the Judiciary in Tunisia* and *Enhancing the Rule of Law and guaranteeing human rights in the Constitution*.²¹

²¹ ICJ Legal Memorandum, *Reform of the Judiciary in Tunisia*, 16 September 2012, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/09/TUNISIALegalmemoENGLISHfinal.doc.pdf> last accessed 25 April 2014; and ICJ report, *Enhancing the Rule of Law and guaranteeing human rights in the Constitution*, 1 February 2013, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/TUNISIA-CONSTITUTION-REPORT-FINAL.pdf> last accessed 25 April 2014

GLOSSARY

AMT – Association des Magistrats Tunisiens

CMJ – Code of Military Justice

CSM – Conseil Supérieur de la Magistrature

GIS – General Inspection Service

HJC – High Judicial Council

IPJJ – Instance Provisoire de la Justice Judiciaire

ISM – Institut Supérieur de la Magistrature (High Judicial Institute)

MJC – Military Judicial Council

NCA – National Constituent Assembly

OPP – Office of the Public Prosecutor

OTIM – Observatoire Tunisien de l'Indépendance de la Magistrature

RCD – Rassemblement Constitutionnel Démocratique (Constitutional Democratic Rally)

CHRONOLOGY

2011

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

2012

- 20 January Adoption of the internal regulations of the National Constituent Assembly
- 13 February Process of drafting the constitution begins
- 26 May Press release of the Minister of Justice announcing dismissal of 81 judges and prosecutors
- 6 July Announcement of the dismissal of 71 judges and prosecutors and the retirement of 4 judges published in the Official Journal
- 10 August First draft of the Constitution published
- 14 December Second draft of the Constitution published

2013

- 6 February Opposition leader Chokri Belaid assassinated
- 13 March Prime Minister Hamadi Jebali steps down and former Interior Minister Ali Laarayedh forms a new government

22 April	Third draft of the Constitution published
2 May	Law No. 2013-13 establishing the <i>Instance Provisoire de la Justice Judiciaire</i>
1 June	Fourth draft of the Constitution published
25 July	National Constituent Assembly member and opposition leader Mohamed Brahmi is assassinated
6 August	National Constituent Assembly Chairman, Mustapha Ben Jafaar, suspends the Assembly's activities in the wake of popular protests
10 September	Resumption of activities of the National Constituent Assembly without opposition members, who refuse to resume their functions
14 October	Decision by the Minister of Justice to transfer two <i>ex officio</i> members of the <i>Instance Provisoire de la Justice Judiciaire</i> , the President of the Land Court and the General Inspector to the Ministry of Justice
7 November	The Prime Minister issues Decree 2013-4451 appointing new President of the Land Court and Decree 2013-4452 appointing new General Inspector to the Ministry of Justice
22 November	Administrative Court suspends the 7 November decrees of the Prime Minister through an urgent interim measure called " <i>report d'exécution</i> "
9 December	Ruling of the Administrative Court confirming the suspension of the 7 November decrees
2014	
26 January	200 members of the NCA voted for the Constitution, with 12 votes against it and 4 abstentions

I. High Judicial Council

A. Introduction

An essential condition of an independent and impartial judiciary is respect for the principle of separation of powers, meaning that the executive, legislative and judicial branches are separate and independent from each other.²² Judicial councils, if they are truly independent and granted the necessary authority, can play a key role in reinforcing the separation of powers and safeguarding the institutional and individual independence of the judiciary.

Judicial councils are common in civil law countries. Typically they are "independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system".²³ The European Charter on the Statute for Judges recommends "the intervention of an authority independent of the executive and legislative powers" in respect of "every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge".²⁴

The composition, organization and functions of judicial councils must be consistent with the separation of powers and the independence of the judiciary. What that means is that where judicial councils are involved in such matters as setting the qualifications, selection, training, discipline, and tenure of judges, they must be constituted so as to ensure that the State fulfils its obligation to respect and preserve the independence of the judiciary. Judicial councils must be both able to act independently and they must have the ability to ensure that the judiciary as a whole and each judge is truly independent.

Under President Ben Ali, the judiciary was supervised by the *Conseil Supérieur de la Magistrature* (CSM), whose composition and functions were set forth in article 67 of the 1959 Constitution and Law No. 67-29 of 14 July 1967. During his rule, many judges were subject to arbitrary disciplinary transfer.²⁵ In some cases they were dismissed for having expressed their views on the lack of independence of the judiciary or for having publicly denounced the flaws of the judiciary.²⁶

²² Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 18 ("It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency."); Report of the Special Rapporteurs on the situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/add.1 (1997), para. 71 (noting that "the separation of powers and executive respect for such separation is a sine qua non for an independent and impartial judiciary to function effectively"); Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1995/39 (1995), para. 55; *Judgment of 31 January 2001*, Inter-American Court of Human Rights, Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru), para. 73.

²³ Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities (hereafter "CoM Recommendation (2010)12"), para. 26.

²⁴ European Charter on the Statute for Judges, adopted by the participants at a multilateral meeting of the Council of Europe, Strasbourg, 8-10 July 1998, DAJ/DOC (98) 23, para. 1.3.

²⁵ ICJ, *Attacks on Justice – Tunisia*, 2005, available at: <http://www.icj.org/IMG/TUNISIA.pdf>. In this report, the ICJ documents the politically-motivated transfers of the most active members of the *Association des Magistrats Tunisiens* (AMT). On 1 August 2005, Ms Kalthoum Kennou, Secretary General of the Association, was transferred to Kairouan (160 km from Tunis) and Ms Wassila Kaabi, a member of the executive board, was transferred to Gabès (420 km from Tunis). Fifteen members of the administrative commission were transferred to other judicial districts.

²⁶ *Attacks on Justice – Tunisia*, 2005. This report describes the case of 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

With the adoption of the Provisional Constitution in December 2011, the CSM was suspended in order to pave the way for the establishment of a temporary judicial authority.²⁷ Organic Law No. 2013-13, adopted on 24 April 2013 by the National Constituent Assembly (NCA), created the “*Instance Provisoire de la Justice Judiciaire*” (IPJJ). However, those provisions of Law No. 67-29 that are not in conflict with the newly adopted provisions remain in force.²⁸

The Constitution adopted by the NCA in January 2014 envisages the creation of a new High Judicial Council (HJC). The Constitution's provisions on the judiciary will enter into force with the establishment of this council, which is expected to happen following legislative elections that are to be held by the end of 2014.²⁹

This chapter reviews the composition and mandates of the CSM and the IPJJ, as well as the provisions of the new Constitution concerning the proposed HJC. It then discusses the international law and standards applicable to both judicial councils and management of the judiciary, and assesses Tunisian law and institutions in light of these standards. Finally it includes recommendations that aim to ensure that the new HJC enhances and safeguards the independence of the judiciary, and thus respect for human rights and the rule of law.

B. Judicial councils: past, present and future

1. CSM

a. Composition

The composition of the CSM was such that the executive could control its functions. Pursuant to article 6 of Law No. 67-29, the President of the Republic served as the president of the CSM. A majority of its members, 11 out of 19, were either representatives of the executive, such as the Minister of Justice who served as its vice-president, or were appointed to their positions through presidential decrees.³⁰ The members appointed by the executive were the first president of the Court of Cassation, the public prosecutor of the Court of Cassation, the director of judicial services, the Inspector General of the Ministry of Justice, the first president of the Property Court, the first president of the Court of Appeal of Tunis, and the public prosecutor of the Court of Appeal of Tunis.³¹ In addition, two female judges were appointed as members by decree on proposition of the Minister of Justice. The other eight members were elected by their peers: two judges from each of the three grades of judges; one president from an

lamenting executive interference in the work of the judiciary. In July 2004 the executive board of the AMT planned a press conference in Tunis to discuss the need for improved status, fairer representation of judges on the CSM and security of tenure. However, the authorities banned it and the police dispersed the journalists who were in attendance. Following condemnation by the AMT for police raids on the Tunis courts in March 2005, the offices of AMT were also raided by police.

²⁷ Article 22 of the Provisional Constitution provides for the NCA to adopt an organic law establishing a temporary judicial authority to supervise the judiciary and to act as the high judicial council. 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.

²⁸ Law No. 2013-13, article 20. It is not always clear which provisions of Law No. 67-29 are deemed to conflict with Law No. 2013-13.

²⁹ 2014 Constitution, article 148.

³⁰ Law No. 67-29, articles 6 and 7bis.

³¹ Law No. 67-29, article 6.

appellate court; and one public prosecutor from an appellate court. In addition, two judges from each of the three grades were elected to serve as substitutes, if needed.³²

Although decisions of the CSM were taken by majority vote, the president or, where appropriate, the vice-president was the tie-breaker.³³

b. Mandate of the CSM

Law No. 67-29 created the disciplinary council of the CSM and established the rules for judicial appointment, recruitment, promotion and discipline.³⁴

Only a subset of the CSM sat as the disciplinary council.³⁵ This body was composed of:

- the first President of the Tunis Court of Appeal (President);
- the first President of another appellate court;
- the Prosecutor-General of the Tunis Court of Appeal;
- the Prosecutor-General of an appellate court other than the Tunis Court of Appeal;
- the more junior judge of the two elected judges who were of the same grade as the judge being investigated by the disciplinary council; and
- the more junior judge of the two substitute elected judges who were of the same grade as the judge being investigated by the disciplinary council.³⁶

The CSM also played a role in the selection, training, assessment, and promotion of judges. These aspects are discussed in Chapter II. A more detailed description of the disciplinary procedure before the CSM is found in Chapter III.

2. IPJJ

a. Composition

The temporary judicial authority consists of twenty members. Of these:

- Five are appointed judges or prosecutors (First President of the Cassation Court who sits as president; the Prosecutor-General of the Cassation Court; the General Director of Judicial Affairs; the Inspector-General to the Ministry of Justice (who is the head of the General Inspection Service); and the President of the Property Court);
- Ten are elected judges (four judges from the first grade, three from the second grade and three from the third grade); and
- Five are elected non-judges (five university professors having at least 15 years' seniority, among whom two must be lawyers to the Cassation Court with at least 10 years' seniority).

The five appointed members are appointed by presidential decree from among the judges and prosecutors of the third grade. The elected judicial members are elected by their

³² Law No. 67-29, article 6. Article 13 of Law No. 67-29 organizes the hierarchy within the judiciary into three grades based on seniority. The first grade is composed of judges of first instance tribunals and of the Property Court and deputy public prosecutors. The second grade is composed of judges of the appellate courts and deputy prosecutors-general of the appellate courts. The third and last grade is composed of judges of the Cassation Court and attorneys-general of the Cassation Court.

³³ Law No. 67-29, article 8.

³⁴ Law No. 67-29.

³⁵ Law No. 67-29, article 55.

³⁶ Law No. 67-29, article 55.

peers in elections organized by an independent electoral commission. A separate election is organized for each of the three grades of judges. The non-judicial members of the IPJJ are elected by the NCA by an absolute majority from a list of candidates drawn up by the election commission.³⁷

Thus the membership includes a majority of judges, half of whom are elected. Law No. 2013-13 further provides that the IPJJ's non-judicial members should be competent, impartial and persons of integrity. In addition, it states that consideration should be given to the representation of female judges within the IPJJ.³⁸

Law No. 2013-13 sets out requirements for candidates wishing to run for the IPJJ. Article 8 provides that any judge can run for a seat on the IPJJ, but that judges from the first grade, which includes judges of first instance tribunals and deputy public prosecutors, must have at least four years' seniority. The law specifies that judges who are members of the executive boards of judges' representative organizations as well as members of the election commission are ineligible to be candidates. Furthermore the following judges are barred from standing for election under article 9:

- judges who held a seat on a previous CSM and obtained unjustified professional or material privileges, except for judges who were victims of a transfer or other abusive measure by reason of their position;
- judges who called on the former president to run for the 2014 presidential elections or defended his regime or was active in the former *Rassemblement Constitutionnel Démocratique* (RCD);
- judges who were involved in political trials ("*procès d'opinion*" and "*procès de liberté*") covered by the general amnesty; and
- judges who participated in trials in which the charges were founded on trade union or political activities and who benefited from a promotion in the aftermath of these trials.

b. Mandate

By law, the IPJJ is in charge of the selection, appointment, promotion and transfer of judges. It is also in charge of examining assignment and transfer requests, in conformity "with international standards on the independence of the judiciary".³⁹ One significant improvement is that a judge may challenge any transfer decision before the IPJJ and any IPJJ ruling is appealable to the Administrative Tribunal. These aspects of its mandate are discussed in greater detail in Chapter II.

Unlike its predecessor, the IPJJ has the authority to submit advisory opinions on draft laws related to the judiciary. These opinions are not binding. This function was previously exercised by the General Inspection Service (GIS), which is under the authority of the Ministry of Justice.⁴⁰ The IPJJ can also submit proposals and recommendations for the improvement of the judiciary.⁴¹

Seven members of the IPJJ sit as a disciplinary body. They are as follows:

³⁷ Law No. 2013-13, articles 5, 6 and 11.

³⁸ Law No. 2013-13, article 5.

³⁹ Law No. 2013-13, article 12.

⁴⁰ Decree No. 2010-3152 organizing the Ministry of Justice, article 24 which provides "*L'inspection générale ... est chargée aussi de donner son avis concernant les projets de textes juridiques qui lui sont présentés*".

⁴¹ Law No. 2013-13, article 2.

- the First President of the Cassation Court;
- the Prosecutor to the Cassation Court;
- the General Director of Judicial Affairs;
- the Inspector-General of the Ministry of Justice (who is the head of the GIS); and
- three elected judges of the same grade as the judge who is the subject of the complaint.⁴²

Further discussion of the disciplinary procedure is contained in Chapter III.

3. High Judicial Council

a. Composition

The 2014 Constitution envisions the creation of a new High Judicial Council consisting of four bodies: the Judiciary Council, the Administrative Judicial Council, the Financial Judicial Council, and the Judicial Councils Commission.⁴³ It specifies that two-thirds of each of these bodies is to be composed of elected and appointed judges. It does not specify precisely what percentage of these judges are to be elected, but it does state that elected members will form the majority of each council. One-third of each of these four bodies is to be composed of individuals who are not judges. The president of the HJC is to be one of the senior judges, elected from among its members.

Article 113 of the 2014 Constitution specifies that the HJC “shall enjoy financial and administrative independence” and “shall function independently”. It is to draw up its budget in discussion with the relevant committee of the Assembly of People’s Representatives.⁴⁴

b. Mandate

Article 114 of the 2014 Constitution mandates the HJC to ensure the proper functioning of the judicial system and respect for its independence. It is to propose reforms and must give its opinion on draft legislation concerning the judiciary. The three councils have jurisdiction over disciplinary and career matters for the judiciary, which includes both judges and prosecutors. In addition, the HJC is to prepare an annual public report that it submits to the Speaker of the Assembly of People’s Representatives, the President of the Republic, and the Prime Minister.

Under article 112 of the 2014 Constitution, details about the jurisdiction of each of the four bodies of the Council, together with their composition, organization and procedures, will be determined by a new law.

C. International law and standards

1. Composition of judicial councils

According to international standards, judicial councils should be bodies that are independent of the executive and legislative powers and a significant proportion of their membership should be judges who are chosen by their peers. For example, the Council of Europe’s Committee of Ministers Recommendation (2010)12 states that “at least half” of

⁴² Law No. 2013-13, article 16.

⁴³ 2014 Constitution, article 112.

⁴⁴ 2014 Constitution, article 113.

the members should be judges.⁴⁵ The African Commission on Human and Peoples' Rights (ACHPR) Principles and Guidelines provides that mechanisms for "monitoring the performance of judicial officers" shall "be constituted in equal part of members [of] the judiciary and representatives of the Ministry responsible for judicial affairs".⁴⁶

The rationale behind this, as noted by the Special Rapporteur on the independence of judges and lawyers, is that "if the body is composed primarily of political representatives there is always a risk that these 'independent bodies' might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly".⁴⁷

Similarly, the Explanatory Memorandum to the European Charter on the Statute for Judges states that in order to avoid the "risk of party-political bias," the judges who are "members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature".⁴⁸

2. Management of the judiciary

In General Comment No. 32, the Human Rights Committee explained that article 14 of the ICCPR imposes the obligation on States to "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them".⁴⁹ Thus the requirement of judicial independence imposed by the ICCPR extends to all aspects of the management of the careers of judges. The management of judicial careers is discussed in greater detail in Chapters II and III.

As a practical matter, in order to ensure the rule of law, the right of access to courts, the independence of the judiciary and the right to a fair trial, the state must ensure that the judiciary is provided with adequate resources in order to discharge its functions

⁴⁵ See CoM Recommendation (2010)12, para. 27.

⁴⁶ ACHPR Principles and Guidelines, Section A, Principle 4(u). See also the European Charter on the Statute for Judges, Principle 1.3 ("at least one half of those who sit are judges elected by their peers"). The International Association of Judges, a professional association, also recommends "a majority of judges" elected by their peers. See IAJ 1st SC Conclusion 2003: The role and function of the high council of justice or analogous bodies in the organisation and management of the national judicial system. The Draft Universal Declaration on the Independence of Justice (hereafter "Singhvi Declaration" provides that proceedings for judicial removal or discipline "shall be held before a Court or a Board predominantly composed of members of the judiciary." The Singhvi Declaration formed the basis for the UN Basic Principles on the Independence of the Judiciary and was formally recommended to States by the Commission on Human Rights in Resolution 1989/32, UN Doc. E/CN.4/RES/1989/32. The Consultative Council of European Judges adopted in November 2010 a Magna Carta of Judges that provides: "To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers. The Council for the Judiciary shall be accountable for its activities and decisions.

⁴⁷ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28.

⁴⁸ Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 1.3.

⁴⁹ General Comment No. 32, para. 19.

effectively.⁵⁰ The Special Rapporteur on the independence of judges and lawyers has consistently urged that the judiciary be involved in the drafting of its own budget.⁵¹ A number of regional standards also provide that the judiciary should be consulted regarding the preparation of the budget and its implementation.⁵²

The ICJ has likewise identified the lack of participation by the judiciary in the drafting of its budget as a factor that can undermine judicial independence and impartiality. "Inasmuch as other branches of power or State institutions wield an important influence in the allocation and administration of those resources given to the judiciary, there is a real possibility of influencing the outcomes of particularly sensitive cases, which would entail an attack on the independence of the judiciary".⁵³

D. Assessment in light of international law and standards

The International Commission of Jurists believes that the CSM did not function effectively as an independent judicial council and was unable to safeguard the independence of courts and judges, as required under international law.

In terms of its composition, the CSM was dominated by members of the executive branch, which, given its mandate, is inconsistent with international standards on the independence of the judiciary. As the Human Rights Committee has explained: "A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal".⁵⁴

The ICJ views the current situation under the transitional authorities as an improvement over the CSM in several significant respects. First, in terms of composition, the IPJJ is not dominated by the executive. Instead, half of its members are judges who are elected to serve by their peers.⁵⁵ Second, as discussed further in Chapter II, under Law No. 2013-13, any transfer other than one for "*nécessité de service*" requires both the consent of the judge and the IPJJ. Transfers can be challenged before the IPJJ and then appealed to the Administrative Tribunal. Finally, Law No. 2013-13 made some improvements to the disciplinary procedure. A judge subject to disciplinary proceedings is now given 15 days notice of the hearing, although, as set out in Chapter III, the ICJ does not consider this sufficient time in all circumstances. Significantly, the law now enshrines the right of a judge to appeal any disciplinary decision to an independent judicial authority.

As described above, the 2014 Constitution envisions the establishment of a High Judicial Council to replace the IPJJ. A new law for this body will be drafted, defining its powers in all issues concerning the management of the judiciary, including selection, appointment,

⁵⁰ UN Basic Principles on the Independence of the Judiciary, Principle 7; see also Concluding Observations of the Human Rights Committee on the Central African Republic, UN Doc. CCPR/C/CAF/CO/2, para. 16.

⁵¹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 39.

⁵² ACHPR Principles and Guidelines, Section A, Principle 4(v); CoM Recommendation (2010)12, para. 40.

⁵³ *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioners' Guide No. 1*, International Commission of Jurists, Geneva, 2007, p. 33 (hereafter "*Practitioners' Guide No. 1*").

⁵⁴ General Comment No. 32, para. 19.

⁵⁵ Law No. 2013-13, article 11 provides: « *Les magistrates élisent les membres de l'instance, chacun selon le grade auquel il appartient, dans des élections libres, directes et à vote secret dans un seul tour* ».

promotion, training, transfer, assignment and discipline.

The composition of the HJC and the method of selection of its members are essential in order to guarantee an independent council and to uphold the confidence of the public in the justice system. In this regard, the ICJ is concerned that the provisions in the 2014 Constitution on the HJC do not guarantee that at least half of its members will be judges elected by their peers. Rather, the current provisions envision that the judges who make up two-thirds of the total membership of the HJC will be both elected and appointed, without specifying the exact proportion. International and regional standards that aim to safeguard the independence of the judiciary, however, recommend that the authority in charge of the career of judges be composed of a majority of judges elected by their peers.⁵⁶ Accordingly the ICJ recommends that the implementing law require that at least half of the members of the HJC will be judges who are elected by their peers to sit on it. In order for elected judges to form half the membership, three-fourths of the judges must be elected.

Furthermore the ICJ considers that it is important that the future law on the HJC should set out clear and objective criteria for candidates seeking election as well as for the non-judge members. These criteria should focus on the integrity, the independence, fair-mindedness and experience of the candidates. The law should also establish a fair, inclusive, transparent and independent procedure for both the election and the appointment of all members of the HJC.

To safeguard the independence of the HJC, the law must ensure that it has sufficient financial and human resources to enable it to carry out its functions. Furthermore the law must guarantee that the HJC has financial and administrative autonomy to enable it to act independently. It should also significantly contribute to the developing the budget for the judiciary. Thus the ICJ welcomes the fact that the 2014 Constitution guarantees the administrative and financial autonomy of the HJC and grants it the power to discuss its own budget with the relevant commission of the legislature.⁵⁷ The ICJ however, notes with concern that the 2014 Constitution does not includes a guarantee of adequate financial resources for the judiciary as a whole, and does not specifically empower the HJC to engage with the legislature with a view to ensuring sufficient budgeting for the judiciary. The ICJ therefore recommends that these deficits be addressed in implementing legislation.

Powers of the HJC regarding the appointment of judges and decisions related to their career development and discipline must be based on objective criteria. There must be clear, consistent, fair and transparent procedures for the selection, appointment, promotion, transfer, discipline and termination of tenure of judges. These are discussed further in Chapter II (Statute for Judges).

E. Recommendations

In light of the above, the Tunisian authorities should ensure that the future law on the High Judicial Council:

- i. Provides that three-quarters of the judges who will sit on the HJC are elected by their peers in a fair, transparent and inclusive manner guaranteeing the widest representation of the judiciary;**

⁵⁶ European Charter on the Statute for Judges, para. 1.3; see also Opinion No. 10 (2007) of the CCJE, para. 16.

⁵⁷ 2014 Constitution, article 113.

- ii. Includes objective criteria and qualifications for the candidates for election to the HJC, including at a minimum integrity, independence, fair-mindedness and experience;**
- iii. Includes objective criteria and qualification for the appointment of non-judge members, including at a minimum integrity, independence, fair-mindedness and experience;**
- iv. Ensures that individuals are not excluded from candidacy or appointment to the HJC on the basis of their political opinions;**
- v. Includes a fair, transparent and inclusive procedure for the appointment of judicial and non-judicial members;**
- vi. Empowers the HJC in all matters relating to the career of judges, including the selection, appointment, training, assessment, transfer, promotion, disciplining and termination of tenure of judges, and ensures that the executive and legislative branches do not have any substantive role in this regard;**
- vii. Establishes consistent, fair, inclusive and transparent procedures to be followed by the HJC for selection, appointment, transfer, promotion and discipline of judges;**
- viii. Provides for all decisions of the HJC relating to the transfer, promotion, and termination of tenure of judges, to be subject to independent judicial review or appeal; and**
- ix. Empowers the HJC to consult directly with the legislative branch in setting the budget for the judiciary and grants the HJC oversight of the budget for the judiciary.**

II. The Statute for Judges

A. Introduction

International law and standards make clear that safeguarding the independence of the judiciary requires States to take measures to ensure that matters related to the appointment, training, evaluation, promotion and discipline of judges are free from improper influence by other branches of government. In addition, respect for the rights of judges to freedom of association and expression are fundamental to ensuring the independence of the judiciary and to the fulfilment by judges of their role in upholding the rule of law and respect for human rights.

In General Comment No. 32, the Human Rights Committee emphasized that the requirement of independence of the judiciary refers not only to actual freedom from political interference but also to “the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions”.⁵⁸ Similarly, the European Court of Human Rights, in interpreting the obligations imposed by the guarantee of the right to fair trial under the European Convention for the Protection of Human Rights and Fundamental Freedoms, has held that “in order to establish whether a tribunal can be considered ‘independent’ ... regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence”.⁵⁹

In the past, the executive had been heavily involved in almost all aspects of the management of the judiciary in Tunisia. Although article 65 of the 1959 Constitution provided that “the judicial authority is independent,” in practice judicial independence was undermined by the executive’s systematic and arbitrary interference in judicial matters.⁶⁰ Efforts by judges to discuss issues relating to the judiciary, including its lack of independence, and to organize collectively with other judges to advocate for reforms were repeatedly repressed by the executive branch. Organic Law No. 67-29 on the Organization of the Judiciary, the High Judicial Council and the Statute for Judges defined the rules applicable to the members of the judiciary, which includes both judges (“*magistrats de siège*”) and prosecutors (“*magistrats du parquet*”). The Statute for Judges contained provisions on the rights and duties of judges and the progression of their careers, including selection, appointment, assessment, promotion, transfer, conditions of tenure and discipline. As written and as implemented, this law did not adequately guarantee the independence of the judiciary as a body or of individual judges.

Article 22 of the Provisional Constitution provided that the judiciary “exercises its powers in total independence”. The Constitution adopted by the NCA in January 2014 contains a more detailed guarantee of the independence of the judiciary. It provides: “The judiciary shall be independent and guarantee delivery of justice, supremacy of the Constitution, the rule of law, and protection of rights and freedoms. Judges shall be independent. In

⁵⁸ General Comment No. 32, para. 19.

⁵⁹ See generally *Incal v. Turkey*, ECtHR, Application No. 22678/93, Judgment of 9 June 1998, para. 65; *Findlay v. United Kingdom*, ECtHR, Application No. 22107/93, Judgment of 25 February 1996, para. 73; *Bryan v. United Kingdom*, ECtHR, Application No. 19178/91, Judgment of 22 November 1995, para. 37.

⁶⁰ ICJ, *Enhancing the Rule of Law and guaranteeing human rights in the Constitution: A report on the constitutional reform process in Tunisia*, Geneva, 2013, p. 30.

the performance of their duties they shall be subject only to the authority of law".⁶¹ The 2014 Constitution also states: "Any interference in the operation of the judicial system shall be prohibited".⁶²

Under the prior regime, the selection and appointment of judges was closely controlled by the executive branch. Amendments to the law during the transition period have resulted in some positive changes. However, further reforms concerning judicial selection, appointment, promotion, transfer and disciplining should be set out in the law in order to ensure that the independent judiciary guaranteed by the 2014 Constitution becomes a reality.

B. Statute for judges: past, present and future

1. Selection, training and appointment

During the rule of President Ben Ali, the selection and appointment of judges was controlled by the executive. The Minister of Justice was responsible for the judicial selection process. The Minister established the conditions, modalities, and programme of the admission exam to the "Institut Supérieur de la Magistrature" (ISM).⁶³ The ISM was under the authority of the Ministry of Justice and was responsible for training judges, court clerks, and court officers.⁶⁴ The Minister of Justice presented the list of graduates who could be appointed as judges to the CSM and the President.⁶⁵ Judges were then appointed by presidential decree on the recommendation of the CSM which, as described in Chapter I, did not function as an independent institution. Newly appointed judges served a trial period of one year, after which they could be recommended for tenure by the CSM.

During the transition period, the IPJJ is charged with recommending candidates for appointment as judges.⁶⁶ Under article 17 of the Provisional Constitution, all senior civilian office-holders, which includes judges, are appointed by the Prime Minister following consultation with the Minister of Justice and the Council of Ministers.⁶⁷ Although the IPJJ is responsible for selecting trainee judges, article 29 of Law No. 67-29 is still in operation and thus it is the Minister of Justice who determines the conditions and modalities of the admission exam. In addition, the ISM remains under the authority of the Ministry of Justice.

The Constitution adopted in January 2014 provides that judges will be "appointed by presidential decree with the assent of the High Judicial Council".⁶⁸ However, it also states that appointments to "high judicial positions" are done by presidential decree after consultation with the Prime Minister, based on a list of candidates prepared by the HJC. High judicial functions are currently defined by Law No. 67-29 as the President of the Cassation Court, the Prosecutor-General of the Cassation Court, the President of the Tunis Court of Appeal, the Prosecutor-General of the Tunis Court of Appeal, the Inspector-General (who is the head of the GIS), the President of the Property Court, and

⁶¹ 2014 Constitution, article 102.

⁶² 2014 Constitution, article 109.

⁶³ Law No. 67-29, article 29.

⁶⁴ Law No. 85-80 of 11 August 1985, article 2; Decree No. 99-1290 of 7 June 1999, article 1.

⁶⁵ Law No. 67-29, article 31.

⁶⁶ Law No. 2013-13, article 14.

⁶⁷ Provisional Constitution, article 17 provides: "*Le Président du Gouvernement est compétent ... pour procéder aux nominations aux emplois civils supérieurs, en concertation avec le ministre concerné et le conseil des ministres*".

⁶⁸ 2014 Constitution, article 106.

the Prosecutor-General Director of Judicial Services.⁶⁹

The new Constitution is otherwise silent on the selection process, which will be determined by a new law.

2. Assessment, promotion and transfer

The assessment of judges is thus far the same during the transitional period as it was during the prior regime. This may change when new laws on the High Judicial Council and the Statute for Judges are adopted. However, since neither the Provisional Constitution nor the 2014 Constitution mention the assessment of judges, the process is still governed by article 34 of Law No. 67-29. Under this article, judges are rated by their hierarchical superiors following the advice of the prosecutor of the jurisdiction to which they belong. Thus judges at appellate courts are rated by the president of the court following the advice of the Prosecutor-General to each of the courts of appeal ("*procureur général*") and judges at first instance courts are rated by the president of the court following the advice of the prosecutor to the court of first instance ("*procureur de la république*").⁷⁰ The assessment process lacks transparency. Law No. 67-29 does not specify any criteria for assessment. However, a form emanating from the Ministry of justice provides for the following assessment criteria: ability and professional competence, compliance with and respect for judicial duties, level of productivity, relationship with hierarchical superiors and work-related behaviour, organisational and administrative management abilities, and general knowledge and the ability to take the initiative and to progress.⁷¹ The concerned judge is not involved in the assessment procedure, nor is he or she informed of the outcome of the assessment.

Under the prior regime, promotion was in the hands of the executive branch through its control of the CSM. No judge could be promoted without appearing on a promotion roster, which was drawn up by the CSM.⁷² The law did not specify any criteria for promotion other than seniority.⁷³ In practice, neither the assessment nor a judge's seniority had much impact. Many judges interviewed during ICJ missions to Tunisia stated that under President Ben Ali, the decision to promote a judge was based on loyalty to the regime.

During the transition period, procedures for the promotion of judges have improved slightly due to the increased authority and independence of the newly established IPJJ. Promotions are made by the decree of the Prime Minister, with the assent of the IPJJ. In most cases, a judge or prosecutor cannot be transferred, even for the purposes of promotion, without his or her written consent. Decisions to promote or to include names in the promotion roster may be challenged before the IPJJ, which then has seven days to rule. However, the law is silent on promotion criteria, thus the main consideration is still seniority under Law No. 67-29.⁷⁴

The 2014 Constitution does not mention how judges will be promoted, leaving promotion procedures to the new HJC.⁷⁵

⁶⁹ Law No. 67-29, article 7bis.

⁷⁰ The Prosecutor-General to the court of appeal ("*procureur général*") supervises the Attorney-Generals ("*avocats généraux*"), who are members of the prosecution service at the level of the appeals courts ("*parquet*").

⁷¹ "Personal Form" of the Tunisian Ministry of Justice

⁷² Law No. 67-29, article 33.

⁷³ Law No. 67-29, article 33.

⁷⁴ Law No. 67-29, article 33.

⁷⁵ 2014 Constitution, article 114.

Under the 1967 law, the Minister of Justice had the power to decide to transfer a magistrate for "*nécessité de service*" (needs of the service) and, under article 20, to control short-term assignments.⁷⁶ Restrictions on the arbitrary transfer of judges have now been adopted but compliance with these new procedures is questionable. Transfers are made by a decree of the Prime Minister, with the assent of the IPJJ.⁷⁷ Law No. 2013-13 provides that judges cannot be transferred, promoted or appointed to a new position without their written consent.⁷⁸ Law No. 2013-13 does not prohibit transfers for "*nécessité de service*", which would include the filling of vacant posts or newly created positions or to respond to increases in workload. However such transfers must meet several conditions. All judges are equally eligible when filling service requirements and, prior to transferring a judge to a new place of work, it is mandatory to verify whether another judge is interested in and available for the position. Priority should be given to judges in the nearest judicial division.⁷⁹

Law No. 2013-13 permits decisions to promote, transfer and add names to the promotion roster to be challenged before the IPJJ within seven days from the publication of the decision. The IPJJ then has to rule within 7 days. A decision of the IPJJ can be appealed to the Administrative Tribunal, which has 6 months to decide the case.⁸⁰

Despite the adoption of some new safeguards against the arbitrary transfer of judges, executive interference continues to constitute a threat to the independence of the judiciary in Tunisia. On 14 October 2013, the Minister of Justice announced the transfer of two judges, Justice Nouri Ktiti, President of the Land Court, and Khaled Barrak, Inspector-General to the Ministry of Justice and the head of the GIS, who were also members of the newly established IPJJ, without their consent. The Minister of Justice took this decision unilaterally, in violation of article 14 of Law No. 2013-13, which requires the prior assent of the IPJJ for promotions and transfers. Furthermore, relying on the "*nécessité de service*" exception to the written consent requirement, the Minister made the transfer without obtaining the consent of the judges concerned. On 7 November 2013, the Prime Minister adopted two decrees appointing a new president of the Land Court and a new Inspector-General to the Ministry of Justice.⁸¹ Ktiti and Barrak, the two judges who had been replaced, then brought a challenge before the Administrative Tribunal, which adopted an urgent measure, called a "*report d'exécution*", to suspend implementation of the Minister's decision.⁸² However, the Ministry of Justice declared that

⁷⁶ Article 14 stipulates that "*nécessité de service*" is the necessity that arises from the need to deal with a vacancy, appoint judges to new judicial functions, to cope with an apparent rise in the volume of work in a court or fill new courts with judges.

⁷⁷ Law No. 2013-13, article 14.

⁷⁸ Law No. 2013-13, article 12. Paragraph 3 provides: « *Le magistrat ne peut être muté en dehors de son poste de travail, même dans le cadre d'une promotion ou une nomination dans un nouvel emploi fonctionnel, sans son consentement exprimé par écrit* ».

⁷⁹ Law No. 2013-13, article 12 paras. 5 & 6 provide: « *Tous les magistrats sont égaux pour répondre aux exigences de la nécessité de service. Un magistrat ne peut être appelé à changer son poste de travail pour nécessité de service que s'il a été établi l'absence d'autres magistrats désirant rejoindre le poste de travail en question* » ; and that « *Les magistrats en exercice dans la circonscription judiciaire la plus proche sont appelés à cet effet, en ayant recours à l'alternance et au tirage au sort le cas échéant* ».

⁸⁰ Law No. 2013-13, article 15.

⁸¹ Decree No. 2013-4452 of 7 November 2013 on the appointment of the President of the Land Court; Decree No. 2013-4451 of 7 November 2013 on the appointment of the General Inspector to the Ministry of Justice.

⁸² "Tunisie - Magistrature: Le tribunal administratif demande la suspension de deux nominations controversées", in *Al Huffington Post Maghreb*, 25 November 2013, available at

it would not abide by the Administrative Tribunal ruling.⁸³ On 9 December 2013, the Administrative Tribunal confirmed the suspension of the application of the two decrees.

3. Security of tenure

Article 107 fails to enshrine fully the principle of security of tenure, as it protects judges against arbitrary transfer but does not include a guarantee of security of tenure until a stated retirement age.

4. Freedom of expression and association

Under the Ben Ali regime, judges' efforts to express their views and advocate on their own behalf were often suppressed. In particular, the *Association des Magistrats Tunisiens* (AMT) faced harassment and intimidation when judges sought to publicly voice their opinions regarding the judiciary. For example in July 2004, the executive board of the AMT planned a press conference in Tunis to discuss fairer representation of judges on the CSM and security of tenure. However, the authorities banned it and the police dispersed the journalists who were in attendance. Following condemnation by the AMT for police raids on the Tunis courts in March 2005, the offices of AMT were also raided by police.⁸⁴ Law No. 67-29 offers no guarantees for the rights of judges to freedom of expression and association.

C. International law and standards

1. Judicial independence

The guarantee of judicial independence must not only be enshrined and safeguarded in the Constitution but also in more specific rules provided at the legislative level.⁸⁵ As the Human Rights Committee has explained, States have the obligation to take "specific measures" in their constitution or laws guaranteeing the independence of the judiciary and protecting judges from any form of political influence.⁸⁶

As a safeguard of the independence of the judiciary, when judges consider that their independence is under threat, they should have recourse to a judicial council or other independent authority.⁸⁷ The law should provide for sanctions against persons seeking to influence judges in an improper manner.⁸⁸ This is consistent with recommendations of the Human Rights Committee that States investigate allegations of improper interference with the independence of the judiciary.⁸⁹

http://www.huffpostmaghreb.com/2013/11/25/tunisie-tribunal-administratif-suspension-nominations_n_4338302.html.

⁸³ "Tunisie: Le gouvernement ignore la décision du Tribunal administratif", in *Al Huffington Post Maghreb*, 27 November 2013, available at http://www.huffpostmaghreb.com/2013/11/27/tunisie-gouvernement-ignore-tribunal-administratif_n_4348072.html?utm_hp_ref=mostpopular.

⁸⁴ *Attacks on Justice – Tunisia*, 2005.

⁸⁵ CoM Recommendation (2010)12, para. 7; see also Explanatory Memorandum to the European Charter on the Statute for Judges, para. 1.2.

⁸⁶ General Comment No. 32, para. 19.

⁸⁷ CoM Recommendation (2010)12, para. 8; European Charter on the Statute for Judges, para. 1.4.

⁸⁸ CoM Recommendation (2010)12, paras. 8 & 14.

⁸⁹ Concluding Observations of the Human Rights Committee on Albania, UN Doc. CCPR/CO/82/ALB, para. 18; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/BRA/CO/2, para. 17.

2. Selection, training and appointment

The selection of judges should be based on objective and transparent criteria. There is unanimity in international standards that selection criteria must be based on training, qualifications, ability and integrity.⁹⁰ For example, the UN Basic Principles state that persons "selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of selection shall safeguard against judicial appointments for improper motives".⁹¹ Similarly, the ACHPR Principles and Guidelines provide that the process of appointment "shall be transparent and accountable" and that the method of selection "shall safeguard the independence and impartiality of the judiciary".⁹²

In the selection of judges, regardless of the system used, there must be no discrimination on any ground, except that the requirement that a candidate be a national of the country concerned is not considered discriminatory.⁹³ The Human Rights Committee has called on States to ensure appointment of qualified judges from among women and minorities, as has the Special Rapporteur on the independence of judges and lawyers.⁹⁴ The Latimer House Guidelines, which were approved by judges from Commonwealth countries, provide that "judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination."⁹⁵

International standards and bodies recommend that the body responsible for decisions to appoint judges should be independent of the executive and legislative branches of government.⁹⁶ The European Charter on the Statute for Judges envisages an authority "independent of the executive and legislative powers" for every decision "affecting the selection, recruitment, appointment, career progress or termination of office of a judge".⁹⁷ Decisions to appoint a candidate as a judge should be taken by this independent authority "or on its proposal, or its recommendation or with its agreement or following its opinion".⁹⁸ The Special Rapporteur on the independence of judges and lawyers has likewise recommended an independent authority in charge of the selection of judges.⁹⁹

⁹⁰ See generally ACHPR Principles and Guidelines, Section A, Principle 4(i) (noting that the "sole criteria" shall be the suitability of a candidate "by reason of integrity, appropriate training or learning and ability."); CoM Recommendation (2010)12, para. 44; European Charter on the Statute for Judges, para. 2.1. See also ICJ, *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioners' Guide No. 1*, Geneva, 2007, p. 41 (hereafter "*Practitioners' Guide No. 1*").

⁹¹ UN Basic Principles on the Independence of the Judiciary, Principle 10.

⁹² ACHPR Principles and Guidelines, Section A, Principle 4(h).

⁹³ UN Basic Principles on the Independence of the Judiciary, Principle 10; CoM Recommendation (2010)12, para. 45; ACHPR Principles and Guidelines, Section A, Principle 4(j); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, OP 13.

⁹⁴ Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 34.

⁹⁵ Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, ("Latimer House Guidelines") Principle 11.1.

⁹⁶ *Practitioners' Guide No. 1*, p. 45.

⁹⁷ European Charter on the Statute for Judges, Principle 1.3.

⁹⁸ European Charter on the Statute for Judges, Principle 3.1. The Explanatory Memorandum further provides: "The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body".

⁹⁹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 27.

The Human Rights Committee has criticized the involvement of the executive in the appointment of judges and has recommended the establishment of an independent body to safeguard appointment, promotion and regulation of the judiciary.¹⁰⁰ For example, with regard to Tajikistan, it raised concern about the “apparent lack of independence of the judiciary, as reflected in the process of appointment and dismissal of judges, as well as their economic status”. It recommended the establishment of “an independent body charged with the responsibility of appointing, promoting and disciplining judges at all levels”.¹⁰¹ Similarly, the Human Rights Committee called on the authorities of the Republic of the Congo to give particular attention to the training of judges and to the system governing their recruitment and discipline, in order to free them from political, financial and other pressures to ensure their security of tenure and enable them to render justice promptly and impartially.¹⁰²

While international standards do not require that the executive and legislative branches be absolutely precluded from taking a role in judicial appointment, they emphasize the necessity of ensuring that the selection process is free of political taint. Thus the Committee of Ministers of the Council of Europe, in their Recommendation on the independence, efficiency and responsibility of judges states that where the head of State, government or legislative power takes decisions concerning the selection and career of judges, “an independent and competent authority drawn in substantial part from the judiciary ... should be authorized to make recommendations or express opinions which the relevant appointing authority follows in practice”.¹⁰³ The Singhvi Declaration provides that participation in judicial appointments by the other branches, or the general electorate, should be “scrupulously safeguarded against improper motives and methods”. The Singhvi Declaration recommends consultation with members of the judiciary and the legal profession or a role for a judicial body to make recommendations.¹⁰⁴

Both initial and in-service training programmes should be implemented by an “independent authority” and “in full compliance with educational autonomy.”¹⁰⁵ The European Charter on the Statute for Judges proposes an independent body composed of a majority of judges, which “ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties”.¹⁰⁶

3. Assessment, promotion and transfer

Any assessment of a judge should be based on “objective criteria” that is “published by the competent judicial authority” and judges should be able to express their views and to challenge assessments before an independent authority or a court.¹⁰⁷ The Human Rights Committee has noted that if promotion decisions depend on the discretion of

¹⁰⁰ Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16.

¹⁰¹ Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/C/84/TJK, para. 17.

¹⁰² Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para. 14.

¹⁰³ CoM Recommendation (2010)12, para. 47.

¹⁰⁴ Singhvi Declaration, para. 11(c).

¹⁰⁵ CoM Recommendation (2010)12, para. 57.

¹⁰⁶ The European Charter on the Statute for Judges, para 2.3, which refers to para 1.2 where the detailed requirements are set out.

¹⁰⁷ CoM Recommendation (2010)12, para. 58.

administrative authorities, it may "expose judges to political pressure and jeopardize their independence and impartiality".¹⁰⁸ Although the head of the court "may legitimately have supervisory powers to control judges on administrative matters," a judge must be "independent vis-à-vis his judicial colleagues" in the decision-making process.¹⁰⁹ As CoM Recommendation (2010)12 notes: "Hierarchical judicial organization should not undermine individual independence".¹¹⁰

Decisions on the promotion of judges should be based on the same kind of independent and objective criteria that regulate selection, such as "ability, integrity and experience".¹¹¹ The Singhvi Declaration states: "Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive".¹¹² The European Charter on the Statute for Judges stipulates a system of promotion "based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned".¹¹³ In this regard, the Human Rights Committee has emphasized that the exercise of power by the Ministry of Justice over judicial matters, including its powers of inspection of the courts, constitutes interference by the executive and a threat to the independence of the judiciary.¹¹⁴

International standards are clear that assignment and transfer decisions should be done by judicial authorities and not by members of the executive branch. Thus the International Bar Association's Minimum Standards of Judicial Independence provides: "The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld".¹¹⁵ The Singhvi Declaration states the assignment of a judge to a post "shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist".¹¹⁶ The Singhvi Declaration further states that "judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge".¹¹⁷ Likewise the European Charter on the Statute for Judges recommends that the decision to assign a judge to a tribunal be taken by an "independent authority" or "on its proposal, or its recommendation or with its agreement or following its opinion".¹¹⁸

¹⁰⁸ Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14.

¹⁰⁹ IBA Minimum Standards of Judicial Independence, paras. 32 & 46.

¹¹⁰ CoM Recommendation (2010)12, para. 22.

¹¹¹ UN Basic Principles on the Independence of the Judiciary, Principle 13 ("Promotion of Judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience."); ACHPR Principles and Guidelines, Section A, Principle 4(0) ("Promotion of officials shall be based on objective factors, in particular ability, integrity and experience."); CoM Recommendation (2010)12, para. 44 ("Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity").

¹¹² Singhvi Declaration, para. 14.

¹¹³ European Charter on the Statute for Judges, Principle 4.1.

¹¹⁴ Concluding Observations of the Human Rights Committee on Romania, UN Doc. CCPR/C/79/Add.111, para. 10.

¹¹⁵ IBA Minimum Standards of Judicial Independence, adopted 1982 by the International Bar Association, Standard A.12.

¹¹⁶ Singhvi Declaration, para. 13.

¹¹⁷ Singhvi Declaration, para. 15.

¹¹⁸ European Charter on the Statute for Judges, Principle 3.1.

4. Security of tenure

Security of tenure is a basic condition for judicial independence. Unless judges have long-term security of tenure, they are vulnerable to pressure from those in charge of renewing their posts. Judges should have guaranteed tenure until a set retirement age or the expiry of their term of office.¹¹⁹ Many standards recommend that life tenure should be the norm.¹²⁰

Judges should only be subject to removal from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties.¹²¹ According to the UN Basic Principles and other international and regional standards, the disciplining of judges and any decisions concerning suspension or removal should only be made following a fair hearing by an independent body on the basis of established standards of judicial conduct and should be subject to review.¹²² For example, the Committee of Ministers Recommendation (2010)12 provides that disciplinary proceedings “should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge accused of misconduct with the right to challenge the decision and sanction”, which must be proportionate.¹²³ In General Comment No. 32, the Human Rights Committee stated: “The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary”.¹²⁴

The Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have regularly expressed concern about the role played by legislative or executive branches in disciplining judges.¹²⁵ Judges should “only be removed in accordance with an objective, independent procedure prescribed by the law”.¹²⁶ Even if the disciplinary body is a legislative or executive one, the due process and fair trial safeguards apply and the right of appeal is even more important.¹²⁷ Disciplinary proceedings are discussed further in Chapter III.

5. Freedom of expression and association

The Universal Declaration of Human Rights, as well as the ICCPR and other international standards guarantee to all people the right to freedom of expression, belief, association and assembly. Respect for and protection of these rights and freedoms is especially

¹¹⁹ CoM Recommendation (2010)12, para. 49; UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Section A, Principle 4(l).

¹²⁰ Latimer House Guidelines, Guideline II.1.

¹²¹ UN Basic Principles on the Independence of the Judiciary, Principle 18; ACHPR Principles and Guidelines, Section A, Principle 4(p).

¹²² CoM Recommendation (2010)12, para. 69; UN Basic Principles, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

¹²³ CoM Recommendation (2010)12, para. 69.

¹²⁴ General Comment No. 32, para. 20.

¹²⁵ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 60; *Patukhov v. Belarus*, Human Rights Committee Communication No. 814/1998, Views of 17 September 2003, UN Doc. CCPR/C/78/D/814/1998, para. 7.3; *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, Human Rights Committee Communication No. 933/2000, Views of 19 September 2003, UN Doc. CCPR/C/78/D/933/2000, para. 5.2.

¹²⁶ Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc. CCPR/CO/75/MDA, para. 12.

¹²⁷ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 61.

important for judges in their role as guarantors of human rights and the rule of law. Freedom of association and expression are fundamental to the fulfilment of these roles.

Principle 8 of the UN Basic Principles provides that “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary”.¹²⁸ Principle 9 provides that judges “shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence”. The Committee of Ministers Recommendation, the ACHPR Principles and Guidelines, the European Charter on the statute for judges, the Latimer House Guidelines, and the Beijing Principles all contain similar guarantees.¹²⁹

D. Assessment in light of international law and standards

The laws in force in Tunisia under the previous regime were insufficient to safeguard the independence of the judiciary. Judges were vulnerable to a high degree of executive influence and politicization. Matters regarding the selection, appointment, training, assignment, promotion and transfer of Judges rested largely with the Minister of Justice or with institutions under the Minister’s control. As the ICJ has documented in its previous publications on Tunisia, the government of President Ben Ali failed to respect the principle of separation of powers and to guarantee or respect the independence of the judiciary as required under international law.¹³⁰

The Provisional Constitution and some of the amended laws operating during this transitional period set out stronger guarantees and some enhanced safeguards of judicial independence. However, the current framework is inconsistent with international standards in some respects and has not fully ensured the independence of the judiciary in practice.

The ICJ welcomes the fact that the 2014 Constitution contains even stronger guarantees of judicial independence. The ICJ considers that additional provisions should be included in the new Statute for Judges in order to ensure systems and procedures for the selection, appointment, promotion and discipline of judges, as well as guarantees of security of tenure, adequate resources and remuneration, consistent with international standards. This will ensure enhanced protection of the independence of the judiciary in law and practice, in keeping with the promises of the 2014 Constitution and Tunisia’s obligations under the ICCPR.

As a preliminary matter, the Statute for Judges must enshrine the principle of judicial independence as well as practical and effective safeguards, and should ensure that judges have recourse to the HJC if they believe that their independence is threatened.

1. Selection criteria and training

Executive branch control of judicial appointment means that it is impossible to guarantee a process free of politicization. International standards require that any method of judicial

¹²⁸ UN Basic Principles on the Independence of the Judiciary, Principle 8.

¹²⁹ CoM Recommendation (2010)12, para. 25; ACHPR Principles and Guidelines, Section A, Principles 4(s) and (t); European Charter on the Statute for Judges, paragraph 1.7; Latimer House Guidelines, Guideline VII.3.

¹³⁰ ICJ *Attacks on Justice – Tunisia*, 2005.

selection “safeguard against judicial appointments for improper motives”.¹³¹ This can only be accomplished through selecting judges based on objective criteria that includes the “qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity”.¹³²

The 2014 Constitution is silent on criteria for appointment as a judge. International law and standards provide that candidates for judicial office should be chosen on the basis of merit and that there should be no discrimination. The future Statute for Judges should set forth specific criteria, including academic qualifications, training, skills, integrity and capacity. It should set out a specific prohibition of discrimination in the process of the selection of judges.

The Statute for Judges should include provisions on initial and in-service training. In doing so, the Statute should require the authorities to ensure sufficient resources for an appropriate training programme, identify the body charged with carrying out this training, ensure the independence of this body from the executive and detail the conditions that this body must meet in discharging this function. In particular, the ICJ considers that if the *Institut Supérieur de la Magistrature* remains the body charged with carrying out judicial training, it should be required to act in accordance with the requirements of competence and impartiality and be placed under the supervision of the HJC rather than the Ministry of Justice, as is currently the case.

2. Assessment, promotion and transfer

The current legal framework governing the assessment and promotion of judges is very vague. The judge being assessed is not informed or consulted and has no right to challenge the assessment. The assessment procedure must not interfere with individual judicial independence. In particular, the current procedure under article 34 of Law No. 67-29 has the potential to render judges vulnerable to their hierarchical superiors. Furthermore, the absence of assessment criteria and the failure to advise or consult with the judge concerned are contrary to international standards.¹³³

The law on the Statute for Judges should detail the criteria for promoting judges and the procedure that applies in this regard. In particular, the criteria should be objective and based upon ability, integrity and experience. Judges who meet promotion criteria but are not promoted should be entitled to lodge a complaint before the HJC.

Although the current law offers some procedural safeguards for transfer decisions and is thus an improvement, these procedures were disregarded in the cases of Justice Ktiti and Inspector-General Barrak. The Statute for Judges should detail the specific situations in which a judge may be transferred, even for the purposes of promotion. Decision-making power in this regard should rest with the HJC. In all instances, the consent of the judge should in principle be obtained in advance.

3. Security of tenure

Current laws on the judiciary do not adequately guarantee the security of tenure of judges. Article 107 of the 2014 Constitution provides that judges “may not be transferred without their consent, and they cannot be dismissed or suspended from office or be subject to disciplinary action except in circumstances and under safeguards laid down in

¹³¹ UN Basic Principles on the Independence of the Judiciary, Principle. 10.

¹³² CoM Recommendation (2010)12, para. 44.

¹³³ CoM Recommendation (2010)12, para. 58.

law and by a reasoned decision of the Supreme Judicial Council". This provision falls short of what is required under international law. The new Statute for Judges should establish that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties.¹³⁴ It should guarantee the security of tenure of judges including by inclusion of a provision setting out guaranteed tenure for life or until a stated age of retirement.

In addition, the Statute for Judges should set out the disciplinary process. The procedure for disciplining judges must be conducted before an independent and impartial body, respect the rights of the judge concerned, and include the right to appeal before a higher independent judicial body. Furthermore the Statute for Judges or another law should set out a code of conduct for judges that is consistent with internationally accepted standards of judicial conduct. The law should also specify that any decision to discipline a judge must be made on the basis of the code of conduct, and any sanction applied must be proportionate. The disciplining of judges is discussed in greater detail in Chapter III.

4. Freedom of expression and association

As mentioned earlier, judges have been subjected to intimidation, harassment, assault, arbitrary disciplinary proceedings and even dismissal for exercising their rights to freedom of expression and association.¹³⁵ Regrettably the current legal framework governing the duties and rights of judges does not expressly protect their rights to freedom of expression and association.

With the aim of enhancing the independence of the judiciary, the ICJ recommends that the Statute for Judges contain a provision expressly enshrining the rights of judges to freedom of expression, in a manner that is consistent with their obligations of reserve and judicial ethics. A provision enshrining their right to freedom of association, including the right to establish and join professional associations within the limits of the requirements of judicial independence and impartiality and in accordance with the law, should also be expressly set out.

E. Recommendations

In light of the above, the ICJ urges the authorities in Tunisia to ensure that the future Statute for Judges:

- i Sets out fair and transparent procedures for selecting trainee judges and appointing judges, and expressly prohibits discrimination;**
- ii Mandates the HJC to oversee the procedures for the selection of trainee judges and appointing judges and vests it with final decision-making power;**
- iii Sets forth objective criteria for appointments, which include training and qualifications, integrity, ability and experience;**
- iv Guarantees adequate, appropriate, effective initial and on-going training for judges at the expense of the State and ensures that the**

¹³⁴ UN Basic Principles on the Independence of the Judiciary, Principle 18; Singhvi Declaration, para. 30; CoM Recommendation (2010)12, para. 50; ACHPR Principles and Guidelines, Section A, Principle (4)(p).

¹³⁵ See, for example, the case of Judge Mokhtar Yahyaoui, who founded the Centre for the Independence of the Judiciary, described in *Attacks on Justice – Tunisia*, 2002 (describing his dismissal after he published an open letter denouncing the lack of independence for the judiciary) and *Attacks on Justice – Tunisia*, 2005 (describing his assault and detention).

- ISM is adequately resourced and is placed under the supervision of the HJC;**
- v Ensures that judges are regularly provided with continuing legal education and training;**
 - vi Guarantees adequate numbers of appropriately-trained judges and appropriately-resourced courts with sufficient infrastructure;**
 - vii Details objective criteria and a transparent procedure for assessing the work of judges. Assessment procedures must include discussions with the judge concerned and guarantee the right of the judge to challenge assessments before the HJC;**
 - viii Sets out objective criteria and a transparent procedure for promoting judges, requires the consent of the judge concerned to any promotion, and grants the HJC oversight and decision-making power in this regard, to the exclusion of any substantive role for the Ministry of Justice. Such criteria should include, among others, legal qualifications, integrity, experience and the proper performance of their judicial duties;**
 - ix Details the specific situations in which, and the relevant time period for which, a judge can be transferred or assigned to another position and the applicable procedure in this regard. This procedure shall include the requirement of obtaining the consent of the judge, and should vest decision-making capacity solely in the HJC, to the exclusion of any substantive role for the Ministry of Justice;**
 - x Guarantees the security of tenure for members of the judiciary until a set retirement age or for an adequate fixed term;**
 - xi Guarantees conditions of tenure for judges, including adequate working conditions and remuneration, including provision for health and other social benefits and a pension on retirement;**
 - xii Limits the instances in which a judge may be removed from office to the following: reaching retirement age, if applicable, or the end of a fixed period of tenure; resignation; being medically certified as unfit; or as a result of the imposition of a lawful and proportionate sanction of dismissal imposed following a full and fair disciplinary procedure;**
 - xiii Grants oversight of all disciplinary sanctions to the HJC, including the temporary suspension of judges facing disciplinary proceedings, to the exclusion of any substantive role for the Ministry of Justice, and ensures due process guarantees for judges, including the right of appeal to a higher independent body or court against such decisions;**
 - xiv Expressly includes reference to the rights of judges to freedom of association, assembly and expression, including the right to form and join associations aimed at representing their interests, promoting their professional training and protecting their judicial independence; Such a reference should specify any limitations on the rights and restrict such limitations strictly to those required to ensure that judges conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary; and**
 - xv Is sufficiently detailed so as to preclude subsidiary legislation that grants the executive a role in the selection, appointment, promotion, transfer, training, inspection and discipline of judges.**

III. Judicial Accountability

A. Introduction

If the rule of law is to prevail in a country, the public must trust the judiciary. As the Special Rapporteur on the independence of judges and lawyers has noted, "what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society".¹³⁶ To instil such trust, the judiciary must not only be independent and impartial, it must also be seen as independent by the public. This requires judges to conduct themselves according to established standards of judicial conduct, enshrined in a clear code of conduct. Where they fail to meet these standards, they should be subject to appropriate disciplinary action.

In Tunisia, the lack of accountability of the judiciary in the past has facilitated corruption and impunity for human rights violations and contributed to a lack of public confidence in the judiciary. Judges told the ICJ that, rather than being investigated and subjected to disciplinary proceedings, certain judges who have been suspected of being involved in corruption or who have failed to address human rights violations, continue to exercise judicial functions; some have even been promoted. What is urgently needed is the establishment and implementation of a system that ensures that judges are held accountable for breaches of standards of judicial conduct, in full and fair procedures before independent and impartial bodies.

The failure to establish and implement a disciplinary system that includes a full, fair and independent accountability mechanism for judges in Tunisia has also meant the judiciary is subject to improper executive interference. In May 2012, over seventy judges and prosecutors were summarily dismissed by the Minister of Justice, leading to protests by Tunisian judges and the ICJ.¹³⁷ Since then, a new disciplinary procedure for judges has been adopted for the transitional period.

This chapter examines the laws applicable to judicial conduct and the disciplining of judges. It looks at the legal framework as it existed under the rule of President Ben Ali, the current system under the transitional government, and the changes envisioned by the 2014 Constitution. It then summarizes international standards related to the accountability of the judiciary and assesses national law in light of those standards. Finally it makes recommendations for legal reform.

B. Judicial accountability and the disciplinary procedure: past, present and future

1. Judicial accountability

Under the prior regime, the laws concerning judicial accountability were set forth in Law No. 67-29, the Code of Criminal Procedure, and the Criminal Code. With the adoption of Law No. 2013-13 by the transitional authorities, there have been changes to the disciplinary procedure but the substantive standards on judicial accountability remain in force. The 2014 Constitution envisages further changes but does not provide much detail. Each of these three stages are considered here.

¹³⁶ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2004/60 (2003), para. 40.

¹³⁷ ICJ, Executive control over judiciary persists in Tunisia, 6 August 2012 <http://www.icj.org/executive-control-over-judiciary-persists-in-tunisia/> (accessed 31 October 2013).

Law No. 67-29 stipulates that upon taking office, judges are required to swear that they will fulfil their duties impartially and honestly, will not disclose the secrecy of deliberations, and will be loyal and honourable.¹³⁸ The law further provides that the exercise of judicial functions is incompatible with the exercise of any public or elected office or any other business or employment.¹³⁹ However, judges may undertake scientific, literary or artistic work provided it does not undermine their dignity or independence. For teaching or other functions that do not undermine a judge's dignity and independence, the Minister of Justice may grant individual exemptions.¹⁴⁰ Article 23 of Law No. 67-29, requires judges to render justice impartially and prohibits them from deciding cases on the basis of personal knowledge. The law also prohibits judges from defending causes that are beyond the remit of the case before them. Judges are also required to refrain from any action or behaviour likely to harm the honour of their profession.¹⁴¹

Law No. 67-29 governs some aspects of judicial conduct, including by defining what conduct amounts to a disciplinary offence that could lead to disciplinary proceedings. Article 50 of Law No. 67-29 provides: "Failure of the duties of the status, honour or dignity of a judge or prosecutor is a disciplinary offence".¹⁴²

In addition, both the Code of Civil Procedure and the Criminal Code contain provisions relating to the accountability of judges. Article 199 of the Code of Civil Procedure provides that a claim for damages can be brought against a judge for wilful misconduct, fraud or corruption, or where the law expressly provides for civil liability.¹⁴³ Such claims must be heard before the Court of Cassation.

In the Criminal Code, some offences are expressly applicable to judges.¹⁴⁴ These include various degrees of corruption and the refusal by a judge to "do justice to the parties" despite a warning or injunction from superiors.¹⁴⁵ Except in cases of *in flagrante delicto*, Law No. 67-29, prohibits the arrest or prosecution of a judge for a crime or misdemeanour without prior approval from the CSM. In cases of *in flagrante delicto*, a judge may be arrested without prior approval but the CSM is to be informed immediately.

The Provisional Constitution of 2011 contained no provisions relating to the accountability of judges, although it paved the way for further legal reform of the judiciary. While Law No. 2013-13 made some changes to the disciplinary system, it did not put in place a comprehensive code of judicial conduct. In late 2012 the Ministry of Justice presented a draft code of ethics to the NCA. The draft code was criticized by judges, including the AMT and the *Observatoire Tunisien de l'Indépendance de la Magistrature* (OTIM) on the basis that it was drawn up exclusively by the Ministry of Justice and not by or in consultation with judges. Consideration of the draft was dropped and has not been revived since.

The Constitution adopted in January 2014 contains some provisions on judicial accountability. Article 103 declares that judges must act with impartiality and integrity

¹³⁸ Law No. 67-29, article 11.

¹³⁹ Law No. 67-29, articles 16 and 17.

¹⁴⁰ Law No. 67-29, article 16.

¹⁴¹ Law No. 67-29, article 24.

¹⁴² Law No. 67-29, article 50.

¹⁴³ Code of Civil Procedure, Law No. 59-130, as amended.

¹⁴⁴ Criminal Code, Decree of 9 July 1913, as amended.

¹⁴⁵ Criminal Code, articles 88-90 and 108.

and are accountable for failures in the accomplishment of their functions.¹⁴⁶ Article 104 provides that judges have immunity from prosecution unless that immunity has been lifted and, except in cases of *in flagrante delicto*, cannot be arrested. The HJC is empowered to lift the immunity.

2. Disciplinary procedure

Law No. 67-29 sets forth the disciplinary procedure applicable to the judiciary, which by definition includes both judges and prosecutors. It has been modified to some extent by Law No. 2013-13, which also provides that those provisions not incompatible with the new law remain in force. Precisely which provisions meet this test is not clear. Both laws are discussed here, as well as relevant provisions of the 2014 Constitution.

a. Law No. 67-29

The General Inspection Service (GIS) is under the direct authority of the Minister of Justice and is responsible for inspecting the functioning of the jurisdictions, services and public institutions attached to the Ministry of Justice, except for the Cassation Court.¹⁴⁷ The GIS is headed by the Inspector-General and consists of two sections, one for inspection and one for organisation, methods and archives. The inspection section itself consists of both a judicial inspection body and a financial and administrative inspection body.¹⁴⁸ Members of the judicial inspection body are chosen from judges of the second or third grade.¹⁴⁹ The Inspector-General is appointed by presidential decree from among judges of the third grade.¹⁵⁰ Inspectors from the GIS conduct disciplinary investigations requested by the Minister of Justice.¹⁵¹

As described in Chapter I, the disciplinary council under Law No. 67-29 was composed of a panel of six designated members of the CSM and was tasked with hearing disciplinary cases relating to judges and prosecutors. The Minister of Justice had the sole authority to refer cases to the disciplinary council.¹⁵² Following a referral by the Minister of Justice, a rapporteur was appointed by the president of the disciplinary council, from among the other members of the CSM.

Under article 57 of Law No. 67-29, the rapporteur investigated the complaint if he or she deemed it necessary, advised the judge concerned of the proceedings, and received the judge's explanations and any exculpatory evidence. The rapporteur could also appoint a judge to assist with the investigation. On the basis of this investigation, the rapporteur submitted a detailed report along with the file to the disciplinary council.

The concerned judge had eight days' notice to prepare a defence and had the right to legal representation. Both judge and counsel had the right to review, but not to make copies of, the investigative file, including the report prepared by the rapporteur, and all of the documents that would be used in the course of the proceeding.¹⁵³ Following a

¹⁴⁶ Article 103 of the 2014 Constitution provides: « *Le magistrat doit être compétent, il doit faire preuve de neutralité et d'intégrité, Il doit répondre de toute défaillance dans l'accomplissement de ses fonctions.* ».

¹⁴⁷ Decree No. 2010-3152, article 24.

¹⁴⁸ Decree No. 2010-3152, articles 25 & 27.

¹⁴⁹ Decree No. 73-436.

¹⁵⁰ Law No. 67-29, article 7bis.

¹⁵¹ Decree No. 2010-3152, article 26.

¹⁵² Law No. 67-29, article 56.

¹⁵³ Article 58 provides: « *Le Conseil cite le magistrat à comparaître devant lui et lui donne un délai de huit jours à compter de la citation pour prendre connaissance, sans déplacement du dossier de*

hearing of the judge and his or her counsel, the disciplinary council would hold a closed-door session to examine the dossier. The disciplinary council could rule on the case *in absentia*, if the judge chose not to attend.¹⁵⁴ The decision was taken by majority vote with the president of the disciplinary council being the tie-breaker.

The disciplinary council had authority to issue any of the following sanctions:

- 1) reprimand recorded in the individual's file;
- 2) disciplinary transfer;
- 3) removal from the promotion shortlist;
- 4) demotion;
- 5) suspension for a period not exceeding nine months;
- 6) dismissal.¹⁵⁵

Sanctions 3 and 4 could also be accompanied by a transfer of office.¹⁵⁶ There was no guidance in the law on the application of these sanctions or a requirement that the punishment be proportional to the offence. However, the council was required to give reasons for its decision.¹⁵⁷

The judge concerned, his or her counsel, or the Minister of Justice could, within one month, appeal the decision of the disciplinary council to a review commission composed of other members of the CSM.¹⁵⁸ Decisions of the review commission were final and could not be appealed.¹⁵⁹

b. Law No. 2013-13

Law No. 2013-13, amended but did not completely overhaul the disciplinary system. As under the prior system, the Minister of Justice can initiate disciplinary investigations by the GIS.¹⁶⁰ Once the GIS has completed a disciplinary investigation, the Minister transmits the GIS report to the IPJJ.¹⁶¹ As described in Chapter I, a panel of seven designated members of the IPJJ sit as a disciplinary council to rule on allegations of judicial or prosecutorial misconduct.

The president of the disciplinary council must convene the entire council within 15 days from the date of referral by the Minister and the council must decide on the disciplinary case within one month from the referral date.¹⁶² The rapporteur is the Inspector-General at the Ministry of Justice, who is the head of the GIS.¹⁶³ Unlike the provisions of Law No.

l'enquête, rapport établi par le rapporteur et, d'une façon générale, de toutes les pièces devant être utilisées au cours de la procédure". It is unclear whether, in practice, the judge would also have had access to any exculpatory material.

¹⁵⁴ Law No. 67-29, article 59.

¹⁵⁵ Law No. 67-29, article 52.

¹⁵⁶ Law No. 67-29, article 53.

¹⁵⁷ Law No. 67-29, article 59.

¹⁵⁸ Law No. 67-29, articles 60 and 60bis. Article 60 provides that the Review Commission is composed of the First President of the Cassation Court; the Prosecutor General of the Cassation Court; the Prosecutor General Director of the Judicial Services; the President of the Property Court; and two most senior elected magistrates of the same rank of the concerned judge.

¹⁵⁹ Article 60bis provides that "*les décisions de ladite commission sont définitives, elles ne sont susceptibles d'aucune voie de recours dont les recours en cassation et pour excès de pouvoir*".

¹⁶⁰ Decree No. 2010-3152, article 26.

¹⁶¹ Law No. 2013-13, article 16.

¹⁶² Law No. 2013-13, article 16.

¹⁶³ Law No. 2013-13, article 16. The head of the GIS is appointed by a presidential decree from among the judges of the third grade. Law No. 67-29, article 7bis.

67-29, there is no second investigation done by the rapporteur. Instead, the rapporteur must notify the judge or prosecutor concerned of the hearing by means of a summons to appear, issued at least 15 days before the date of the hearing. The judge or prosecutor is permitted to have access to the disciplinary case file, present evidence in his or her defence, and to be assisted by a lawyer or any other person whom the judge selects.¹⁶⁴

Where the facts require, the council can dismiss the judge or prosecutor and must give its reasons for doing so. If the alleged misconduct constitutes a crime or an intentional misdemeanour likely to harm the honour of an individual, the disciplinary council may waive the person's immunity and transfer the file to the public prosecutor. In such cases disciplinary proceedings are suspended until a final decision has been reached in the criminal case.¹⁶⁵

Decisions of the disciplinary council may be appealed to the Administrative Tribunal.¹⁶⁶ Final decisions on disciplinary cases are forwarded to the Minister of Justice for implementation of sanctions.

What is less clear from Law No. 2013-13 is whether the sanctions for misconduct under Law No. 67-29 can also be applied by the new disciplinary council. It is also not clear if the Minister of Justice's powers under Law No. 67-29 – including the power to issue warnings to judges, and, in urgent cases, to temporarily suspend a judge from office until a final disciplinary decision has been taken – remain in force.¹⁶⁷

c. The 2014 Constitution

The Constitution adopted in January 2014 provides that judges cannot be subject to suspension, dismissal or any other disciplinary sanction except for those cases, and in accordance with those guarantees, set out in law and by a reasoned decision of the HJC.¹⁶⁸ The HJC is granted oversight of disciplinary matters.¹⁶⁹

On 26 May 2012, prior to the enactment of Law No. 2013-13, the Minister of Justice issued a press release announcing the dismissal of 81 judges and prosecutors. The Minister justified his decision by referring to article 44 of Law No. 67-29 and the need to "re-establish the confidence of the public in the justice system" by putting an end to "the practices of the former regime of despotism and corruption, including by ensuring the accountability of those suspected of committing infractions that undermine the proper administration of justice and the honour of the judiciary".¹⁷⁰ The decision was said to be based on a "conviction beyond doubt", based on "in-depth research and investigation", that the individuals had "carried out the practices of the former regime and, instead of

¹⁶⁴ Law No. 2013-13, article 17.

¹⁶⁵ Law No. 2013-13, article 18.

¹⁶⁶ Law No. 2013-13, articles 16 & 3(4). This marks a contrast with article 60 of Law No. 67-29, which provided for an appeal to a body within the CSM.

¹⁶⁷ Law No. 67-29, articles 51 & 54. The power to suspend a judge can be accompanied by the withholding of part or all of the judge's salary. Where a judge is not ultimately sanctioned or has been sanctioned with a punishment other than suspension or dismissal, the judge is entitled to receive his/her entitlements.

¹⁶⁸ 2014 Constitution, article 107.

¹⁶⁹ 2014 Constitution, article 114.

¹⁷⁰ Press release of the Minister of Justice, 26 May 2012, <http://www.e-justice.tn/index.php?id=1161> (accessed 25 November 2013).

taking the opportunity that the revolution had provided them, continued these same practices".¹⁷¹ In most cases the order to dismiss was communicated to the concerned individual's supervisor, who was instructed to transmit it.

Following complaints from judges and judges' associations, the Minister of Justice reached an agreement with the *Syndicat des Magistrats Tunisiens* (SMT), a judges' association, to allow the dismissed judges and prosecutors to challenge the decision and to have legal representation. Subsequently, the GIS interviewed most, but not all, of the 81 judges and prosecutors. On 6 July 2012, after the interviews had taken place, the Minister of Justice published a series of decrees in the Official Journal announcing the dismissal of 71 judges and prosecutors and the retirement of four judges.¹⁷²

The ICJ subsequently met with 15 of the judges and prosecutors who were dismissed. Information received by the ICJ indicates that the procedures followed lacked any respect for due process. First, it appears that none of the dismissed judges and prosecutors were given reasons at the time of their dismissal. Nor were they given any reasons or additional information prior to interviews with the GIS, thus hampering their ability to prepare a defence. Second, the interviews with the GIS were uniformly cursory, lasting between 15 and 30 minutes. Although some received additional information about the basis for their dismissal during these interviews, they had a very limited opportunity to contest the information both because the interviews were brief and because they had no legal counsel. They lacked legal counsel either because they were told they could not bring a lawyer or because they believed, on the basis of a Minister of Justice radio broadcast on 30 May 2012, that these interviews with the GIS were only preliminary and that they would be granted legal representation at a second in-depth interview. Finally, no one was given an opportunity to contest the allegations at a later stage, prior to their dismissals being confirmed by an announcement in the Official Journal.

The accounts below are based on ICJ interviews with the individuals concerned. The positions stated are the ones they held prior to being dismissed.

Mr Houssine Mbarek, first investigating judge at the Sfax Tribunal of First Instance, had been serving as a judge since 1981. On 28 May 2012 he was informed of his dismissal by the deputy prosecutor of the Tribunal. He was not provided with reasons either orally or in writing at this time. Mr Mbarek challenged the dismissal. On 18 June 2012, he received a summons to attend an interview at the GIS the following day. According to the information available to the ICJ, the interview with the Inspector-General lasted 30 minutes. During the interview Mr Mbarek was accused of corruption but was not presented with any evidence. Mr Mbarek was formally dismissed pursuant to Ministerial Decree No. 2012-715.

Mr Lotfi Zrelli, the Deputy Prosecutor-General to the Court of Appeal of Mednine, was informed of his dismissal by the Prosecutor-General on 28 May 2012; the Prosecutor-General had been informed of the dismissal in a fax from the Ministry of Justice. No reason for the dismissal was given at this time. Mr Zrelli contested the dismissal. During the meeting at the GIS Mr Zrelli was accused of "drinking alcohol" and being associated with "suspicious people". The consumption of alcohol is not prohibited under Tunisian law. Mr Zrelli was not given sufficient time and information to prepare and present a defence. Mr Zrelli was formally dismissed according to Ministerial Decree No. 2012-703.

¹⁷¹ Id.

¹⁷² *Official Journal of the Republic of Tunisia*, No. 53 of 6 July 2012.

Mrs Ahlem Makhlouf, a judge at the Ben Arous Tribunal of First Instance, was informed on 28 May 2012 of her dismissal by her superior, who had received a fax from the Ministry of Justice. No reason for the dismissal was given at this time. Mrs Makhlouf was not summoned to attend a meeting with the GIS. She went of her own accord to the Ministry of Justice and met with the chief of staff on 23 June 2013. She was subsequently summoned to the GIS on 26 June 2012. During the meeting with the GIS she was accused of corruption and presented with an old complaint. The dismissal was confirmed despite the fact that she was not given any opportunity to prepare and present her defence to the allegations of corruption. Mrs Makhlouf was formally dismissed according to Ministerial Decree No. 2012-676.

Mr Chokri Ben Sadok, the Vice President of the Jendouba Tribunal of First Instance, was informed by phone by the Prosecutor-General of the Kef First Instance Tribunal of his dismissal on 28 May 2012. No reason for the dismissal was given at this time. During his interview with the GIS, on 8 June 2012, Mr Ben Sadok was informed that his dismissal was due to a complaint made in relation to his having convicted an individual for "contempt of court" in 2010. The individual had filed a complaint with the GIS in 2011. At the time of the dismissal, no further action had been taken against Mr Sadok by the GIS regarding this complaint. The judge's interview with the GIS lasted 15 minutes. Mr Ben Sadok was formally dismissed according to Ministerial Decree No. 2012-684.

Mr Habib Zammali, the counsellor to the criminal section of the Gabes Tribunal of First Instance, was notified of his dismissal by phone on 28 May 2012. No reason for the decision was given at this time. In the interview with the GIS, Mr Zammali was accused of "drinking alcohol" and of associating with "suspicious persons". The evidence presented during the interview with the Inspector-General were anonymous letters saying that he was seen drinking alcohol with a lady and that he paid over 100 Dinars for the bill. In addition, in his file there was a photo of him drinking beer with a group of people. He had not either heard of any complaints against him or seen the letters or photo before the interview and was not provided with an opportunity to adequately prepare and present a defence before a decision confirming his dismissal was made. Mr Zammali was formally dismissed according to Ministerial Decree No. 2012-677.

Mr Abdelkarim Ben Romdhane, a judge since 1984 who served as a Counsellor to the Cassation Court, was informed of his dismissal on 29 May 2012 by the President of the Cassation Court, who had received a fax in this regard from the Ministry of Justice. No reason for the decision was given at the time. In the interview at the GIS he was accused of implementing the Minister of Justice's instructions in relation to a high-profile case in 2008 when he was the Prosecutor-General at the Gafsa Tribunal of First Instance. He was also accused of "dishonesty in his administration of justice". This accusation was stated in an anonymous letter. The GIS also questioned him in relation to an argument he had in 1985 with a colleague that led to a "warning" being placed in his file. Mr Romdhane's dismissal was confirmed without him having been given the opportunity to prepare and present a defence. He was formally dismissed according to Ministerial Decree No. 2012-679.

Mr Mohamed Attafi, a judge since 1982 who was the President of a chamber of the Kef Court of Appeal, was informed of his dismissal by phone on 28 May 2012 by the Prosecutor-General of the Kef Court of Appeal. No reasons were given for the dismissal at this time. In an interview with the GIS, he was accused of "drinking alcohol" and questioned in relation to a warning issued in 2005. The warning had

been issued on the basis of a complaint brought against him in 1998 by a party to a case in which he had issued an unfavourable ruling while he was a judge on the Kef Real Estate Tribunal. He was formally dismissed according to Ministerial Decree No. 2012-689.

Under article 37 of the Law of the Administrative Tribunal, the judges and prosecutors who were dismissed had the right to challenge their dismissal.¹⁷³ In July 2012, the judges submitted a request for preliminary injunction ("*recours en référé*") to the Administrative Tribunal in order to suspend the decision of the Minister of Justice and to reinstate their salary until a ruling on the merits. The request for a preliminary injunction was rejected.

The ICJ understands that the Administrative Tribunal requested the Minister of Justice to provide the disciplinary files of the dismissed judges and prosecutors. Some but not all of these disciplinary files were sent by the Ministry to the Administrative Tribunal, and some of these files were reportedly incomplete. On 25 December 2013, the Administrative Tribunal issued two decisions relating to two dismissed judges, Lofti Daoues and Chakib Mchita. The Administrative Tribunal found that their dismissals were in "violation of the law", that "the disciplinary guarantees provided for by the 1967 law were violated, including the right to defence", that the "dismissal decision was not reasoned and did not contain any legal and factual basis for the dismissal", and that, in violation of the law, the judges "were dismissed without being referred to the High Judicial Council".¹⁷⁴

The ICJ considers that the methods adopted by the Minister of Justice violated the due process rights of these individuals, including their right to an independent determination of complaints against them; to be represented by legal counsel; to receive all relevant information relating to the complaint; to adequate time to prepare a defence; to a full hearing by an independent decision-making body; and to have the disciplinary decision to be made only on the basis of objective and relevant considerations. In addition, article 44 of Law No. 67-29, which was cited by the Minister of Justice as the basis for his actions, does not grant the Minister any power to dismiss judges.¹⁷⁵

C. International law and standards

1. Judicial code of conduct

The ethical standards that judges are required to meet in the discharge of their professional duties should be set down in law or codes of conduct.¹⁷⁶ Judges should play a leading role in the development of such codes and should be able to seek advice on ethics from a body within the judiciary.¹⁷⁷ As the UN Basic Principles make clear, grounds for

¹⁷³ Law No. 72-40 of 1 June 1972 on the Administrative Tribunal.

¹⁷⁴ Administrative Tribunal of first instance: *Chakib Mchita vs the President of the Government and Minister of Justice*, case number 128620 of 25 December 2013 and *Lofti Daoues vs the President of the Government and Minister of Justice*, case number 123041 of 25 December 2013.

¹⁷⁵ Article 44 provides: "La cessation définitive des fonctions entraînant radiations des cadres et sous réserve des dispositions de l'article 47 de la présente loi, la perte de la qualité de magistrat résulte: ... (4) de la revocation".

¹⁷⁶ CoM Recommendation (2010)12, para. 73; UN Basic Principles on the Independence of the Judiciary, Principle 19; Singhvi Declaration, para. 27.

¹⁷⁷ Bangalore Principles, para.8 of the preamble; see also CoM Recommendation (2010)12, paras. 73 & 74; and see ICJ, *Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, Geneva, 2011, p. 211.

and decisions about discipline, including suspension or removal, should be based on established standards of judicial conduct.¹⁷⁸

The leading international guidance on judicial ethics is the Bangalore Principles of Judicial Conduct (the Bangalore Principles), which were drafted by a group of chief justices under the auspices of the UN.¹⁷⁹ The Bangalore Principles were subsequently endorsed by resolutions of the UN Commission on Human Rights and the Economic and Social Council.¹⁸⁰

The Bangalore Principles are organized around six core values: independence; impartiality; integrity; propriety; equality; and competence and diligence. Principle 1.3 provides: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches, but must also appear to a reasonable observer to be free therefrom".¹⁸¹ Under Principle 2.5, a judge "shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially". Examples of such situations, include where the judge previously served as a lawyer or was a material witness in the case or has personal knowledge of the case, or where the judge or a member of the judge's family "has an economic interest in the outcome of the matter in controversy".¹⁸² In addition, the Principles state that a judge and members of the judge's family "shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties".¹⁸³ The same restriction applies to court staff "or others subject to the judge's influence, direction or authority".¹⁸⁴

2. Judicial discipline

International standards make clear that any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly and adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge's rights are respected. The disciplining of judges must be based on established standards of judicial conduct. Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.¹⁸⁵

The UN Basic Principles on the Independence of the Judiciary clarify that the law should guarantee that judges enjoy personal immunity from suits for damages for improper acts or omissions in the exercise of their judicial functions.¹⁸⁶ This is necessary so as to safeguard judicial independence. Discipline and civil liability should not be used against

¹⁷⁸ UN Basic Principles on the Independence of the Judiciary, Principle 19.

¹⁷⁹ For drafting history see UNODC, Commentary on the Bangalore Principles of Judicial Conduct (September 2007).

¹⁸⁰ Commission on Human Rights Resolution 2003/43, UN Doc. E/CN.4/2003/L.11/Add.4; UN Economic and Social Council (ECOSOC), Strengthening Basic Principles of Judicial Conduct, UN Doc. E/RES/2006/23.

¹⁸¹ Bangalore Principles, Principle 1.3.

¹⁸² Bangalore Principles, Principles 2.5.1, 2.5.2, and 2.5.3. The Singhvi Declaration and the Burgh House Principles on the Independence of the International Judiciary contain similar prohibitions.

¹⁸³ Bangalore Principles, Principle 4.14.

¹⁸⁴ Bangalore Principles, Principle 4.15.

¹⁸⁵ CoM Recommendation (2010)12, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

¹⁸⁶ UN Basic Principles on the Independence of the Judiciary, Principle 16.

judges for the manner in which they interpret the law, assess the facts or weigh the evidence.¹⁸⁷ Nor should judges be subject to disciplinary procedures if their decisions are overruled or modified on appeal.¹⁸⁸ However, the State may be responsible for ensuring adequate reparation for improper acts or omissions of judges committed in the exercise of their judicial functions.

Judges should generally enjoy immunity in criminal proceedings for acts and omissions which are characterised as criminal under national law, when the acts are undertaken in the course of their judicial functions.¹⁸⁹ Such immunity would not apply to disciplinary proceedings that do not impose criminal liability. However, there must be no immunity for acts or omissions that constitute corruption, human rights violations, or crimes under international law. Judges like other individuals are also accountable in criminal law for acts they may commit in their private capacity.¹⁹⁰

D. Assessment in light of international law and standards

The ICJ considers that the laws and procedures concerning judicial accountability currently in place in Tunisia are inconsistent with international standards safeguarding the independence of the judiciary. In order to bring Tunisia into conformity with international standards, a number of changes must be made to the laws implementing the 2014 Constitution.

First, the absence of a comprehensive and consolidated code of ethics runs counter to the UN Basic Principles on the Independence of the Judiciary, which provides: "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."¹⁹¹ Similarly, the Committee of Ministers Recommendation (2010)12 states that judges should be "guided in their activities by ethical principles of professional conduct," which should include "duties that may be sanctioned by disciplinary measures".¹⁹² Likewise the Singhvi Declaration provides: "All disciplinary action shall be based upon established standards of judicial conduct."¹⁹³

Law No. 67-29 is not a substitute for a comprehensive code of conduct. Only some of its provisions deal with the conduct of judges and even then it is incomplete. For example, unlike the Bangalore Principles, it does not mention the requirement to uphold judicial independence, the circumstances for recusal or disqualification, or the need to avoid use of one's office for private gain. Nor does it state that breaches of its provisions concerning judicial conduct lead to disciplinary proceedings. It is not only incomplete as a code of conduct, it was also not drafted by judges or in consultation with them.

Tunisian judges have consistently called for the adoption of a code of judicial conduct. It should be developed, preferably by judges themselves or in close consultation with them,

¹⁸⁷ ACHPR Principles and Guidelines, Section A, Principle 4(n) ("Judicial officers shall not be: (i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions").

¹⁸⁸ CoM Recommendation (2010)12, para. 70; see also ACHPR Principles and Guidelines, Section A, Principle 4(n)(ii); Concluding Observations of the Human Rights Committee on Vietnam, UN Doc. CCPR/CO/75/VNM, para. 10.

¹⁸⁹ ACHPR Principles and Guidelines, Section A, Principle 4(n).

¹⁹⁰ CoM Recommendation (2010)12, para. 71.

¹⁹¹ UN Basic Principles on the Independence of the Judiciary, Principle 17.

¹⁹² CoM Recommendation (2010)12, para. 72.

¹⁹³ Singhvi Declaration, para. 27.

and included within the new Statute for Judges. In developing its code of judicial ethics, Tunisia should look to the Bangalore Principles.¹⁹⁴

Second, the ICJ considers that the description of what constitutes a disciplinary infraction, as formulated in article 50 of Law No. 67-29, is far too vague and overbroad as to give reasonable notice of what conduct is prohibited. In particular, article 50 depends on interpretation of the terms "honour" and "dignity" by the disciplinary decision-maker. Where that decision-maker is the executive, or heavily influenced by the executive, it undermines judicial independence. As was demonstrated in the context of the mass dismissal in May 2012, behaviour such as drinking alcohol outside of working hours and in the absence of proof of any resulting disorderly conduct, could be considered an "infringement to honour" or "dignity". Article 50 should therefore be amended in a manner that is consistent with the principle of legality. It should state that a violation of the code of conduct constitutes a disciplinary offence.

Third, the current disciplinary procedure, even as slightly modified by Law No. 2013-13, lacks sufficient guarantees to ensure fairness and, given the role of the Minister of Justice and his subordinates in initiating this procedure, it is neither independent nor impartial. The ICJ therefore recommends that the disciplinary system be reformed to ensure the fairness of the procedure before independent and impartial decision-making bodies.

In particular, the procedure prescribed by the law should be amended to provide greater guarantees of fairness, ensuring respect for the rights of those suspected of misconduct. The Human Rights Committee has held that whenever "a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee".¹⁹⁵ A new law on the judicial disciplinary system should not only retain the right under the current system to legal representation and access to the investigative file but should also ensure that there is adequate time for the persons suspected of misconduct to prepare his or her defence. In this regard, the ICJ considers that the 15 day notice of the proceedings in advance of the hearing might not be sufficient in all cases; rather the law should require that any judge or prosecutor suspected of misconduct be promptly informed of the allegations against him or her, and be guaranteed adequate time and facilities to prepare a defence. Furthermore the law should explicitly state that the individual is to be given access to all potentially exculpatory material.

In addition, the law must prescribe that the sanctions that are imposed following a finding of misconduct are proportionate. Furthermore the law must ensure that judges may be dismissed "only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".¹⁹⁶ The law should ensure that judges cannot be removed or punished for *bona fide* errors or for disagreeing with a particular interpretation of the law.

¹⁹⁴ The Singhvi Declaration and the Burgh House Principles on the Independence of the International Judiciary also contain ethical standards, which are similar to the Bangalore Principles but in some instances more detailed. For example, the Singhvi Declaration provides: "A judge shall ensure the fair conduct of the trial and inquire fully into any allegations made of a violation of the rights of a party or of a witness, including allegations of ill-treatment". Singhvi Declaration, para. 37.

¹⁹⁵ *Perterer v. Austria*, Human Rights Committee Communication No. 1015/2001, Views of 20 August 2004, UN Doc. CCPR/C/81/D/1015/2001 (2004), para. 9.2.

¹⁹⁶ General Comment No. 32, para. 20.

The continuing influence exerted by the executive is inconsistent with international principles on safeguarding the independence of the judiciary. Under the current system, the Minister of Justice can request the GIS to conduct a disciplinary investigation and is also responsible for ensuring the implementation of disciplinary sanctions. Furthermore, the GIS is under the supervision of the Minister of Justice.

In order to comply with international standards, the law in Tunisia must be amended to ensure that disciplinary proceedings are “conducted by an independent authority or a court with all the guarantees of a fair trial” and provide the judge or prosecutor with the right to challenge the decision and sanction before an independent, impartial and higher judicial body.¹⁹⁷ The role of the Minister of Justice in initiating disciplinary cases and supervising the GIS should be rescinded in order to reduce the potential for executive control and interference and to safeguard the independence of the judiciary. Similarly, if the Minister of Justice has retained the power to temporarily suspend judges, as provided under Law No. 67-29, this too must be rescinded. The GIS should be under the supervision of the new HJC. Furthermore, the Minister of Justice should no longer have any authority to grant exemptions or derogations for judges who wish to engage in teaching or other forms of professional activity, as is currently the case under article 16 of Law No. 67-29.

Moreover, without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State and the exceptions specified herein, the new Statute for Judges should ensure that judges enjoy personal immunity from civil suits for monetary damages or from criminal prosecution for improper acts or omissions in the exercise of their judicial functions.¹⁹⁸ However, under the law, such immunity should be subject to waiver by decision of a court in any case in which it considers that the immunity would impede the course of justice and that the waiver would not prejudice the exercise of judicial functions, such as in cases of alleged corruption. In addition, the law should clarify and ensure that there is no immunity in cases in which there is a reasonable suspicion of criminal responsibility for a gross human rights violation or crime under international law.

E. Recommendations

In light of the above and in order to ensure the accountability of the Tunisian judiciary in a manner that it is consistent with the requirements of its independence and impartiality, the Tunisian authorities should ensure that:

- i. A sufficiently detailed and comprehensive code of conduct, in line with the Bangalore Principles and the principle of legality, is developed by the members of the judiciary or in close consultation with them;**
- ii. This code of conduct is established in law as the basis on which judges will be held to account professionally;**
- iii. A disciplinary procedure for addressing complaints against judges for alleged breaches of the code of conduct is set out in law and affords judges the right to a fair hearing before an independent and impartial body and includes the right to:
 - a. the prompt and fair determination of the complaint before an independent and impartial body;**
 - b. be promptly informed of the complaint;****

¹⁹⁷ CoM Recommendation (2010)12, para. 69; see also UN Basic Principles on the Independence of the Judiciary, paras. 17-20.

¹⁹⁸ CoM Recommendation (2010)12, para. 68.

- c. **consult and be represented by legal counsel;**
- d. **an adequate amount of time to prepare a defence and the provision of all relevant information relating to the complaint, including information about the basis of the allegations and any exculpatory information;**
- e. **a full hearing by the independent and impartial decision-making body, during which the judge has an opportunity to present a defence;**
- f. **the decision to be made on the basis of the code of conduct, in the light of objective and relevant evidence;**
- g. **in the event of a finding of misconduct, ensuring a range of sanctions and the imposition of proportionate sanctions;**
- h. **the complaint or charges to be kept confidential until a decision is made, unless the judge concerned decides otherwise;**
- i. **appeal against any disciplinary decision or sanction to a higher independent body or court; and**
- j. **the disciplinary decision to be published upon its determination;**
- iv. **The disciplinary procedure does not undermine the independence and impartiality of the judiciary and, to this end:**
 - a. **the mandate of the HJC should include oversight of the disciplinary process, including over the appointment and functioning of members of the judicial inspection body of the GIS, and over the commencement of disciplinary proceedings and imposition of interim measures and disciplinary sanctions; and**
 - b. **the powers of the executive, including the Minister of Justice and his or her subordinates, in relation to the disciplinary procedure, should be rescinded, including the power to initiate disciplinary investigations, refer matters to the disciplinary council, suspend judges pending a disciplinary decision, issue warnings and impose and oversee the implementation of sanctions;**
- v. **The law is amended to ensure that judges enjoy personal immunity from civil suits for monetary damages or from criminal prosecution for improper acts or omissions in the exercise of their judicial functions, provided that such immunity is subject to waiver by a court if it determines that the immunity would impede the course of justice and the waiver would not prejudice the exercise of judicial functions, such as in cases of alleged corruption; furthermore the law should be amended to ensure that there is no immunity in cases in which there is reasonable suspicion of criminal responsibility for a gross human rights violation or crime under international law; and**
- vi. **The law clarify that the State should guarantee compensation for any harm suffered by individuals as a result of acts or omissions by judges in the improper or unlawful exercise of their judicial functions.**

IV. Military Tribunals

A. Introduction

International law guarantees the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹⁹⁹ The independence of the judiciary, both institutionally and individually, is an important aspect of securing this right. The requirements of article 14 of the ICCPR apply equally to military tribunals. Because of the particular nature of military tribunals, they raise “serious problems as far as the equitable, impartial and independent administration of justice is concerned”.²⁰⁰ Military tribunals are relevant to the independence of the judiciary and respect for the rule of law in Tunisia because they have a very broad grant of jurisdiction that empowers them to hear cases involving allegations of human rights violations by military and security personnel and cases involving civilian defendants.

Under the rule of President Ben Ali, military tribunals were used to try political opponents, who were sometimes accused of having links to foreign terrorist organizations or to “international terrorism”.²⁰¹ During the transition period, the use of military tribunals for cases of human rights violations actually increased. Most of the human rights violations committed during the uprising that led to the toppling of President Ben Ali, including cases of unlawful killings, have been transferred to these jurisdictions.

This chapter summarizes the features of the current system of military justice and the provisions in the 2014 Constitution, sets out international standards relevant to military courts and then evaluates the system in light of international law and standards. It concludes by advocating for and setting out recommendations for significant reforms to bring the military courts into compliance with Tunisia’s human rights obligations.

B. Military courts: past, present and future

The military justice system was established by Decree No. 9 of 10 January 1957, promulgating the Code of Military Justice (CMJ). There are three permanent military tribunals of first instance in Tunis, Sfax and Kef; a military court of appeal based in Tunis; military indictment chambers; and a military chamber at the Court of Cassation.²⁰²

In the aftermath of the uprising and due to the increased number of cases that were transferred to military courts, the National Constituent Assembly amended the CMJ by adopting Law No. 2011-69 in July 2011. The amendments set out some additional guarantees aimed at enhancing procedural fairness but also expanded the jurisdiction of military courts.²⁰³

¹⁹⁹ ICCPR, article 14.

²⁰⁰ General Comment No. 32, para. 22.

²⁰¹ Article 123 of the CMJ gives military tribunals jurisdiction over civilians charged with serving a terrorist organization that operates abroad. See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Tunisia, UN Doc. A/HRC/16/51/Add.2, para. 35. The Special Rapporteur also points out that following the entry into force of the 2003 Counter-Terrorism Law, “the focus of the military courts’ terrorism-related cases changed to cases which had a link with ‘international terrorism’ or international money laundering”.

²⁰² Code of Military Justice, article 1, as amended by Law No. 2011-69 of 29 July 2011. The indictment chamber is composed of a president and two judges. The chamber reviews the decisions of military investigating judges under article 28 of Law No. 69-2011.

²⁰³ Law No. 2011-69 and Law No. 2011-70.

1. *Ratione materiae and personae competences*

Ratione materiae competence, also known as subject matter jurisdiction, refers to a court's authority to hear and decide a particular case. It is separate from questions of personal or *in personae* jurisdiction, which refers to whether a court has jurisdiction over that particular person.

Amendments to the CMJ significantly enlarged the scope of the jurisdiction *ratione materiae* of military tribunals. Prior to its amendment, article 1 of the CMJ granted jurisdiction over "military offences".²⁰⁴ As amended, article 1 was expanded to include jurisdiction over "military cases", a much broader category.²⁰⁵ Now the jurisdiction of military tribunals is not restricted to military offences but instead includes cases of a military "nature". In addition, article 5 of the CMJ was amended to clarify that military courts have jurisdiction over both ordinary crimes committed *by* military personnel and ordinary crimes committed *against* military personnel.²⁰⁶ As a result of these changes, military courts have jurisdiction over the following offences:

- 1) offences under Title II, Chapter III of the CMJ;
- 2) offences committed inside the barracks, camps, schools and places occupied by the military for the needs of the army or armed forces;
- 3) offences committed against the army;
- 4) offences under the jurisdiction of military tribunals as provided for by special laws and regulations;
- 5) offences committed by soldiers belonging to allied forces stationed on the Tunisian territory and all offences against these armies, unless special agreements contrary to these provisions exist between their government and the Tunisian government;
- 6) offences under ordinary law committed by military personnel; and
- 7) offences under ordinary law committed against military personnel on duty or during their service.

In addition, amended article 6 of the CMJ provides that "in case of prosecution for offences under ordinary law committed by military personnel while off-duty and where one party does not belong to the army, the prosecutor or the investigating judge of ordinary courts should defer the charges against the member of the army to the competent military court of first instance".

Article 8 of the CMJ sets out the *ratione personae* jurisdiction of military tribunals. In addition to covering military personnel, it includes students at military schools, retired officers when they are called to serve, civilian employees of the army in times of war or during a state of war or when the army or armed force is in an area where a state of emergency is declared, prisoners of war and civilians as authors or co-authors of offences.

A much older law, article 22 of Law No. 82-70 of 6 August 1982 on the General Statute of Internal Security Forces, grants military tribunals competence over cases involving "agents of the Internal Security Forces for facts that took place in, or on the occasion of,

²⁰⁴ Former article 1 of the CMJ stipulated: « A dater de la mise en vigueur du présent code, connaîtront des infractions d'ordre militaire».

²⁰⁵ Article 1 now provides: "Connaîtront des affaires d'ordre militaire: 1. Des tribunaux militaires permanents de première instance à Tunis, Sfax et au Kef. Ces tribunaux peuvent, en cas de besoin, tenir leurs audiences dans tout autre lieu; 2. Une cour d'appel militaire siégeant à Tunis; 3. Des chambres militaires d'accusation; 4. Une chambre militaire à la Cour de cassation".

²⁰⁶ Although these grants of jurisdiction were previously contained in article 5(6), they are now separated into article 5(6) and 5(7).

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". Under Law No. 82-70, the jurisdiction of military courts takes precedence over ordinary courts in cases where both have jurisdiction over cases involving agents of the Internal Security Forces.

On the basis of both Law No. 2011-69, amending the CMJ, and Law No. 82-70, military tribunals hear most cases involving human rights violations, including cases of unlawful killings and torture and other ill-treatment, committed during the December 2010 to January 2011 uprising. Many of these cases were allegedly committed by members of the Internal Security Forces. Consequently, cases relating to violations during the uprising that were initially brought before ordinary courts have been transferred to military tribunals on the basis of article 22 of Law No. 82-70.

2. Provisions in the 2014 Constitution

The 2014 Constitution narrows the jurisdiction of military courts. Article 110 of the 2014 Constitution restricts their jurisdiction to military offences ("*infractions militaires*"). Under the current CMJ military offences include insubordination, desertion, refusal to obey, outrage to superior, army or flag, rebellion, abuse of authority, looting, treason and spying. The 2014 Constitution further provides that the jurisdiction, structure, operation and procedures of the military court and the rules governing military court judges shall be determined by law.

3. Composition, selection and appointment

In times of war, only military judges may sit on military courts.²⁰⁷ In times of peace, although military courts are presided over by civilian judges, military judges form the majority of judges on each of the courts of first instance and appeal.²⁰⁸

Under article 10 of the CMJ, the Permanent Military Tribunal of First Instance is comprised of several divisions including ones that hear misdemeanour cases and ones that hear felonies. Misdemeanour divisions are comprised of a civilian judge, who sits as president, and two military judges. Felony divisions are composed of a civilian judge, who sits as president, and four military judges.²⁰⁹

Civilian judges sitting on military tribunals are appointed by decree based on recommendations by both the Minister of Justice and Minister of Defence.²¹⁰ Prosecutors and their deputies, investigating judges, the single judge sitting at the Permanent Military Court of First Instance in Tunis and other cities, advisors to the Military Court of Appeal or to the military indictment division, are drawn exclusively from the military.²¹¹

Military judges are appointed by decree following a proposition by the Minister of Defence and a decision by the Military Judicial Council (MJC). Military judges are appointed after the completion of their military training and after their graduation from the ISM.²¹²

²⁰⁷ Law No. 2011-70 on the organization of military justice and the statute of military judges, article 1B.

²⁰⁸ Law No. 2011-70, article 1A and B.

²⁰⁹ Article 10(2) and (3) of the CMJ, as amended by Law No. 2011-69.

²¹⁰ Law No. 2011-70, article 2.

²¹¹ Law No. 2011-70, article 1(a).

²¹² Law No. 2011-70, article 12.

Article 5 of Law No. 2011-70 provides that military judges are independent from the military hierarchy when exercising their functions and are only subject to the law. Article 6 provides that they are protected against any threat or attack of any nature they may be subjected to in the course of, or because of the exercise of, their duties.

However, other provisions of the CMJ undermine the individual independence of military judges. They are subject to “general disciplinary rules” (article 19) and their careers are subject to extensive control by the executive. Their recruitment process is tightly controlled by the Minister of Defence. The list of candidates authorized to sit for the examination is established by a commission set up by an order of the Minister of Defence and chaired by the General Prosecutor Director of Military Justice.²¹³ In addition, according to article 11 of Law No. 2011-70, the modalities and programme of the examination are also fixed by an order of the Minister of Defence. The Minister of Defence is also the President of the newly established Military Judicial Council.

4. Military Judicial Council

Law-Decree No. 2011-70 established a Military Judicial Council (MJC).

The MJC consists of:

- the Minister of Defence, sitting as the president of the Council;
- the General Prosecutor Director of Military Justice as vice-president;
- the General Prosecutor of the Military Court of Appeal;
- the First President of the Military Court of Appeal, and
- the most senior military judge from each of the three judicial grades.²¹⁴

Other than the First President of the military court of appeal, who is a civilian judge, the MJC is composed of a majority of military judges.

The MJC is charged by law with powers relating to the career of military judges, including their promotion, transfer and discipline.²¹⁵

The MJC also sits as the disciplinary council for military judges. However, only military members are allowed to sit when it meets as a disciplinary body.²¹⁶ In addition to general disciplinary rules that they are subject to, disciplinary sanctions can be imposed on military judges by the MJC for any act that undermines the fulfilment of their duties, or the honour or dignity of their profession.²¹⁷

The disciplinary council of the MJC hears matters referred by the General Prosecutor Director of Military Justice or the superiors of the concerned military judge.²¹⁸ In each case, the President of the MJC appoints a rapporteur from among the members of the disciplinary council to proceed with the investigation, inform the concerned judge of the disciplinary procedure against him or her, receive the concerned judge’s explanations,

²¹³ Law No. 2011-70, article 10.

²¹⁴ Law No. 2011-70, article 14.

²¹⁵ Law No. 2011-70, article 15.

²¹⁶ Law No. 2011-70, article 17.

²¹⁷ Law No. 2011-70, article 19.

²¹⁸ Law No. 2011-70, article 20.

and hear witnesses.²¹⁹ The rapporteur then prepares a detailed report, which is transmitted to the concerned judge's counsel along with the case file.²²⁰

The concerned judge is summoned to appear before the disciplinary council within ten days of the date of the summons. The summons must include the alleged facts and supporting evidence.²²¹ During disciplinary proceedings, the judge has the right to be assisted by counsel who is entitled to have a copy of the case file.

The decision of the disciplinary council must be supported by reasons and any sanction imposed can be challenged before the Administrative Tribunal.²²²

5. Prosecutors and investigating judges in military courts

All public prosecutors and their deputies who practice in military courts as well as investigating judges who sit on military court cases are members of the military.²²³ They are appointed by decree following a proposal by the Minister of Defence and a decision by the MJC.²²⁴

The CMJ provides that the prosecution functions are performed by the public prosecutor of the permanent military tribunal of first instance or by one of his deputies.²²⁵

Under article 14bis, the General Prosecutor Director of Military Justice is in charge of directing cases before the military courts, ensuring the application of criminal laws and the enforcement of judgements and other decisions of military courts, and exercising authority over the other members of the military prosecution service.

Military prosecutors are charged with conducting the public prosecution ("*action publique*") in military courts through initiating criminal proceedings and requiring the application of the law in compliance with the rules and procedures determined by the civilian Code of Criminal Procedure.

Under the CMJ, investigating judges who sit on military cases carry out investigations in accordance with the Code of Criminal Procedure.²²⁶ The Code of Criminal Procedure provides that preliminary investigations by the investigating judge are mandatory in cases of more serious crimes and are optional in cases of misdemeanours and minor offences. The investigating judge investigates the case with a view to establishing the truth and the facts upon which a jurisdiction can base its decision.

Investigating judges are appointed by decree. For each military tribunal, the prosecutor decides whether to refer a case to an investigating judge. Investigating judges have to investigate the facts mentioned in the referral order only, unless new facts revealed by the investigation would constitute aggravating circumstances in relation to the offences that have been referred.²²⁷

²¹⁹ Law No. 2011-70, article 21.

²²⁰ Id.

²²¹ Law No. 2011-70, article 22.

²²² Law No. 2011-70, articles 23, 24 & 26.

²²³ Law No. 2011-70, article 1(a).

²²⁴ Law No. 2011-70, articles 1 and 2. See also article 14 of the CMJ, as amended by Law No.2011-69.

²²⁵ Articles 10 and 14 of the CMJ, as amended by Law No. 2011-69.

²²⁶ CMJ, article 24, as amended by Law No. 2011-69.

²²⁷ Code of Criminal Procedure, articles 47-51.

6. Trials before military courts

Article 38 of the CMJ provides that the procedure before military courts is the one provided for in the Code of Criminal Procedure, taking into account the special provisions provided for by the CMJ.

Article 40 of the CMJ provides that the hearings of military courts are public. However, these hearings can be closed to the public if the court decides that publicity will undermine the interests of the armed forces. Article 40 also provides that the court can prohibit, totally or partially, any reporting of a case when the court considers it necessary. Under the law, all judgments of military courts are required to be pronounced publicly.

Before the adoption of Law No. 2011-69, decisions of military tribunals were not subject to appeal. Judgments could only be reviewed before the Military Chamber of the Court of Cassation. The Court of Cassation is not a court of appeal. It does not rule on the merits of a case but rather decides whether the law has been correctly applied by the lower courts based on the facts.

However, articles 28, 28bis, and 29 of Law No. 2011-69 provide for appeal to military appellate courts and then review by the military chamber at the Cassation Court. Judgments of a single judge can be appealed to the Permanent Military Courts of First Instance in Tunis, Sfax and Kef. The judgements of these three Courts can be appealed before the Military Court of Appeal, based in Tunis. The decisions of the military investigating judges can be appealed before the military indictment chambers at the competent civilian appellate court.

Law No. 2011-69 also grants jurisdiction to military courts over pendent civil claims for compensation brought in the context of criminal cases, in conformity with the Code of Criminal Procedure.²²⁸

C. International law and standards

The guarantees of article 14 of the ICCPR, including the right to a fair hearing before a competent, independent and impartial tribunal, apply to all courts, including military ones. In the words of the Human Rights Committee, these guarantees apply regardless of whether the court is "ordinary or specialized, civilian or military".²²⁹

Moreover, international standards, including the Basic Principles on the Independence of the Judiciary, guarantee that everyone has the right to be tried "by ordinary courts or tribunals using established legal procedures".²³⁰ Due to their intended purpose, their composition and nature, military courts are specialised rather than ordinary courts under international standards.

Concerns about the purpose of military courts and their lack of independence and impartiality have led a range of human rights experts to recommend that military courts be used only to try members of the military and only for military-related offences. Furthermore, there is a growing consensus that military courts should not have jurisdiction to try individuals charged in relation to the commission of ordinary crimes, human rights violations, or crimes under international law, including but not limited to torture, enforced disappearance, and extrajudicial and summary execution. The law

²²⁸ CMJ, article 7 as amended by the Law No. 2011-69.

²²⁹ General Comment No. 32, para. 22.

²³⁰ UN Basic Principles on the Independence of the Judiciary, Principle 5.

should also prohibit military courts from exercising jurisdiction over civilians, even where the target or victim of the offence is the military.

1. Ratione materiae competence: Trial of non-military related offences

In order to ensure respect for the guarantee of a fair trial before an independent and impartial tribunal, the subject matter jurisdiction of military courts should exclude ordinary crimes, human rights violations, and crimes under international law. Their jurisdiction should be limited to offences of a military nature.

For example, the ACHPR Principles and Guidelines state that “the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel”.²³¹ The Inter-American Court of Human Rights has held: “In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces”.²³² In a case concerning Brazil, the Inter-American Commission explained that “trying common crimes as though they were service-related offences merely because they were carried out by members of the military violates the guarantee of an independent and impartial court”.²³³ Similarly, in its recommendations issued to member states on improving the administration of justice, the Inter-American Commission observed: “Military justice has merely a disciplinary nature and can only be used to try Armed Forces personnel in active service for misdemeanours or offences pertaining to their function”.²³⁴

Bringing military personnel accused of human rights violations to trial in military courts is incompatible with international human rights law. This was the conclusion of an ICJ study in 2004 on the views and opinions of a variety of human rights bodies and mechanisms. This is because “gross human rights violations – such as extrajudicial executions, torture and enforced disappearance – carried out by members of the military or police cannot be considered to be military offences, service-related acts, or offences committed in the line of duty”.²³⁵ Thus, for example, the Inter-American Court has held that “when the military courts hear of acts that constitute violations to human rights against civilians they exercise jurisdiction not only with regard to the defendant, which must necessarily be a person with an active military status, but also with regard to the civil victim, who has the right to participate in the criminal proceedings not only for the effects of the corresponding reparation of the damage but also to exercise their rights to the truth and to justice. In that sense, the victims of the violations of human rights and their next of kin have the right to have said violations heard and resolved by a competent tribunal, pursuant with the due process of law and the right to a fair trial”.²³⁶

Similarly, the Principles for the protection and promotion of human rights through action to combat impunity provide: “In order to avoid military courts, in those countries where

²³¹ ACHPR Guidelines and Principles, Section A, Principle L(a).

²³² *Judgment of 6 August 2000*, IACtHR, Durand and Ugarte v. Peru, para. 118. See also *Judgment of 23 November 2009*, IACtHR, Radilla-Pacheco v. Mexico, para. 272 & n. 274 and cases cited therein.

²³³ *Report No. 55/01 of 16 April 2001*, Inter-American Commission on Human Rights, Case Nos. 11.286, 11.406, 11.407, 11.412, 11.413, 11.415, 11.416 and 11.417, *Aluisio Cavalcante et al. v. Brazil*, para. 153.

²³⁴ *IACHR Annual Report 1997*, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13 (1998), Ch. VII Recommendation I.

²³⁵ ICJ, *Military jurisdiction and international law: military courts and gross human rights violations*, Vol. I, Geneva, 2004, p.12.

²³⁶ *Judgment of 23 November 2009*, IACtHR, Radilla-Pacheco v. Mexico, para. 275.

they have not yet been abolished, helping to perpetuate impunity by virtue of a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be limited solely to specifically military offences committed by military personnel, excluding human rights violations constituting serious crimes under international law, which come under the jurisdiction of the ordinary domestic courts or, where necessary, an international court".²³⁷

The Human Rights Committee and the Committee Against Torture have repeatedly expressed concern when military tribunals' jurisdiction includes human rights offences committed by members of the military.²³⁸ The Committee on the Rights of the Child has also stated that violations of human rights and children's rights "should always be examined by civilian courts under civilian law, not military courts".²³⁹

The Draft Principles Governing the Administration of Justice through Military Tribunals (the Decaux Principles), are consistent with the above-referenced jurisprudence.²⁴⁰ The Decaux Principles state:

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.²⁴¹

In addition, the Inter-American Convention on Forced Disappearance of Persons and the UN Declaration on the Protection of All Persons from Enforced Disappearance, both specifically exclude the use of military courts for trials of individuals charged with acts of enforced disappearance.²⁴²

²³⁷ Principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/Sub.2/1997/20 (1997), Principle 34.

²³⁸ Concluding Observations of the Human Rights Committee on Venezuela, UN Doc. CCPR/C/79/Add.14, para. 10; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/79/Add.66, para. 315; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/BRA/CO/2, para. 9; Concluding Observations of the Human Rights Committee on Colombia, UN Doc. CCPR/C/79/Add2, para. 393; Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4, para. 14; Concluding Observations of the Human Rights Committee on the Democratic Republic of Congo, UN document CCPR/C/COD/CO/3, para. 21; Conclusions and Recommendations of the Doc. against Torture on Mexico, UN Doc. CAT/C/MEX/CO/4, para. 14; Conclusions and Recommendations of the Committee against Torture on Peru, UN Doc. CAT/C/PER/CO/4, para. 16. See generally ICJ, *Military jurisdiction and international law*, pp. 61-71.

²³⁹ Concluding Observations of the Committee on the Rights of the Child on Colombia, UN Doc. CRC/C/15/Add.30, para. 17.

²⁴⁰ The Decaux Principles, set out in UN Doc. E/CN.4/2006/58 (2006) were drafted by a Rapporteur of the UN Sub Commission on the Promotion and Protection of Human Rights, a main body of the UN Commission on Human Rights. They have been cited by a range of human rights bodies and mechanisms, including the UN Special Rapporteur on the Independence of Judges and lawyers, who in her 2013 annual report called for their prompt adoption by the UN Human Rights Council and their endorsement by the UN General Assembly. See Note by the Secretary-General transmitting the report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013) para. 92. See also *Ergin v. Turkey* (No. 6), ECtHR, Application No. 47533/99, Judgment of 4 May 2006, para. 45.

²⁴¹ Draft Principles Governing the Administration of Justice through Military Tribunals ("Decaux Principles"), UN Doc. E/CN.4/2006/58, Principle 9.

²⁴² See *Inter-American Convention on Forced Disappearance of Persons*, article IX; *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, para. 16. ("They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts."). But note that the *Convention on the Protection of All Persons from Enforced Disappearance* states only that persons tried for such an offence "shall

2. *Ratione personae* competence: Trial of civilians

Under international standards military courts should be specialized courts, not ordinary courts. The UN Basic Principles provide: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".²⁴³ Similarly, the ACHPR Principles and Guidelines state that military courts should not "in any circumstances whatsoever have jurisdiction over civilians".²⁴⁴

The Human Rights Committee has stated that while the ICCPR "does not prohibit the trial of civilians in military courts or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned."²⁴⁵ The Committee further clarified that parties to the ICCPR must ensure that military trials of civilians should be "exceptional" and "limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".²⁴⁶

Consistent with this view, the Committee has called on a number of countries to prohibit trials of civilians by military courts.²⁴⁷ Indeed, as described by the Special Rapporteur on the independence of judges and lawyers and the European Court of Human Rights, there is a developing consensus in international law towards the prohibition of military trials for civilians.²⁴⁸ The Working Group on Arbitrary Detention, the Committee against Torture, and the Special Rapporteur have taken the position that military courts are incompetent to try civilians.²⁴⁹

In *Incal v. Turkey*, the European Court heard the case of the trial of a civilian by a specialized security court one of whose members was a military judge. Although it noted that domestic law provided certain procedural guarantees of independence and impartiality, nevertheless the applicant had legitimate fears about a judge who remained subject to military discipline. There was thus a violation of article 6 of the *European*

benefit from a fair trial before a competent, independent and impartial court or tribunal established by law". See article 11(3).

²⁴³ UN Basic Principles on the Independence of the Judiciary, Principle 5.

²⁴⁴ ACHPR Principles and Guidelines, Section A, Principle L (c).

²⁴⁵ General Comment No. 32, para. 22.

²⁴⁶ Id.

²⁴⁷ Human Rights Committee Concluding Observations on Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20; see also Human Rights Committee Concluding Observations on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 14; Human Rights Committee Concluding Observations on Chile, UN Doc. CCPR/C/CHL/CO/5, para. 12; Human Rights Committee Concluding Observations on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 18; Human Rights Committee Concluding Observations on Ecuador, UN Doc. CCPR/C/ECU/CO/5, para. 5.

²⁴⁸ Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Peru, UN Doc. E/CN.4/1998/39/Add.1, paras. 78-79; *Satik v. Turkey (No. 2)*, ECtHR, Application No. 60999/00, Judgment of 8 July 2008, para. 44; see also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 36.

²⁴⁹ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para. 8; Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Peru, UN Doc. E/CN.4/1998/39/Add.1, paras. 78-79.

Convention.²⁵⁰ In other cases the European Court has held that “only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible” with the European Convention.²⁵¹

The Decaux Principles provide:

Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.²⁵²

3. Fair trial before an independent and impartial tribunal

Any individual who is brought before a military tribunal for an offence which would be considered as a criminal offence under international human rights law, owing to the nature of the alleged act or the nature and severity of the potential penalties, is entitled to enjoyment of the fair trial guarantees set out in international standards. As noted above, the fair trial guarantees set out at article 14 of the ICCPR apply to proceedings on criminal offences in all courts and tribunals, regardless of whether they are ordinary or specialized, civilian or military.²⁵³

In a number of cases the European Court of Human Rights has examined the applicability of article 6 of the *European Convention* (guaranteeing the right to a fair trial), to military proceedings involving military personnel. The independence and impartiality of a court are assessed with regard to “the manner of the appointment of its members, their terms of office, the existence of guarantees against outside pressures and whether the military criminal courts presented an appearance of independence”.²⁵⁴

As with civilian courts, the independence and impartiality of military courts must be guaranteed by law. Respect for the independence and impartiality of the courts requires that the selection of judges to sit on military courts be based on clear criteria, including legal qualifications, experience and integrity, to ensure that individuals are chosen on the basis of merit. Although international law does not prohibit the appointment of judges by the executive branch, certain safeguards must be adopted to safeguard the independence and impartiality of the judiciary and the appointment process.²⁵⁵ Where there is a judicial council charged with appointing judges for ordinary courts, that council should play a role in the selection of judges for military courts. Further, military judges must have statutory independence from the military chain of command in the course of carrying out their judicial functions. They should also have secure tenure in office and should be held accountable in fair proceedings for breaches of a clearly defined code of ethics, which is

²⁵⁰ *Incal v. Turkey*, ECtHR, Application No. 41/1997/825/1031, Judgment of 9 June 1998, paras. 67-68 & 72-73.

²⁵¹ *Ergin v Turkey (No. 6)*, ECtHR, Application No. 47533/99, Judgment of 4 May 2006, para. 44; see also *Martin v. United Kingdom*, ECtHR, Application No. 40426/98, Judgment of 24 October 2006, para. 44; *Satik v. Turkey (No. 2)*, ECtHR, Application No. 60999/00, Judgment of 8 July 2008, para. 47.

²⁵² Decaux Principles.

²⁵³ General Comment No. 32, para. 22; Concluding Observations of the Human Rights Committee on the Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/3, para. 21. See also Decaux Principles, Principle No. 2; ACHPR Principles and Guidelines, Section A, Principle L(b).

²⁵⁴ *Ibrahim Gurkan v. Turkey*, ECtHR, Application No. 10987/10, Judgment of 3 July 2012, para. 17.

²⁵⁵ See generally Decaux Principles, Principle No. 13 and paras 45-47; see also *Report on Chile*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para. 140.

consistent with established standards of judicial conduct including as set out in international standards.

Article 14 of the ICCPR requires that all persons charged with a criminal offence must be presumed innocent and be informed promptly and be given adequate time and facilities for the preparation of their defence. The Human Rights Committee has clarified that what counts as "adequate time" depends on the circumstances of each case. "If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed".²⁵⁶ In addition "adequate facilities" must include access to "all materials that the prosecution plans to offer in court against the accused or that are exculpatory".²⁵⁷

Trials must be public unless one of the specific grounds for excluding the public or the press from all or part of the proceedings applies.²⁵⁸ However, in all cases the judgment must be made public except where the interest of juvenile persons otherwise requires.²⁵⁹ Judgments must be reasoned.²⁶⁰ Indeed, the Decaux Principles explicitly recognize that "a statement of the grounds for a court ruling is a condition sine qua non for any possibility of a remedy and any effective supervision" and further that "military secrecy may not be invoked ... to obstruct the publication of court sentences".²⁶¹ The Human Rights Committee has explained that the right to have one's conviction reviewed "can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgment of the trial court".²⁶²

Judgments and sentences for criminal offences imposed by a military tribunal must be subject to appeal before a higher court.²⁶³ There are two issues here. The first is the kind of appellate scrutiny that is considered sufficient under international law. The Human Rights Committee has stated that the right to have one's conviction and sentence reviewed "imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant".²⁶⁴

The Inter-American Commission has explained: "For a lawful and valid review of the judgment in compliance with human rights standards, the higher court must have the jurisdictional authority to take up the merits of the particular case in question and must satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law."²⁶⁵ In *Incal*, for example, the European Court of

²⁵⁶ General Comment No. 32, para. 32.

²⁵⁷ General Comment No. 32, para 33.

²⁵⁸ ICCPR, article 14(1); Arab Charter, article 13(b).

²⁵⁹ ICCPR, article 14(1).

²⁶⁰ General Comment No. 32, para. 29.

²⁶¹ Decaux Principles, para.50 and Principle 10(d).

²⁶² General Comment No. 32, para. 49.

²⁶³ Article 14 (5) of the ICCPR; See generally, *Report on Chile*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para. 172; Singhvi Declaration, Principle 5(f); Decaux Principles, Principle No. 15.

²⁶⁴ General Comment No. 32, para. 48.

²⁶⁵ *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 239.

Human Rights found appellate review lacking where the Court of Cassation did not have full jurisdiction.²⁶⁶

The second issue is the civilian nature of the reviewing court. Decaux Principle 17 states that where military tribunals exist, "their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts".²⁶⁷

D. Assessment in light of international law and standards

The expansive nature of current *ratione materiae* and *personae* competences of Tunisian military courts is inconsistent with international standards. In particular, the provisions of the CMJ that grant military courts jurisdiction over non-military offences, including serious violations of human rights, and over civilians, runs counter to international standards and the recommendations of UN treaty bodies, the ACHPR, the Special Rapporteur on the independence of judges and lawyers, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the Decaux Principles.

In his report on Tunisia, the Special Rapporteur on the promotion of truth, justice, reparation and the guarantees of non-recurrence recommended that the Tunisian authorities should "ensure that the jurisdiction of military tribunals is limited to military personnel who have committed military offences".²⁶⁸ In short, military courts should have no authority to try civilians and they should be restricted to service-related offences.

Based on its research and experience the ICJ considers that use of such courts to try individuals for human rights violations is "one of the greatest sources of impunity in the world".²⁶⁹ International standards are clear that the jurisdiction of military courts over military personnel must exclude human rights violations. As the Updated Set of Principles to Combat Impunity provide, "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court".²⁷⁰ Jurisdiction should be limited to offences of a military nature and all other offences should be subject to the jurisdiction of ordinary courts.

As for the trial of civilians in military courts, there is growing agreement reflected *inter alia* in the Decaux Principles and by a wide range of human rights bodies and mechanisms that the use of military courts to try civilians should be prohibited. Although the Human Rights Committee currently retains the view that the trial of civilians by military courts may in some circumstances be permitted, the conditions under which civilians may be tried by military courts in Tunisia do not rise to the level of "exceptional" envisaged by the Committee, as the authorities have not and cannot show that the resort to military tribunals is "necessary and justified by objective and serious reasons" and that

²⁶⁶ *Incal v. Turkey*, para 72.

²⁶⁷ Decaux Principles, Principle 17.

²⁶⁸ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mission to Tunisia (11-16 November 2012), UN Doc. A/HRC/24/42/Add.1, para 85 (c).

²⁶⁹ ICJ, *Military jurisdiction under international law*, p. 8.

²⁷⁰ Updated set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 29.

civilian courts are “unable to undertake” such trials.²⁷¹ Granting military tribunals jurisdiction over all offences referred to in article 5 of the CMJ committed by civilians simply does not meet these standards.

The independence and impartiality of the military courts in Tunisia is not adequately safeguarded owing to the appointment and other processes, and chain of command that remain tied to the executive. Not only does the Minister of Defence control the recruitment and appointment process, the disciplinary process is entrusted to the Military Judicial Council, which is also dominated by members of the Ministry of Defence. Furthermore, article 19 of Law No. 2011-70 provides that military judges are subject to military discipline.²⁷² This means, in theory, that a military judge’s failure to comply with an order from his superior could constitute an infringement to the “general disciplinary rules” and lead to disciplinary proceedings, despite international guidelines and recommendations that military judges should have statutory independence from the military chain of command. Thus the Decaux Principles stipulate: “Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy”.²⁷³

The fact that prosecutors in military courts are also members of the military and subsumed within the military structure is another cause for concern. According to the Tunisian National Fact-Finding Commission, “police forces appeared to have been responsible for 99 percent of the violations between 17 December 2010 and 14 January 2011 investigated by the Commission. After that date, the military, having assumed some internal order functions, was considered responsible for 49 percent of violations”.²⁷⁴

The obligation to investigate human rights violations is an international obligation under treaties as well as under customary international law.²⁷⁵ This requirement is reflected in Principle 19 of the Updated Set of Principles to Combat Impunity, which provides: “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”.²⁷⁶ In order to comply with these standards, the investigation must be conducted by an independent and impartial authority. This independence is compromised where the investigation of violations perpetrated by members of the armed forces or security forces is carried out by members of the same forces.

Investigations by the military prosecution involving the armed forces or security forces do not possess the independence and impartiality required by international standards. In the case *Voiculescu v. Roumanie*, examined by the European Court of Human Rights, “military prosecutors were, as well as the accused, active military personnel and they were

²⁷¹ General Comment No. 32, para. 22.

²⁷² Law No. 2011-70, article 19.

²⁷³ Decaux Principles, Principle 12

²⁷⁴ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mission to Tunisia (11-16 November 2012), UN Doc. A/HRC/24/42/Add.1, 30 July 2013; para 14. The Tunisian National Fact-Finding Commission on the abuses committed between 17 December 2010 and 23 October 2011, was created by Law-decree No. 8 of 18 February 2011. This Commission was established to investigate the violations committed during the transitional period up until the election of the NCA. The report was officially presented to the Tunisian President of the Republic on 2 May 2012.

²⁷⁵ ICJ, *Military jurisdiction and international law*, p. 33.

²⁷⁶ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1

members of the military structure based on the principle of hierarchical subordination". The Court clarified that "this institutional link has resulted, in this case, in a lack of independence and impartiality of the military prosecutor in the carrying out of the investigation".²⁷⁷ To ensure the independence and impartiality of investigations, the Human Rights Committee has recommended that "in case of violations of human rights committed by the military or armed forces, investigation should be conducted by civil authorities."²⁷⁸

As amended, the CMJ provides for appeal to military appellate courts and then review by the military chamber at the Cassation Court. However, these provisions are inconsistent with international standards. Individuals convicted by military courts should have the right to appeal their conviction and sentence to a higher civilian court and the nature of the review must not be limited to only the formal or legal aspects of the conviction without any consideration of the underlying facts.

Although the amendments to the CMJ were introduced with a view to reinforcing procedural guarantees before military courts, lawyers who represented civil parties in proceedings before military courts have reported difficulties in accessing files in cases that involved senior security or military officials accused of human rights violations.

Moreover, as mentioned earlier, numerous cases regarding human rights violations committed either before or during the revolution have now been transferred to military courts. The ICJ is concerned that some of the sentences imposed are not commensurate with the severity of the violations. Disproportionate sentences may contribute to reinforcing the impunity that prevailed under the old regime. For example, in the case of *Barakat Essahel*, a prosecution of members of the military for involvement in acts of torture carried out in 1991 of other members of the armed forces who were suspected of involvement in a coup attempt, the sentence imposed on some of those found guilty was reduced from four years' to two years' imprisonment by the Military Court of Appeal of Tunis.²⁷⁹

E. Recommendations

In light of the above, and in order to enhance the independence and impartiality of the judiciary and ensure fair trials in military courts, the ICJ urges the Tunisian authorities to reform the military justice system so as to:

- i. Guarantee the independence and impartiality of military tribunals;**
- ii. Limit the personal jurisdiction of military tribunals to military personnel and ensure that military courts do not have jurisdiction over civilians even where the victim is a member of the armed forces or an equivalent body or the accused is alleged to have committed the offence together with a member of the military;**
- iii. Explicitly restrict the jurisdiction of military tribunals to cases involving members of the military for alleged breaches of military discipline and to this end:**
 - a. limit the offences set out in article 5 of the CMJ accordingly; and**
 - b. explicitly exclude the jurisdiction of military courts in cases involving human rights violations and crimes under**

²⁷⁷ *Voiculescu v. Roumanie*, ECtHR, Application No. 5325/03, Judgement of 3 February 2009.

²⁷⁸ ICJ, *Right to a remedy and to reparation for gross human rights violations, Practitioners' Guide No. 2*, Geneva, 2007, p. 67.

²⁷⁹ Case No. 20416, Tunis Military Court of Appeal, 7 April 2012.

- international law such as genocide, enforced disappearance, extrajudicial executions or torture, war crimes and crimes against humanity;**
- iv. Ensure that allegations of violations of human rights committed by the military or armed forces are investigated by civilian authorities;**
 - v. Ensure that judges who sit on military tribunals are independent and impartial and that they have a status guaranteeing their independence and impartiality. In particular, to this end ensure that:**
 - a. the selection of judges to sit on military courts be based on clear criteria, including legal qualifications, experience and integrity;**
 - b. the HJC plays a role in the selection of judges for military courts and that the selection process is independent and impartial and maintains the independence and impartiality of the judiciary;**
 - c. judges sitting on military courts have security of tenure and are accountable in fair proceedings for breaches of a clearly defined code of ethics, which is consistent with international standards on judicial conduct; and**
 - d. judges on military courts remain outside the military chain of command and military authority in respect of matters concerning the exercise of any judicial function;**
 - vi. Ensure that proceedings before military tribunals are carried out in a manner that is consistent with minimum requirements of a fair trial guaranteed in international standards; and**
 - vii. Amend the grounds for appealing against decisions of the military court to ensure a full right of appeal of the conviction and sentence by the military court to a higher civilian tribunal.**

V. Office of the Public Prosecutor

A. Introduction

Prosecutors play an essential role in the administration of justice and the effective protection of human rights. The proper functioning of the criminal justice system presupposes the existence of a strong, independent and impartial prosecutorial authority to investigate and prosecute criminal offences, including serious violations of human rights.

International standards underscore that prosecutors play a major role in ensuring that the rights of the defendant are guaranteed, that the principle of equality of arms is respected, and that perpetrators of human rights violations are held to account. The ICJ notes with concern, however, that prosecutors in Tunisia, have frequently proven reluctant to pursue investigations into or prosecutions of human rights cases.

This section will first review the past and present law governing practices of the Office of the Public Prosecutor (OPP) and the changes envisaged by the 2014 Constitution. Then it will discuss the international law and standards applicable to prosecutors. Finally it will propose steps to strengthen the independence of the OPP.

B. Office of the Public Prosecutor: past, present and future

1. Organization

Prosecutors have always been viewed as part of the judiciary in Tunisia. The 1959 Constitution made no distinction between judges ("*les magistrats du siège*") and prosecutors ("*les magistrats du parquet*").²⁸⁰ This same conception of prosecutors as part of the judiciary is also found in the Provisional Constitution and the Constitution adopted by the NCA in January 2014.²⁸¹

Under Law No. 67-29, prosecutors, as part of the judicial corps, are subject to the same appointment, transfer, promotion and disciplinary system that is applied to judges.²⁸² Consequently, the executive exercised the same degree of influence over the careers of prosecutors as it did over judges, including through its control of the CSM.²⁸³ Indeed, as described in Chapter III, prosecutors were among those individuals summarily dismissed by the Minister of Justice in May 2012. Furthermore, article 15 of Law No.67-29 states: "Public prosecutors are placed under the direction and control of their superiors and under the authority of the Minister of Justice. During hearings, they are free to make any oral submissions."

Prosecutors take the same oath of office as judges, are restricted from public and elected office, business and other employment, and are afforded the same protections and immunities.²⁸⁴ There is no explicit recognition of prosecutors' rights to freedom of expression and association. Assessments of the work of prosecutors are performed by the prosecutors of the relevant court, based on the advice of the presiding judge of that court.²⁸⁵ Under Decree No. 2010-3152, the GIS, which is responsible for investigating

²⁸⁰ 1959 Constitution, article 65.

²⁸¹ 2014 Constitution, article 115.

²⁸² Article 12.

²⁸³ For further detail, see Chapters II and III above.

²⁸⁴ Law No. 67-29, articles 11, 16, 17, & 19.

²⁸⁵ Law No. 67-29, article 35.

complaints regarding the work of prosecutors, is part of the Ministry of Justice and reports to the Minister.²⁸⁶

During the transitional period, pursuant to Law No. 2013-13, the career of prosecutors is overseen by the IPJJ, which is composed of a majority of judges and prosecutors and is relatively free from executive control.²⁸⁷ The selection, appointment, promotion and transfer of prosecutors is made by a decision of the Prime Minister, on the advice of the IPJJ.²⁸⁸ As set out in further detail in Chapter I and Chapter III, under Law No. 2013-13 a new disciplinary council was established, as was an amended procedure for hearing disciplinary cases against prosecutors.²⁸⁹ However, pursuant to article 16 of Law No. 2013-13, it is still the Minister of Justice who is responsible for the referral of disciplinary case files to the disciplinary council.²⁹⁰ Law No. 67-29 remains in force to the extent that its provisions do not conflict with Law No. 2013-13.²⁹¹ It is therefore not clear whether the Minister of Justice also retains the authority to provisionally suspend prosecutors from office and to issue warnings to prosecutors.²⁹²

The 2014 Constitution provides that the Office of the Public Prosecutor is part of the judiciary and enjoys the same constitutional guarantees. The proposed HJC will oversee the career management and disciplinary system for prosecutors. Prosecutors will have the same immunity as judges and, like judges, must act with competence, impartiality and integrity.²⁹³

2. Functions

The functions of prosecutors are primarily set out in the Code of Criminal Procedure.²⁹⁴ Chapter I, section II, outlines the role of the OPP, while section III contains provisions concerning the specific role and competences of the Prosecutor-General of the Republic and the Attorneys-General.

Under these provisions, the Minister of Justice is granted broad powers over the OPP. Pursuant to article 22, the Prosecutor-General is placed at the head of the prosecution service but specifically “under the authority of the Minister of Justice”. Article 23 provides that the Minister of Justice may “report to the Prosecutor-General 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”. In addition, by virtue of article 21 of the Code of Criminal Procedure, all public prosecutors are “required to comply with written submissions in accordance with instructions given to him under the conditions set out in article 23”. The Minister of Justice may also order the Prosecutor-General to the Court of Cassation to lodge an appeal against a ruling to the Court of Cassation.²⁹⁵ These provisions serve to consolidate the control of the Minister of Justice over the prosecution service as a whole.

Under the rule of President Ben Ali, the hierarchical relationship between prosecutors and the executive branch meant that prosecutors were especially susceptible to political

²⁸⁶ Decree No. 2010-3152 on the organization of the Ministry of Justice, articles 24-31.

²⁸⁷ Law No. 2013-13, articles 5-11.

²⁸⁸ Law No. 2013-13, article 14.

²⁸⁹ Law No. 2013-13, articles 16-18. For further detail, see Chapter III.

²⁹⁰ Law No. 2013-13, article 16.

²⁹¹ Law No. 2013-13, article 20.

²⁹² Law No. 67-29, articles 51 and 54.

²⁹³ 2014 Constitution, articles 103 & 104.

²⁹⁴ Law No. 68-23 of 24 July 1968.

²⁹⁵ Code of Criminal Procedure, article 258(6).

pressure. Their careers depended on decisions taken by the Ministry of Justice. This system contributed to an almost total absence of investigations into and prosecutions of cases involving gross violations of human rights. Indeed, in the report of his visit to Tunisia in 2012 the UN Special Rapporteur on torture noted, "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".²⁹⁶

Under article 30 of the Code of Criminal Procedure, the public prosecutor has discretion over whether to dismiss a complaint or denunciation received by or transmitted to him or her. No reason is required for the dismissal and there is no power to request judicial review of a prosecutor's decision not to prosecute. Where the victim of a crime wishes to ensure criminal proceedings are started, he or she must become a civil party and request the opening of an inquiry or commence direct proceedings against the accused.²⁹⁷

This margin of appreciation granted to prosecutors through the principle of discretionary prosecution ("*opportunité des poursuites*") has often been abused in Tunisia, particularly in cases involving human rights violations. In its Concluding Observations, following its examination of Tunisia's implementation of the ICCPR, the UN Human Rights Committee noted that "(a) some judges refuse to register complaints of ill-treatment or torture; (b) some inquiries ordered subsequent to such complaints take an unreasonable amount of time; and (c) some superiors responsible for the conduct of their agents, in violation of article 7 of the Covenant, are neither investigated nor prosecuted".²⁹⁸

In the case *Khaled Ben M'Barek v. Tunisia*, concerning the death of Faisal Baraket due to police torture, the Committee against Torture noted significant shortcomings on the part of the judge, the public prosecutor, and the Minister of Justice. In particular, the Committee stated that the Public Prosecutor had committed a breach of the duty of impartiality imposed on him by his obligation to give equal weight to both accusation and defence "when he failed to appeal against the decision to dismiss the case".²⁹⁹ The Committee went on to note: "In the Tunisian system the Minister of Justice has authority over the Public Prosecutor. It could therefore have ordered him to appeal, but failed to do so".³⁰⁰

3. Relationship with the investigating judge

The prosecutor has discretion to assign cases to the investigating judge of his choice within the jurisdiction. Article 28 of the Code of Criminal Procedure stipulates that when a crime is committed, the public prosecutor should inform the Prosecutor-General of the Republic and the relevant Attorney-General, and order an investigating judge within his jurisdiction to conduct an inquiry. Article 49 provides that where there are several investigating judges in one jurisdiction, the prosecutor decides who will be in charge of the investigation. Investigating judges are themselves assigned to their functions by the

²⁹⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, UN Doc. A/HRC/19/61/Add.1, paras. 29 & 32.

²⁹⁷ Code of Criminal Procedure, article 36.

²⁹⁸ Concluding Observations of the Human Rights Committee on Tunisia, UN Doc. CCPR/C/TUN/CO/5 (2008), para. 11.

²⁹⁹ *Khaled Ben M'Barek v. Tunisia*, Committee Against Torture Communication No. 60/1996, Views of 10 November 1999, UN Doc. CAT/C/23/D/60/1996, para. 11.10

³⁰⁰ *Id.*

Minister of Justice.³⁰¹ Furthermore, the Minister of Justice can order a judge to assume the role of investigating judge for a specific case.³⁰²

According to testimony heard during ICJ missions to Tunisia, prosecutors designate investigating judges based on the nature of the case. "Sensitive" cases, including cases of corruption or cases involving high officials of the former regime, are reportedly assigned to "specialized" investigating judges known for their loyalty to the authorities or their superiors.

C. International law and standards

The main sources of international standards on prosecutors are the UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, standards set out in instruments adopted by the Council of Europe, the ACHPR and the Inter American Commission on Human Rights. General Comments, conclusions and recommendations and views of treaty provisions by treaty monitoring bodies (including in General Comments, conclusions and recommendations) and the jurisprudence of regional human rights courts contain clarification of the relevant requirements tied to treaty guarantees. In addition, the International Association of Prosecutors adopted standards on professional responsibility in 1999.

These standards aim to ensure that prosecutors play an effective role in the administration of justice in a manner that is consistent with the right to a fair trial and the protection of human rights and the rule of law. The standards from these various sources are largely similar and thus the review here most closely tracks the UN Guidelines on the Role of Prosecutors. The one significant area of difference between the various standards is on the institutional status of the prosecutorial service within the government and in particular whether it must be "independent" of the executive branch, or only "objective" and "impartial". This is due to the fact that the status and role of prosecutors differs in some national legal systems. However, even where the public prosecutor is a part of or subordinate to the executive power, international standards are explicit that the lines of authority must be clear and transparent and that prosecutors should be impartial in carrying out their duties. Specific guidance on such a situation is detailed below.

The UN Guidelines on the Role of Prosecutors (hereafter "UN Guidelines") were expressly formulated to assist States in "securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".³⁰³ The Guidelines are intended to be applicable to all jurisdictions, regardless of whether the prosecutorial function is subsumed within or independent of the executive branch. The Guidelines are thus neutral on specific appointment procedures and the status of prosecutors within either the executive or judicial branches of the State.

The UN Guidelines provide that the selection of individuals as prosecutors should be based on objective criteria, should "embody safeguards against appointments based on impartiality or prejudice" and should exclude discrimination.³⁰⁴ Prosecutors should have

³⁰¹ Code of Criminal Procedure, article 48.

³⁰² Id.

³⁰³ Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1, para. 189 (1990) (hereafter "UN Guidelines"), Preamble.

³⁰⁴ UN Guidelines on the Role of Prosecutors, Guidelines 1 & 2(a); CoM Recommendation (2000)19, paras. 5(a) & (b); ACHPR Principles and Guidelines, Section F, Principle (c).

“appropriate education and training” and should be made aware of the ideals and ethical duties of their office and of constitutional and statutory protections for suspects and victims, as well as human rights law.³⁰⁵

According to the UN Guidelines, promotions should be based on “objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures”.³⁰⁶

Furthermore, States have a duty 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”.³⁰⁷

The conduct of prosecutors should be regulated by law or regulation and they should be accountable for professional misconduct. In the face of allegations of professional misconduct which are the subject of disciplinary proceedings, prosecutors have the right to a fair hearing and independent review of decisions to discipline them.³⁰⁸

Furthermore, as public officials who are key players in the administration of justice, prosecutors should also be accountable to the public. As the Special Rapporteur on the independence of judges and lawyers has noted, among other things, some regional systems recommend the possibility of interested parties challenging a decision by a prosecutor not to prosecute.³⁰⁹

As regards the prosecutorial function, the UN Guidelines state that prosecutors shall “carry out their functions impartially”, shall “protect the public interest” and “shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded”.³¹⁰ They are also under a duty to refuse to use evidence known or believed to have been obtained by recourse to unlawful means and must take steps to ensure that persons responsible for the use of such unlawful means are brought to justice.³¹¹ In keeping with the importance of prosecutors in the administration of justice and protection of human rights, the Guidelines also state 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”.³¹²

Recommendation (2000)19, adopted by the Committee of Ministers of the Council of Europe, on the role of public prosecution in the criminal justice system closely follows the UN Guidelines. The Committee of Ministers recommends that where the public prosecution “is part of or subordinate to the government” States should take effective measures to guarantee, *inter alia*, that:

³⁰⁵ UN Guidelines on the Role of Prosecutors, Guideline 2(b); CoM Recommendation (2000)19, para. 7.

³⁰⁶ UN Guidelines on the Role of Prosecutors, Guideline 7; see also ACHPR Principles and Guidelines, Section F, Principle (c); CoM Recommendation (2000)19, para. 5(b).

³⁰⁷ UN Guidelines on the Role of Prosecutors, Guideline 4; see also ACHPR Principles and Guidelines, Principle F(a)(ii); CoM Recommendation (2000)19, para. 11.

³⁰⁸ UN Guidelines on the Role of Prosecutors, Guideline 21; see also ACHPR Principles and Guidelines, Principle F(n); CoM Recommendation (2000)19, para. 5(e).

³⁰⁹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 86.

³¹⁰ UN Guidelines on the Role of Prosecutors, Guidelines 13(a) & (b) & 14; see also ACHPR Principles and Guidelines, Section F, Principle (i) and (j); CoM Recommendation (2000)19, paras. 24 & 27.

³¹¹ UN Guidelines on the Role of Prosecutors, Guideline 16.

³¹² UN Guidelines on the Role of Prosecutors, Guideline 14; see also ACHPR Principles and Guidelines, Section F, Principle (k); CoM Recommendation (2000)19, para. 16.

- the nature and scope of the powers of the government with respect to the public prosecution are established by law;
- the government exercises these powers in a transparent way and in accordance with national and international law;
- if the government has the power to give instructions to prosecute a case, such instructions should be in writing and must respect principles of transparency and equity; the government should be under a duty:
 - to seek prior written advice from either the public prosecutor or the body that is carrying out the public prosecution;
 - to explain its written instructions, especially when they deviate from the public prosecutor's advice, and to transmit them through hierarchical channels; and
 - to see to it that, before trial, the advice and instructions become part of the public case file;
- prosecutors remain free to make any legal argument of their choice to a court; and
- instructions not to prosecute a case are either prohibited or are exceptional.³¹³

In other international standards, there is a strong preference for an independent prosecutorial authority. The Special Rapporteur on the independence of judges and lawyers has noted a "growing tendency to move towards a more independent prosecution service model, in terms of its relationship with other authorities, notably the executive."³¹⁴ A prosecution service that is autonomous and viewed by the public as such will increase confidence in its ability to investigate and prosecute crimes.³¹⁵

For example, in the context of Mexico, the Inter-American Commission on Human Rights focused on the need to increase "the independence, autonomy and impartiality which the Office of the Public Prosecutor must have".³¹⁶ The Commission found a "clear violation of autonomy" and stated that "for the proper exercise of its functions [the public prosecutor] must have autonomy and independence from the other branches of government".³¹⁷

The European Court has held that "in a democratic society both the courts and the investigation authorities must remain free from political pressure" and that "it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State".³¹⁸

Regardless of whether prosecutors are independent of or subordinate to the government, they should always "be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law".³¹⁹

³¹³ CoM Recommendation (2000)19, para. 13(a)-(f).

³¹⁴ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 27.

³¹⁵ See Report on Mission to Mexico of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/65/274, paras. 16 & 87.

³¹⁶ IACHR, *Report on the Situation of Human Rights in Mexico*, OAS Doc. OEA/Ser.L/V/II.100, para. 372. See also IACHR, *Annual Report 1997*, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13, Ch. VII.1.

³¹⁷ *Report on the Situation of Human Rights in Mexico*, para. 381

³¹⁸ *Guja v. Moldova*, ECtHR, Application No. 14277/04, Judgment of 12 February 2008, paras. 86 & 90.

³¹⁹ CoM Recommendation (2000)19, para. 16. See also ACHPR Principles and Guidelines, Section F, Principle (k).

The Bordeaux Declaration, adopted by the Consultative Council of European Judges and the Consultative Council of European Prosecutors in 2009, offers similar guidance. The Explanatory Note to the Declaration underscores that:

*The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised. Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interests of the prosecutors, but a guarantee of a fair, impartial and effective justice that protects both public and private interests of the person concerned.*³²⁰

The Bordeaux Declaration states that even if prosecutors are located within a government hierarchy, they must “enjoy complete functional independence in the discharge of their legal roles”. In order to “ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must provide clear and transparent guidelines as regards the exercise of their prosecution powers”.³²¹

The Bordeaux Declaration further provides that to ensure that public prosecutors have independent status, their position and activities should not be “subject to influence or interference from any source outside the prosecution service itself”.³²² Thus matters such as “their recruitment, career development, security of tenure including transfer” should be effected only according to the law or by their consent, and their remuneration should be “safeguarded through guarantees provided by the law”.³²³ The Bordeaux Declaration recognizes that in some States the prosecution service is hierarchical. In such cases there should be transparent lines of authority, accountability, and responsibility. Furthermore, directions to public prosecutors “should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively.”³²⁴

The Special Rapporteur on the independence of judges and lawyers recommends that prosecutors should have the right to challenge instructions received, especially when they deem the instructions unlawful or contrary to professional standards or ethics.³²⁵

The UN Guidelines make clear that the “office of prosecutors shall be strictly separated from judicial functions”.³²⁶ Regional standards are in agreement on this point.³²⁷ CoM Recommendation (2000)19 provides: “States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about

³²⁰ Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), *Judges and Prosecutors in a Democratic Society*, CM(2009)192 (hereafter “Bordeaux Declaration”), Explanatory Note, para. 27.

³²¹ Bordeaux Declaration, Explanatory Note, para. 29.

³²² Bordeaux Declaration, para. 8.

³²³ Bordeaux Declaration, para. 8.

³²⁴ Bordeaux Declaration, para. 9.

³²⁵ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 116.

³²⁶ UN Guidelines on the Role of Prosecutors, para. 10.

³²⁷ ACHPR Principles and Guidelines, Section F, Principle (f); CoM Recommendation (2000)19, para. 17; Bordeaux Declaration, para. 3.

the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge".³²⁸

The Special Rapporteur on the independence of judges and lawyers has noted that the opportunity for judges and prosecutors to switch careers, which may happen if the prosecution service is part of the judiciary, "could potentially affect their independence and impartiality".³²⁹

The Explanatory Note to the Bordeaux Declaration acknowledges that in continental law systems judges and prosecutors may both be part of the judicial corps and that the public prosecution's autonomy from the executive may be limited. Nevertheless it states that there must be a guarantee of separate functions.³³⁰ The Explanatory Note explains that: "The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed".³³¹

The UN Guidelines and the ACHPR Principles and Guidelines both specify the need for "adequate remuneration" for prosecutors.³³² CoM Recommendation (2000)19 provides greater detail on these and other requirements: "States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal".³³³ Similarly, the Bordeaux Declaration states: "Adequate organisational, financial, material and human resources should be put at the disposal of justice".³³⁴

Prosecutors, like judges, are entitled to enjoy the right of all persons to freedom of expression and association. The UN Guidelines clarify that, in particular, prosecutors have the right to "take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering" any professional disadvantage.³³⁵ They also underscore that prosecutors should always "conduct themselves in accordance with the law and the recognized standards and ethics of their profession".³³⁶ The ACHPR Principles and Guidelines and CoM Recommendation (2000)19 contain similar provisions.³³⁷

D. Assessment in light of international law and standards

³²⁸ CoM Recommendation (2000)19, para. 17.

³²⁹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 39.

³³⁰ Bordeaux Declaration, Explanatory Note, paras. 6-9.

³³¹ Bordeaux Declaration, Explanatory Note, para. 10.

³³² UN Guidelines on the Role of Prosecutors, para. 6; ACHPR Principles and Guidelines, Section F, Principle (b).

³³³ CoM Recommendation (2000)19, para. 4.

³³⁴ See also the Bordeaux Declaration, para. 8.

³³⁵ UN Guidelines on the Role of Prosecutors, paras. 8 & 9.

³³⁶ UN Guidelines on the Role of Prosecutors, para. 8.

³³⁷ ACHPR Principles and Guidelines, Section F, Principles (d) & (e); CoM Recommendation (2000)19, para. 6.

International standards require that prosecutors are able to perform their functions with objectivity and impartiality. Even if structurally included within the executive branch, they should be able to operate with a high degree of autonomy and independence. In Tunisia, however, prosecutors, while nominally part of the judiciary, do not enjoy requisite safeguards for their independence. The executive has a dominant role not only in their appointment, promotion and discipline but also in the direction of individual cases. These features of the current system are not consistent with international standards.

According to the UN Guidelines on the Role of Prosecutors, the selection and promotion of prosecutors should be based on objective criteria and should exclude appointments for improper motives. Prosecutors have a duty not to continue a prosecution if an impartial investigation shows the charge to be unfounded. They must refuse to use evidence that they know or believe to have been obtained by unlawful means. At the same time, prosecutors should give due attention to crimes committed by public officials, including corruption and violations of human rights. Case-specific instructions to prosecutors are to be avoided, but where they exist they must be in writing and in conformity with clear rules of transparency and equity. Any instruction not to prosecute should be either prohibited or exceptional.

Law No. 67-29 and the Code of Criminal Procedure place the prosecutorial service under the authority of the Minister of Justice. The GIS, which is responsible for disciplinary investigations, is part of the Ministry of Justice and reports to the Minister. The Code of Criminal Procedure authorizes the Minister of Justice to issue instructions and directions to prosecutors. The Minister of Justice can also appoint judges as investigating judges, temporarily or otherwise. All these aspects of the current system serve to undermine the independence, impartiality and objectivity of prosecutors.

The law should provide that appointment and promotion decisions be made on the basis of objective criteria, without any discrimination. Furthermore, the law on the High Judicial Council and the Statute for Judges should specify objective criteria for appointment and promotion, including appropriate skills, knowledge and training.

The law on the High Judicial Council should clarify that only the relevant judicial council has authority over decisions relating to the promotion and transfer or secondment of prosecutors. Powers currently granted to the Minister of Justice in this regard should be revoked.

The law should limit the use of case-specific instructions from the Ministry of Justice and should make clear that any instructions must follow the principles of equity and transparency and may not be politically-motivated. It should prohibit any instruction to cease the investigation or prosecution of a case. The law should also give prosecutors the right to challenge any instruction if they deem it unlawful or contrary to professional standards or ethics.

The ICJ welcomes the fact that the 2014 Constitution limits the control of the executive over prosecutors by providing that decisions on discipline will be taken by the relevant judicial council, as opposed to the Minister of Justice. Where prosecutors are subject to disciplinary action, it should be based on a clear code of conduct and prosecutors, like judges, should have the right to a fair hearing and be able to appeal any decision. The new Law on the Statute for Judges should clarify that prosecutors are subject only to the authority of the Prosecutor-General of the Republic. It should also clarify who submits evaluation reports to the judicial council and what use will be made of such reports and under what procedures. As stated earlier, the GIS should report to the HJC and not the

Minister of Justice. Establishing clear lines for the accountability of prosecutors in the law will prevent the disciplinary system being used as a form of pressure.

The 2014 Constitution makes clear that prosecutors are part of the judiciary and enjoy the same guarantees of independence. However, it does not ensure any separation between judges and prosecutors. The law should establish a clear division between judges and prosecutors. In addition, the law should contain provisions to ensure that judges and prosecutors have distinct roles and are independent of one another.

This separation must also extend to investigating judges and prosecutors. A prosecutor should not have the power to identify which investigating judge is in charge of a specific case, nor should the Minister of Justice have authority to appoint judges as investigating judges or assign them to such a role temporarily. The law should be amended to ensure that the assignments are handled by judges themselves, consistent with the Basic Principles on the Independence of the Judiciary, which states that the "assignment of cases to judges within the court to which they belong is an internal matter of judicial administration".³³⁸ As with previous recommendations on the appointment of judges, investigating judges should not be appointed to their function by the executive.

The 2014 Constitution contains general provisions concerning the rights to freedom of association, assembly and expression.³³⁹ The rights of prosecutors in this respect are not explicitly guaranteed. Given unjustified restrictions imposed on these rights when exercised by members of the judiciary in the past, the ICJ recommends that the new Law on the Statute for Judges make clear that these rights extend to prosecutors and that restrictions on these rights are only permissible where they are strictly necessary to maintain the dignity of the profession.

A number of regional and international standards discuss the importance of adequate remuneration as a safeguard of independence and impartiality. Although the HJC is guaranteed administrative and financial autonomy in the 2014 Constitution, there is no provision to ensure sufficient resources for the OPP.³⁴⁰ The law must guarantee and the legislature must ensure that the OPP has adequate human and financial resources as well as financial autonomy.

E. Recommendations

In light of the above, with the aim of enhancing the independence of the judiciary and the independence of prosecutors and tackling impunity, the ICJ recommends that Tunisian authorities ensure that laws on the organisation of the judiciary, the statute for judges, and the High Judicial Council:

- i. Require prosecutors to carry out their functions independently, impartially, with objectivity and in defence of and in a manner which respects human rights and, to this end, among other things, specifies that any influence or interference from any source outside the OPP itself as well as any attempts to undermine the independence and impartiality of prosecutors is prohibited;**
- ii. Recognise and guarantee a clear separation between the role and functions of judges and prosecutors and to this end detail safeguards to ensure the independence of prosecutors from the judiciary;**

³³⁸ UN Basic Principles on the Independence of the Judiciary, Principle 14.

³³⁹ 2014 Constitution, articles 31, 35 & 37.

³⁴⁰ 2014 Constitution, article 113.

- iii. **Guarantee sufficient human and financial resources and financial autonomy for the OPP and ensure adequate remuneration for prosecutors;**
- iv. **Remove the hierarchical authority of the Minister of Justice over the OPP, including the ability to control and direct prosecutors and to order their reassignment;**
- v. **Prohibit any interference in the decisions of prosecutors or any attempts to undermine their objectivity and impartiality;**
- vi. **Ensure that prosecutors give due attention to the prosecution of crimes committed by public officials, including corruption, human rights violations and crimes under international law;**
- vii. **Provide for decisions relating to the recruitment, appointment, classification, training, promotion and transfer of prosecutors to be determined by the HJC;**
- viii. **Provide for any decisions relating to the appointment, or promotion of prosecutors to be based on objective criteria relating to their qualifications, integrity, ability, efficiency and experience, and prohibit discrimination on any ground;**
- ix. **Guarantee the security of tenure of prosecutors until a set retirement age or for an adequate fixed term;**
- x. **Guarantee conditions of tenure for prosecutors, including adequate working conditions and remuneration, including provision for health and other social benefits and a pension on retirement;**
- xi. **Guarantee the rights of prosecutors to freedom of expression and association, including the right to form and join associations aimed at representing their interests, promoting their professional training and protecting their independence in a manner consistent with international law and standards. No restrictions may be placed on the exercise of these rights other than those provided for by articles 19 and 22 of the ICCPR;**
- xii. **Set out the disciplinary procedure applicable to prosecutors and to this end, includes provision for an independent disciplinary procedure under the auspices of the HJC, which ensures prompt notification of allegations of misconduct, a fair hearing before an independent and impartial body and due process guarantees for the prosecutor concerned, including access to the file and the right to representation and to adequate time and facilities to prepare and present a defence and the right to appeal against a decision or sentence to an independent body;**
- xiii. **Empower the HJC to appoint investigating judges and the General Assembly of the relevant court to assign an investigating judge to a case; and**
- xiv. **In consultation with prosecutors, establish a code of conduct for prosecutors which is consistent with international standards.**

In addition, the Tunisian authorities must ensure additional legal reforms to:

- i **Revoke the power of the Minister of Justice to appoint investigating judges (article 48 of the Code of Criminal Procedure);**
- ii **Revoke the ability of prosecutors to choose which investigating judge is charged with a particular case (articles 28 and 49 of the Code of Criminal Procedure);**
- iii **Where the power to issue written instructions extends to the executive, define in law the nature and scope of any power to issue**

written instructions, including a prohibition on the ability to issue instructions not to prosecute or to require prosecution in a specific case, as well as recognition that the issuance of written instructions does not preclude the ability of the prosecutor to submit to the court any legal arguments of their choice;

- iv Require that any power to issue written instructions is exercised transparently, in accordance with international and national law, and that written instructions are published adequately, become part of the case file where they relate to a specific case and are therefore made available to other parties, who are entitled to comment;**
- v Ensure that any decision by the public prosecutor not to prosecute may be challenged, including before a court in the context of an independent and impartial judicial review; and**
- vi Require prosecutors to refuse to use any evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods and to take all necessary steps to ensure that those responsible for using such methods are brought to justice.**

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ISBN 978-92-9037-191-9



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