

Illusory Justice, Prevailing Impunity

Lack of Effective Remedies and Reparation for
Victims of Human Rights Violations in Tunisia



International
Commission
of Jurists

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® **Illusory Justice, Prevailing Impunity**

Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia

© Copyright International Commission of Jurists

Published in May 2016

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

Supported by Open Society Foundations



Illusory Justice, Prevailing Impunity

Lack of Effective Remedies and Reparation for
Victims of Human Rights Violations in Tunisia

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS	4
GLOSSARY	8
INTRODUCTION	9
1. THE RIGHT TO AN EFFECTIVE REMEDY IN THE RULES OF CRIMINAL PROCEDURE IN TUNISIA AND INDIVIDUAL CRIMINAL RESPONSIBILITY	18
A. Initiating criminal proceedings	18
i. Tunisian legal framework and practice	18
ii. Assessment in light of international law and standards	21
B. The role of the public prosecutor and prosecutorial discretion	24
i. Tunisian legal framework and practice	24
ii. Assessment in light of international law and standards	27
C. The investigating judge and the direction of the investigation	31
i. Tunisian legal framework and practice	31
ii. Assessment in light of international law and standards	34
D. The role of the civil party	37
i. Tunisian legal framework and practice	37
ii. Assessment in light of international law and standards	40
E. Victim and witness testimony and protection	42
i. Tunisian legal framework and practice	42
ii. Assessment in light of international law and standards	44
2. OTHER LEGAL AND PRACTICAL OBSTACLES TO INDIVIDUAL CRIMINAL RESPONSIBILITY	47
A. Definition of offences	47
i. Extrajudicial executions	47
1. Tunisian legal framework	47
2. Assessment in light of international law and standards	50
ii. Torture and other ill-treatment	53
1. Tunisian legal framework and practice	53
2. Assessment in light of international law and standards	57
iii. Enforced disappearances and secret detention	60
1. Tunisian legal framework and practice	60
2. Assessment in light of international law and standards	61
iv. Arbitrary detention	63
1. Tunisian legal framework and practice	63
2. Assessment in light of international law and standards	64
B. Sentences not commensurate with the crime	67
i. Tunisian legal framework and practice	67
ii. Assessment in light of international law and standards	69
C. Application of international law by the court	71
i. Tunisian legal framework and practice	71
ii. Assessment in light of international law and standards	73
D. Ne bis in idem	75
i. Tunisian legal framework and practice	75
ii. Assessment in light of international law and standards	76
E. Principle of legality	78
i. Tunisian legal framework and practice	78

ii.	Assessment in light of international law and standards	81
F.	Statute of limitations	84
i.	Tunisian legal framework and practice	84
ii.	Assessment in light of international law and standards	86
G.	Responsibility of superiors and superior orders	88
i.	Tunisian legal framework and practice	88
1.	Superior responsibility	88
2.	Superior orders	92
ii.	Assessment in light of international law and standards	93
1.	Superior responsibility	93
2.	Superior orders	94
H.	The use of military courts	96
i.	Tunisian legal framework	96
1.	Jurisdiction of military courts over gross human rights violations	96
2.	Proceedings before military courts	97
3.	The role of victims in military courts	99
4.	Investigations by the military investigating judge	99
ii.	Assessment in light of international law and standards	101
3.	THE RIGHT TO AN EFFECTIVE REMEDY IN OTHER PROCEDURES AND THE RIGHT TO REPARATION	104
A.	Overview	104
B.	Court ordered reparations	106
i.	Reparations flowing from criminal proceedings	106
1.	Tunisian legal framework	106
2.	Assessment in light of international law and standards	109
ii.	Tunisian civil and administrative proceedings	112
1.	Tunisian legal framework	112
2.	Assessment in light of international law and standards	113

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

As Tunisia celebrates the fifth anniversary of the toppling of the Ben Ali regime, access to effective remedy and reparations remains elusive for victims of past human rights violations, despite significant institutional, legal and policy reforms.

From 7 November 1987 to 14 January 2011, Tunisia was under the control of Zine El Abidine Ben Ali and his ruling party. During this period, as well as during the previous government of Habib Bourguiba, law enforcement and other security officers perpetrated human rights violations, including torture and other ill-treatment, unlawful killings, enforced disappearances, and arbitrary arrests and detentions against political opponents, human rights defenders and ordinary citizens. Peaceful protests were countered with the disproportionate use of force. The legitimate enjoyment of human rights and fundamental freedoms was severely curtailed. Numerous similar violations were also committed during the December 2010 to January 2011 uprising and some of them continue today.

The toppling of Ben Ali led to a series of political and institutional reforms that culminated with the adoption of a new Constitution providing greater protection for rights and fundamental freedoms. On 23 October 2011, Tunisians elected a National Constituent Assembly (NCA) in the nation's first democratic elections. After a 27 month process, the NCA approved a new Tunisian Constitution in January 2014 (the 2014 Constitution). In October, November and December 2014, a newly elected Parliament and President of the Republic replaced the Tunisian transitional authorities.

The transition created expectations and the potential for greater respect for the rule of law. As a result, victims and lawyers have in the intervening years brought several cases concerning violations committed in the past and during the uprising before the Tunisian courts, in particular military tribunals.

Concerns for the victims of past human rights violations were high on the political agenda and were also reflected in the enactment of a Transitional Justice Law in 2013, the creation of a Truth and Dignity Commission, and other measures. These mechanisms and processes can provide additional opportunities for victims beyond the ordinary justice system. They may provide victims with reparation more quickly or efficiently than would be the case through individual court cases, particularly where there is a significant number of violations, victims and perpetrators.

However, "transitional justice" measures that are not capable of fulfilling all victims' individual rights to remedy and reparation, and the State's obligations to bring those responsible for violations to justice, can never be invoked by a state as a valid basis for denying an individual victim access to a full judicial remedy, to reparation and to justice as provided for under international law and standards.

In Tunisia, to date, many violations remain unpunished and perpetrators of human rights violations have either not been held accountable or have been sentenced to penalties that are disproportionately low in relation to the gravity of the crimes. This lack of accountability has contributed to a general climate of impunity in Tunisia and rendered illusory the fundamental right of victims to an effective remedy and adequate reparation for the harm suffered.

The first part of this report assesses victims' right to an effective remedy and justice in relation to the rules of criminal procedures in Tunisia. The second part addresses other legal and practical obstacles that undermine individual criminal responsibility in Tunisia. The third part focuses mainly on the provision of other forms of remedy (civil and administrative) and the extent to which the right to substantive reparation has been fulfilled in various court proceedings.

As highlighted in this report, the Tunisian justice system, be it through criminal, civil or administrative procedures, fails in many respects to fulfil the right of victims of human rights violations to a remedy and to reparation. Nor does it adequately implement the related obligation on the State to investigate and prosecute crimes under international or national law. This report assesses Tunisian legal instruments, and how they are interpreted and applied in practice, against international norms and standards. In doing so, it identifies various legal and practical obstacles that prevent victims from realizing their

right to a judicial remedy and reparation and hamper accountability.

As analysed in this report, the nature of these obstacles is twofold: legal obstacles arising from the non-conformity of Tunisian legislation with international law norms, and practical obstacles, mainly due to the lack of independence of the judiciary. Among the problems are current weaknesses in Tunisian criminal procedures, such as: the broad discretion of the public prosecutor to dismiss cases without providing specific reasons (and the lack of ability of victims to effectively challenge such decisions); the inadequacy of criminal investigations; the lack of effective measures for the protection of victims and witnesses; inadequate statutory definitions of crimes and of superior responsibility; and the use of military courts to address human rights violations. Indeed, virtually all cases of human rights violations committed during the December 2010 to January 2011 uprising have been tried before military courts in violation of international norms related not only to remedy but also to the right to a fair trial and deviating from the normal course of the criminal procedure established under Tunisian law.

The frustration and sense of injustice experienced by the victims of past gross human rights violations seriously undermine the democratic transition Tunisia has been undergoing since January 2011. The victims' quest for accountability and reparation for past abuses clashes against the numerous dysfunctions and shortcomings of the Tunisian legal and judicial system and against the lack of political will to reform the system in a way that would properly guarantee effective remedy and reparation to victims of human rights violations.

Until the demands of the victims of human rights violations are met and their right to a remedy and to reparation is guaranteed, Tunisia will have a long way to go on its path towards democratization and respect for human rights.

Key reforms of the justice system both in law and practice are needed for Tunisia to properly address past abuses, end pervasive impunity and provide victims with justice. Through this report, the International Commission of Jurists (ICJ) offers a series of general and specific recommendations for each stage of the judicial process for Tunisia to provide a full and effective right to remedy and reparation for victims, in line with international law and standards.

In summary (more detailed recommendations are included in the body of the report), the ICJ urges the Tunisian authorities:

- **With regard to the criminal justice system:**

- i) **To adopt an effective criminal justice strategy to deal with the legacy of gross human rights violations.** Measures should include prosecutorial guidance that ensures investigation and prosecution whenever there is reasonable ground to believe a violation has occurred or an allegation of a violation is received, even where no formal complaint has been lodged;
- ii) **To adopt the necessary legal reforms to ensure that prosecutors are empowered and required to act in compliance with international standards.** Of particular concern are impartiality and independence, the principle of equality of arms, and respect for and protection of human dignity and human rights;
- iii) **To establish a right of victims of human rights violations to judicially review any decision by a prosecutor to dismiss a case prior to opening an investigation;**
- iv) **To ensure gross human rights violations are promptly, thoroughly and effectively investigated through independent and impartial bodies.** Measures should include: the establishment of guidelines for investigative judges, reflecting international standards, that among other things: detail the timeframe and procedures for conducting investigations; provisions for the suspension of public officials from office where they are suspected or accused of gross human rights violations, pending the completion of investigations and, where they are subsequently indicted, pending a decision by the trial court; and ensuring that investigative bodies have sufficient material and human resources;
- v) **To enact the legal and policy reforms necessary to give full effect to victims' rights.**

The Code of Criminal Procedure should for instance, provide the civil party with a formal right to submit information during the investigation process and ensure that victims are provided with full information regarding the applicable procedure throughout the investigation and prosecution process, their rights in relation to the investigation and trial, and any time-limits for exercising these rights;

- vi) **To adopt reforms to ensure the protection of witnesses and the physical and psychological well-being of victims of gross human rights violations.** While taking into account the rights of the accused and the requirements of fair trial, measures should among other things minimize the risk of re-traumatization or other forms of further harm to victims and their representatives, protect against unnecessary interference with their privacy, and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings;

· **With regard to other legal and practical obstacles to individual criminal responsibility:**

- vii) To establish a clearly defined legal framework that delimits the use of force by law enforcement officials in line with international standards;
- viii) To reform the Tunisian legal framework on torture and other ill-treatment in order to comply with international law and standards;
- ix) To fully implement Tunisia's obligations under the International Convention for the Protection of All Persons from Enforced Disappearances (ICPED) and other international instruments and commitments;
- x) To conduct a comprehensive review of detention procedures and guarantees for detainees under the Code of Criminal Procedure and enact the necessary reforms to bring them in line with international standards;
- xi) To ensure that all allegations of prolonged secret or incommunicado detention are independently and impartially investigated and, where the evidence establishes that the detention amounted to torture or other cruel, inhuman or degrading treatment or punishment or other crimes, that the persons responsible are prosecuted;
- xii) To ensure that all provisions criminalizing gross human rights violations provide for minimum and maximum sentences that are commensurate with the gravity of the crime and in line with the sentencing policy for the most serious offences in Tunisian law;
- xiii) To establish prosecutorial guidelines that require gross human rights violations to be prosecuted as the most serious offences applicable under domestic criminal law and not as minor offences that carry lesser sentences;
- xiv) To ensure that aggravating factors in cases involving gross human rights violations can result in a more serious sentence and that aggravating factors include the severity of mental as well as physical consequences for the victim and family;
- xv) To adopt legislative amendments that expressly provide that ratified conventions are directly applicable by the Courts in domestic legal proceedings, that when several interpretations of a domestic legal provision are possible, the interpretation that best accords with Tunisia's international legal obligations should be adopted, and that in the event of a conflict between domestic law and international human rights obligations, international obligations must prevail;
- xvi) To amend articles 132bis and 121 of the Tunisian Criminal Code to expressly provide for appropriate exceptions to the principle of *ne bis in idem* in cases of human rights violations that constitute crimes under international or national law;
- xvii) To amend article 1 of the Criminal Code in line with article 15(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR), such that acts and omissions that, at the time of their commission, constituted a criminal offence under national or international law or are criminal according to the general principles of law recognized by the community of nations can be prosecuted and punished in domestic criminal proceedings;
- xviii) To enact amendments to the Criminal Code or Code of Criminal Procedure in respect of specific offences such as torture, to specify that they apply retroactively to at least the date on which Tunisia ratified the relevant treaty (without prejudice to the possibility of a longer period of retroactivity pursuant to the amendments to article 1 of the Code of Criminal Procedure as contemplated above).

- xix)** To ensure that impunity for gross human rights violations is not permitted due to the application of limitation periods, preferably by eliminating any limitation period for such violations;
- xx)** To ensure that superior law enforcement and security officials are held responsible for the actions of their subordinates in line with international standards;
- xxi)** To amend the Criminal Code to establish criminal accountability for superior law enforcement officials who knew or had, at the time, reason to know that the subordinate was committing or about to commit such a crime but did not take the necessary measures within their power to prevent or punish the crime;
- xxii)** To amend the Criminal Code and Law No. 82-70 to ensure that any individual who is responsible for a gross human rights violation is not able to rely on an order received from a superior officer or public authority to escape criminal responsibility;
- xxiii)** To restrict the jurisdiction of military courts to cases involving members of the military for alleged breaches of internal military discipline only;

· **With regard to the right to an effective remedy in other procedures and the right to reparation:**

- xxiv)** To ensure that the State is presumptively joined as a respondent to assess its civil liability in all cases of gross human rights violations where the acts or omissions are attributable to the State;
- xxv)** To establish in the law the basis on which civil compensation and legal expenses claimed during criminal proceedings are to be assessed, and ensure that these provide adequate and effective reparation to victims and are consistent with the approach taken in civil proceedings;
- xxvi)** To ensure that the right to reparation is not unduly delayed by having to wait for criminal proceedings to end before a civil claim can be determined;
- xxvii)** To ensure that the State is obliged to provide reparation to victims of human rights violations for all acts and omissions attributable to it and, to this end, amend article 49 of Law No. 82-70 to ensure that all acts or omissions constituting human rights violations by persons employed by or acting on behalf of the ISF give rise to State liability;
- xxviii)** When determining effective and adequate reparation, to ensure that judicial decisions take into account the harm caused to the victims (including family members), the gravity of the violations and the circumstances of each case;
- xxix)** To ensure that victims of human rights violations receive the fullest restitution possible;
- xxx)** To ensure that compensation for human rights violations awarded is proportional to the gravity of the violation and the circumstances of each case and extends to cover all economically assessable damage;
- xxxi)** To ensure that rehabilitation is included as a form of reparation for victims, including medical and psychological care as well as legal and social services;
- xxxii)** To provide courts and other decision-makers with the explicit authority to order any appropriate form of satisfaction necessary to provide full remedy and reparation, to clarify that their role is not limited to verifying facts, imposing sanctions, and awarding compensation; and
- xxxiii)** To ensure that courts and other decision-makers are explicitly authorized to order any measures necessary to guarantee non-repetition of human rights violations.

GLOSSARY

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CAT	Convention against torture and other cruel, inhuman or degrading treatment or punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CMJ	Code of Military Justice
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECtHR	European Court of Human Rights
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
GLC	General Legislation Commission
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
IAP	International Association of Prosecutors
ICPED	International Convention for the Protection of All Persons from Enforced Disappearances
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IVD	Truth and Dignity Commission
ISF	Internal Security Forces
MJC	Military Judicial Council
NCA	National Constituent Assembly
NGO	Non-Governmental Organizations
OPP	Office of the Public Prosecutor
UDHR	Universal Declaration of Human Rights
UN	United Nations
WGAD	Working Group on Arbitrary Detention

INTRODUCTION

For decades, Tunisian law enforcement officers and security services committed widespread violations of human rights, including torture and other ill-treatment, arbitrary arrests and detention, unlawful killings and enforced disappearances. From 7 November 1987 to 14 January 2011, Tunisia was under the control of Zine El Abidine Ben Ali and his ruling party, the Constitutional Democracy Rally (*Rassemblement Constitutionnel Démocratique*). During this period, as well as during the previous rule of Habib Bourguiba, these and many other gross human rights violations were carried out by law enforcement and other security officers against political opponents, human rights defenders but also against politically uninvolved citizens. Peaceful protests were countered with the disproportionate use of force and the legitimate enjoyment of human rights and fundamental freedoms was severely curtailed. Numerous similar violations were also committed during the December 2010 to January 2011 uprising (the 2011 Uprising) and some of them continue today.

The toppling of the Ben Ali regime in January 2011 in Tunisia marked the beginning of a wave of political and social changes in the Middle East and North Africa region. Tunisia emerged as the most promising case of democratic transition among all of the countries that underwent a popular uprising. On 23 October 2011, Tunisians elected, in their first democratic elections, the National Constituent Assembly (NCA), which approved, after a 27 month long process, a new Tunisian Constitution in January 2014 (the 2014 Constitution). In October, November and December 2014, Tunisian transitional authorities were replaced by a newly elected Parliament (the Assembly of the People's Representatives, ARP) and a President of the Republic. These political reforms also saw the adoption of new legislation and policies, most notably in the field of transitional justice. The Transitional Justice Law was adopted by the NCA on 15 December 2013 and entered into force on 24 December 2013 with a view to addressing past human rights violations.¹ The Transitional Justice Law includes a broad definition of transitional justice² and of human rights violations³ and creates various institutions mandated to play a role in transitional justice processes. In addition many violations committed in the past and during the uprising have been brought to court.

Despite these positive developments, to date the transition of Tunisia remains incomplete due in large part to the lack of progress in realizing the right of victims of past serious human rights violations to a remedy and reparation for the harm they suffered. Meaningful and effective justice for victims should be a fundamental component of any transition, and the fact of transition can never be a justification for failure to ensure the rights of victims. To date, numerous violations have gone unpunished and perpetrators of human rights violations have either not been held accountable or have been sentenced to inappropriately light penalties in relation to the gravity of the crimes committed. This lack of accountability has contributed to a general climate of impunity in Tunisia and rendered illusory the victims' rights to an effective remedy and adequate reparation for the harm suffered. This situation greatly undermines the prospects for the past to be properly addressed in Tunisia.

Furthermore, recent developments bear the risk of curtailing the exercise of victims' rights to remedy and reparation. For example, a Draft Law on the "Repression of Attacks against Armed Forces" was approved by the Council of Ministries on 8 April 2015 and submitted to the Parliament on 18 April 2015. This draft legislation, while being non retroactive, includes a provision that provides for the exclusion of criminal liability for members of the armed forces in case of injury or death of someone involved in different types of attacks against the army as defined by this law. Although this article provides that it will apply only when conditions of necessity, last resort and proportionality are met for the use of force in question, it carries the potential of hampering the fight against impunity if interpreted broadly.⁴

¹ Law No.53-2013 of 24 December 2013 on the establishment of transitional justice and its organisation.

² Article 1 of the law defines transitional justice as an "integrated process of mechanisms and methods implemented to understand and deal with human rights violations committed in the past by revealing the truth, holding those responsible accountable, providing reparations for the victims and restoring their dignity in order to achieve national reconciliation, preserve and document the collective memory, guarantee the non-recurrence of such violations and allow the transition from an authoritarian state to a democratic system which contributes to consolidating human rights".

³ Law No.53-2013 of 24 December 2013, article 3.

⁴ Draft Law on Preventing Attacks against the Armed Forces, 2015, article 18, available at: http://www.legislation.tn/sites/default/files/rd_l_mjls_nwb_lshb_mshrw_qnwn_zjr_ltd_l_lqwt_lmslh_syg_nhyy_.pdf?hc_location=ufi, last

The ARP's General Legislation Commission (GLC) reviewed the draft law but has not adopted it yet due to significant opposition from Tunisian civil society. Equally worrying is the promulgation of a new Law on Counter-Terrorism and Suppression of Money Laundering (*Loi organique N°26/2015 relative à la lutte contre le terrorisme et la répression du blanchiment d'argent*) on 7 August 2015 that fails in many respects to comply with international standards, notably through provisions that appear to shield members of the security forces from criminal liability when using lethal force in the context of combatting terrorism, including in some circumstances when the use of force may be in violation of the internationally-protected right to life.⁵

Meaning and scope of the right to a remedy under relevant international norms and standards

The overthrow of the Ben Ali regime has created an opportunity for victims of human rights violations to realize their right to remedy and reparation for the first time and for the new authorities to tackle impunity by prosecuting and punishing those responsible for such violations. These rights and obligations are widely recognized in international law.

The right of victims of human rights violations to a remedy and reparation must be understood within the wider set of States' obligations under international human rights law. This body of norms requires the State to ensure, secure or guarantee the effective enjoyment of human rights. This broad obligation not only requires the State to prevent violations but also to respect, protect and fulfil human rights. States must adopt all necessary legislative and other measures to give effect to the rights guaranteed in international law. States must ensure that everyone whose human rights are violated has an effective remedy.⁶

This entails, in part, that where violations are alleged or otherwise suspected to have occurred, the State must ensure that they are investigated; where established violations constitute crimes under international or national law, those responsible must be brought to justice.⁷ In this regard, as highlighted by the Human Rights Committee (HRC) in relation to the International Covenant on Civil and Political Rights (ICCPR), "a failure by a State Party to investigate allegations of violations" or to bring perpetrators to justice "could in and of itself give rise to a separate breach of the Covenant".⁸ The duty to investigate human rights violations is set out in numerous international instruments and requires an effective investigation that is prompt, thorough, independent and impartial.⁹ The obligations to

accessed 22 January 2016.

⁵ International Commission of Jurists, "Tunisia's Law on Counter-Terrorism in light of international law and standards", Position paper, 6 August 2015, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/08/Tunisia-CT-position-paper-Advocacy-PP-2015-ENG-REV.pdf>, last accessed 22 January 2016.

⁶ For example, article 2 of the International Covenant on Civil and Political Rights, (ICCPR), article 2 of the International Convention on the Elimination of all forms of Racial Discrimination, (CERD), article 2 of the Convention on the Elimination of all forms of Discrimination against Women, (CEDAW), article 2 of the Convention on the Rights of the Child, (CRC), article 1 of the American Convention on Human Rights, (ACHR) and article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights), (ECHR).

⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (hereinafter, Basic Principles on the Right to a Remedy and Reparation), adopted by the General Assembly, Resolution 60/147, 16 December 2005,, Principle 4; Principles 1, 19 and 21 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1 (8 Feb 2005), noted with appreciation by Human Rights Council resolution 9/11 (2008) and General Assembly resolution 68/165 (2013) ("hereinafter Updated Impunity Principles").

⁸ HRC, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, (hereinafter HRC, General Comment No.31) paras.15 and 18.

⁹ Convention against Torture, (CAT), article 12; International Convention for the Protection of All Persons from Enforced Disappearances (ICPED), articles 3 and 12; UN Declaration on Human Rights Defenders, adopted by UN General Assembly resolution 53/144, 9 December 1998, article 9(5). See also the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (UN Principles on Extra-legal Executions), Recommended by the Economic and Social Council resolution 1989/65 of 24 May 1989 1, Principle 9; Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 9 December 1998, adopted by the UN General Assembly resolution 43/173 of 9 December 1988 at Principles 33 and 34; The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/10034 (1975), article 9; UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman

investigate and prosecute are also reaffirmed by regional instruments and jurisprudence. For example, the Inter-American Court of Human Rights has recognised that it is the duty of States to “investigate human rights violations, prosecute those responsible and avoid impunity”.¹⁰ Consequently, where the State has failed to do so, the Court has ordered such investigations to be carried out and those responsible identified and punished.¹¹ The European Court has similarly noted that in cases of such human rights violations, the right to a remedy set out in article 13 of the European Convention on Human Rights, requires “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure”.¹² Furthermore, the Court has noted that the failure to prosecute and punish leads to impunity.¹³

Victims have a corresponding right to have their allegations properly investigated, to know the truth about the facts surrounding the human rights violation, and, in appropriate circumstances, to see the perpetrators brought to justice.

In addition to the Universal Declaration of Human Rights (UDHR)¹⁴, numerous international and regional treaties to which Tunisia is a party specifically recognise the right to a remedy.¹⁵ The right to a remedy applies to all violations of civil, cultural, economic, political, social rights, though the specific modalities for remedy may vary depending on the right in question and the character of the violation.¹⁶

The right to an effective remedy and reparation guarantees, first of all, the right to bring allegations of human rights violations for a fair hearing by an independent and impartial body, capable of formally confirming the violation, bringing the violation to an end if it is continuing, and ensuring that victims receive adequate reparation in all its forms. The term ‘remedy’ at times causes confusion because it is sometimes used not only to refer to the procedure for having the violation adjudicated and responded to, but also to the substantive response to recognise and repair the harm once a violation is confirmed, i.e. reparation.¹⁷ The term ‘redress’ is also often used to encompass those two aspects.¹⁸ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles on the Right to a Remedy and Reparation) state that the right to a remedy includes the right to: “(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access the relevant information concerning the violations and

or Degrading Treatment or Punishment (the UN Principles on Investigation and Documentation of Torture), adopted by UN General Assembly resolution 55/89, 4 December 2000, Principle 2.

¹⁰ Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*, (Reparations), judgment of November 27, 1998, para.170.

¹¹ *Id.* para.192(6). See also, Inter-American Court of Human Rights, *Barrios Altos v. Peru*, (Merits), judgment of 14 March 2001, para.51(5).

¹² *Aksoy v. Turkey* No.21987/93, European Court of Human Rights, judgment of 18 December 1996, para.98. See also, *Osman v the United Kingdom* No. 87/1997/871/1083, European Court of Human Rights, judgment of 28 October 1998, para.115-6; *Kurt v. Turkey* No. 15/1997/799/1002, European Court of Human Rights, judgment of 25 May 1998, para.140. See also, Eradicating impunity for serious human rights violations, Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies, Guidelines VIII.1.

¹³ *Gäffen v. Germany* No.22978/05, European Court of Human Rights, judgment of 1 June 2010 (Grand Chamber), para.119; *Çamdereli v. Turkey*, No.28433/02, European Court of Human Rights, judgment of 17 July 2008, para.29; *Öneryıldız v. Turkey* No.48939/99, judgment of 30 November 2004 (Grand Chamber), paras.93-96.

¹⁴ Universal Declaration of Human Rights, (UDHR), article 8.

¹⁵ See for example the ICCPR, article 2(3); the CERD, article 6; the CAT, articles 13 and 14; the CRC, article 39; the ICPCD, articles 8(2), 17(2)(f), 20(2) and 24; and the African Charter on Human and Peoples’ Rights (ACHPR), article 7(1)(a).

¹⁶ In addition to sources cited above, see for example, Committee on Economic, Social and Cultural Rights, General Comment No.9 UN Doc E/C.12/1998/24 (1998), para.2. See also General Comments No. 12, UN Doc. E/C.12/1999/5 (1999), paras.32-35; No. 14, UN Doc. E/C.12/2000/4 (2000), paras.59-62; No. 15 UN Doc. E/C.12/2002/11, paras.55-59; No.18 E/C.12/GC/18 (2006), paras.48-51; and No. 19 E/C.12/GC/19 (2008), paras.77-81; and for the Committee on the Elimination of Discrimination Against Women, General Recommendation No.28, UN Doc. CEDAW/C/GC/28 (2010), paras.17, 32, 34 and 36. See also General Recommendations No.19 (11th session 1992) para.24; No.25 (13th session 2004), para.7; No.26 (42nd session 2008) para.26; and No.27 (47th session 2010) paras.33-34.

¹⁷ See HRC, General Comment No.31, para.16.

¹⁸ Committee against Torture, General Comment No.3: Implementation of article 14 by States parties, CAT/C/GC/3,

reparation mechanisms.”¹⁹ The Basic Principles elaborate on each of these elements.

Besides treaty norms, the scope and elements of the right to a remedy have been elaborated through the work of human rights mechanisms, including jurisprudence, general comments and recommendations of UN treaty bodies as well as reports of the UN Special Procedures, and through other instruments such as the UN Basic Principles on the Right to a Remedy and Reparation.²⁰ The Human Rights Committee, interpreting article 2 of the ICCPR, has highlighted that remedies must be accessible and effective, that States must establish appropriate judicial and administrative mechanisms for addressing domestic claims of rights and that the obligation on the State to provide an effective remedy cannot be discharged without reparation.²¹ Several aspects warrant particular attention.

The procedural nature of the right to a remedy may include in some cases of human rights violations non-judicial mechanisms²², such as disciplinary and administrative remedies. However, in cases of certain “gross” or “particularly serious” human rights violations “an effective judicial remedy” must be secured whether or not other non-judicial mechanisms are also available.²³ A judicial remedy must be prompt and effective²⁴ and secured through fair and impartial proceedings.²⁵ This requires that the judicial authority reviewing the remedy is independent and is not subject to interference by the executive or other authorities.²⁶ Proceedings must also be accessible in practical terms, which requires taking account of the vulnerability of certain categories of persons, as well as ensuring access to legal representation and legal aid if required.²⁷ Furthermore, to be effective a judicial remedy must be capable of providing redress.²⁸ Therefore, although the right to a judicial remedy is procedural in nature, it must be capable of leading to a substantive remedy, which can be enforced by the authorities. In this regard it is closely linked to the right to reparation. Victims have the right to adequate, effective and prompt reparation.²⁹ As the HRC has identified, reparation will generally entail appropriate compensation but might also involve, as appropriate, “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations”.³⁰ The Basic Principles on the Right to a Remedy and Reparation elaborate on each of these aspects of the right to reparation.³¹

The right to truth under international law and standards is also closely interlinked with the right to

¹⁹ Basic Principles on the Right to a Remedy and Reparation, Principle 11. See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power, UN General Assembly Resolution A/RES/40/34 (1985), (hereinafter Basic Principles of Justice for Victims of Crime), article 4.

²⁰ Basic Principles on the Right to a Remedy and Reparation, Principle 11.

²¹ HRC, General Comment No.31, paras.15 and 16.

²² ICCPR article 2(3)(b); HRC, General Comment No.31, para.15; Basic Principles on the Right to a Remedy and Reparation, Principle 12.

²³ See e.g. Basic Principles on the Right to a Remedy and Reparation, Principle 12; HRC, *Bautista v. Colombia*, Communication No. 563/1993 (27 October 1995), para. 8.2 (right to life, enforced disappearance); HRC, *Vicente v. Colombia*, Communication No. 612/1995 (29 July 1997), para 8.2 (right to life, enforced disappearance). Committee against Torture, General Comment No. 3, para.30 (torture and other cruel, inhuman or degrading treatment or punishment).

²⁴ HRC, General Comment No.31, para.15. See also Principle 19 of the Updated Principles on Impunity.

²⁵ Basic Principles on the Right to a Remedy and Reparation, Principle 12.

²⁶ Article 14(1) of the ICCPR. See also European Court of Human Rights: *Keenan v the United Kingdom*, Judgment of 3 April 2001, para.123.

²⁷ HRC, General Comment No.31, para.15. See also Basic Principles on the Right to a Remedy and Reparation, Principle 12 (b) and (c); and see Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission’s activity report at 2nd Summit and meeting of heads of state of AU held in Maputo from 4-12 July 2003, Principle H, (hereinafter Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa).

²⁸ Inter-American Court of Human Rights: Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, para.24; See also European Court of Human Rights: *Silver v the United Kingdom*, Judgment of 25 March 1983, para.113.

²⁹ Basic Principles on the Right to a Remedy and Reparation, Principle 15.

³⁰ HRC, General Comment No.31, para.16.

³¹ Basic Principles on the Right to a Remedy and Reparation, Principles 19, 20, 21, 22, and 23.

remedy and reparation and the right to an investigation.³² Indeed, truth lies at the heart of the right to a judicial remedy and is a primary outcome of the right to an investigation. In addition, establishing the truth about human rights violations is part of ensuring satisfaction for victims of violations.³³ Both the individual victims and society as a whole have the right to the truth about human rights violations.³⁴ It is particularly important in the context of addressing systemic human rights violations and ensuring a transition to a democracy based on respect for human rights, not least because knowing the truth is an essential element in safeguarding against the recurrence of violations.³⁵

Given the nature and scale of human rights violations committed in Tunisia over several decades, it is imperative to properly identify victims. Indeed, in order for individuals and groups to claim their right to remedy and reparation, it is essential to establish who are the victims and the rights they have as a result of the recognition of the harm caused to them.³⁶ Therefore, remedies should recognise the victims as such, allow their participation in judicial proceedings, ensure that they are treated with dignity and respect, protect them from intimidation, and provide them with the legal and moral support they may need. The concept of "victim" in this context is broad. Article 2(3) of the ICCPR refers to "any person whose rights or freedoms as herein recognized are violated." The Basic Principles on the Right to a Remedy and Reparation state as follows:

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.³⁷

The UN Committee against Torture has adopted a very similar definition in relation to torture or other cruel, inhuman or degrading treatment or punishment under the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT) and has affirmed without qualification that "the term 'victim' also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization."³⁸

The Human Rights Committee, acting under the ICCPR, has found that not only the direct victims of the violation but also indirect victims such as family members are entitled to remedy and reparation.³⁹

³² ICPED, article 24(2); Human Rights Council, Resolution 12/12, Right to the truth, UN Doc. A/HRC/RES/12/12, 12 October 2009, article 1; Committee against Torture, General Comment No.3,, para.16; HRC, Case Almeida de Quinteros et al v Uruguay, 21 July 1983, CCPR/C/19/D/107/1981, para.14 and HRC Concluding Observations on Guatemala, UN Doc. CCPR/C/79/Add.63, 3 April 1996, para.25; Inter-American Court of Human Rights, Case of Bámaca-Velásquez v. Guatemala (Reparations and Costs), Judgment of 22 February 2002, paras.74-76. Basic Principles on the Right to a Remedy and Reparation, Principles 22(b) and 24; Updated Impunity Principles, Principles 2-5.

³³ Human Rights Council, Resolution 12/12, Right to the truth, UN Doc. A/HRC/RES/12/12, 12 October 2009, preamble, para.13. See also, Reports of the Office of the United Nations High Commissioner for Human Rights on the right to the truth, UN Doc. A/HRC/5/7, 7 June 2007, paras.2 and 84.

³⁴ Human Rights Council, Resolution 12/12, Preamble; European Court of Human Rights (Grand Chamber), El-Masri v. the former Yugoslav Republic of Macedonia, App No 39630/09 (13 December 2012), para.191.

³⁵ Updated Impunity Principles, Principle 2.

³⁶ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/21/46, 9 August 2012, para.29.

³⁷ Principle 1 of the Basic Principles of Justice for Victims of Crime.

³⁸ Committee against Torture, General Comment No. 3, para.3.

³⁹ See, for example, the HRC in a case involving the suffering caused to a mother by the enforced disappearance of her daughter: Case Almeida de Quinteros et al v Uruguay, UN Doc. CCPR/C/OP/2 (1990), para.14. See also in relation to other gross human rights violations: Case Suarez de Guerrero v Colombia, UN Doc. CCPR/C/15/D/45/1979 (1982), para.15; Case Bautista de Arellana v. Colombia UN Doc. CCPR/C/55/D/563/1993 (1995), para.10.

Reinforcing the right to a remedy and reparation through specific mechanisms in Tunisia

It is now common for States emerging from a situation of large scale human rights violations to establish special mechanisms and processes to address such past violations. These mechanisms and processes, often referred to under the general concept of “transitional justice”, can provide additional opportunities for victims beyond the ordinary justice system. Such mechanisms may have the potential to provide victims with reparation more speedily or efficiently than would be the case through individual court cases, particularly where there is a very great number of violations, victims and perpetrators. As highlighted in the Basic Principles, “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations”.⁴⁰ “Transitional justice” measures that are not capable of fulfilling all victims’ individual rights to remedy and reparation, and the state’s obligations to bring those responsible for violations to justice, can never however be invoked by a state as a valid basis for denying an individual victim access to a full judicial remedy, reparation and justice as provided for under international law and standards.

In Tunisia, various mechanisms have been created specifically to address past human rights violations. Reparation initiatives initially focused predominantly on providing compensation to certain categories of victims, pardoning individuals convicted under the previous regime, and conducting investigations into human rights violations committed during the uprising. Following a national consultation on transitional justice, launched in April 2012 by the then Ministry of Human Rights and Transitional Justice, a bill on transitional justice was drafted by a technical commission within the Ministry. The Transitional Justice Law was adopted by the NCA on 15 December 2013 and entered into force on 24 December 2013.⁴¹

The Transitional Justice Law includes a broad definition of “transitional justice”⁴² and defines the range of violations to which it is addressed as “gross or systematic violations of any human rights committed by the State’s apparatus or by groups of individuals who acted in the State’s name or under its protection, even if they did not have the capacity or authority to do so” as well as “gross or systematic violations of human rights committed by organised groups.”⁴³ The definition of the victims recognised by the Transitional Justice Law is “any person who has suffered harm following a violation committed against him under this Act, whether an individual, group of individuals or a corporation”.⁴⁴ The definition also includes “family members who have suffered harm due to their relationship with the victim under the rules of the common law, and any person who has suffered an injury during his intervention to assist the victim or prevent the aggression”, as well as “any area undergoing marginalization or organized exclusion”.⁴⁵

Article 11 of the Transitional Justice Law recognises that “the State has the responsibility to provide sufficient, effective and adequate reparation depending on the gravity of the violation and the personal situation of each victim”, taking into account the State’s available resources. Such reparation can be granted on an individual or collective ground based on “moral and material compensation, restoration of human dignity, forgiveness, restitution of rights, rehabilitation and reinsertion”.⁴⁶ Furthermore, the State is required to meet the legal costs relating to all human rights claims under the law, pursuant to the laws on legal aid and on legal assistance before the Administrative Court.⁴⁷

⁴⁰ Basic Principles on the Right to a Remedy and Reparation, Principle 16.

⁴¹ Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organisation.

⁴² Article 1 of the law defines transitional justice as an “integrated process of mechanisms and methods implemented to understand and deal with human rights violations committed in the past by revealing the truth, holding those responsible accountable, providing reparations for the victims and restoring their dignity in order to achieve national reconciliation, preserve and document the collective memory, guarantee the non-recurrence of such violations and allow the transition from an authoritarian state to a democratic system which contributes to consolidating human rights”.

⁴³ Law No.53-2013 of 24 December 2013, article 3.

⁴⁴ Law No.53-2013 of 24 December 2013, article 10.

⁴⁵ Law No.53-2013 of 24 December 2013, article 10.

⁴⁶ Law No.53-2013 of 24 December 2013, article 11.

⁴⁷ Law No.53-2013 of 24 December 2013, article 13.

The law includes provisions on the following objectives: revealing the truth and preserving memory (articles 2-5); accountability (articles 8-9); reparation and rehabilitation for individual and collective victims of human rights violations (articles 10-13); institutional reform (article 14); and reconciliation (article 15).

The primary mechanism for addressing these issues is through the establishment of a “truth and dignity commission” (“*instance vérité et dignité*”, IVD) with competence over violations that took place from 1 July 1955 until 31 December 2013, (the date of the entry into force of the Transitional Justice Law).⁴⁸

While the IVD is not mandated directly to address criminal responsibility, which is described by the Transitional Justice Law as instead falling within the remit of judicial and administrative bodies pursuant to the legislation in force (article 7), the Law also refers to “specialized chambers within the first instance tribunal located in the courts of appeal” (article 8).⁴⁹ These chambers are to be composed of judges who “have not taken part in political trials” and who receive specific training in transitional justice. The chambers are to hear cases involving gross human rights violations as defined in those international conventions that have been ratified and under the Transitional Justice Law and include: “deliberate killing; rape and any form of sexual violence; torture; enforced disappearance; and execution without fair trial guarantees”. Lawsuits falling within the remit of the specialized chambers are not to be time barred (article 9). No detailed provisions exist regarding these chambers, including how judges are to be selected and how and when a case can be transferred to a specialized chamber, although it appears that the chambers will hear those cases transferred by the IVD to the public prosecutor (article 42).

Organic Law No. 2014-17 of 12 June 2014 affirms that the offences committed against those killed and injured during the revolution are considered serious violations under the Transitional Justice Law.⁵⁰ According to article 3 of the same organic law, the cases which will be referred by the IVD to the Office of the Public Prosecutor (OPP) will be automatically referred to the special chambers. A draft law on the functioning of the specialised chambers was submitted to the NCA in August 2012.⁵¹ On 19 May 2014, in the absence of consensus on the text, the plenary voted to send the draft law back to the constituent commissions of general legislation and consensus. In August 2014, the government adopted a decree on the establishment of the specialized chambers within 6 first instance tribunals (Tunis, Sfax, Gafsa, Gabès, Sousse, Le Kef) later amended to include 3 additional tribunals, without providing further details on the functioning of those chambers.⁵²

This report does not address the Tunisian transitional justice framework, including the role of the criminal specialized chambers. However, it underlines that any such initiative can in no way be invoked to undermine the right of victims to an effective remedy and reparation as well as their right to see the perpetrators of gross human rights violations held individually to account. In particular, the establishment and functioning of the specialized chambers should if properly implemented serve to address existing gaps and obstacles in the criminal justice system in conformity with international standards for a full realization of victims’ rights in Tunisia. Conversely, they cannot be allowed to create a two-tier justice system by which victims who would see their case transferred to those chambers would be treated differently from those bringing their case before other courts.

⁴⁸ Law No.53-2013 of 24 December 2013, Title II, articles 16 and 70.

⁴⁹ These chambers have been established by Decree No.2014-2887 of 8 August 2014 within the courts of first instance located in the appeal courts of Tunis, Gafsa, Gabès, Sousse, Le Kef, Bizerte, Kasserine, and Sidi Bouzid.

⁵⁰ Organic Law No.2014-17 of 12 June 2014 on provisions related to transitional justice and to the cases connected to the period from 17 December 2010 to 28 February 2011, article 2.

⁵¹ Draft Law 44/2012 published on 4 August 2012, available at http://majles.marsad.tn/uploads/documents/projet_loi_44_2012.pdf, last accessed 21 January 2016.

⁵² Decree No. 2014-2887 of 8 August 2014, on the creation of specialized criminal chambers in the field of transitional justice within the tribunals of first instance in the Courts of Appeals of Tunis, Sfax, Gafsa, Gabès, Sousse, and Le Kef. See also Decree No. 2014-4555 of 29 December 2014 modifying Decree No. 2014-2887 of 8 August 2014, on the creation of specialized criminal chambers in the field of transitional justice within the tribunals of first instance in the Courts of Appeals of Tunis, Sfax, Gafsa, Gabès, Sousse, Le Kef, Bizerte, Kasserine and Sidi Bouzid.

Scope and Methodology of the Report

In this report, the right to a remedy will generally refer to the right to access a procedure for having a complaint adjudicated, while the right to reparation will cover the obligation to provide victims whose claims have been established with full reparation, including as necessary in the form of compensation, satisfaction, restitution, rehabilitation, and guarantees of non-repetition. Remedy and reparation are intrinsically linked in that an independent assessment of the alleged violation by a competent authority, including judicial authorities, constitutes the first step towards obtaining reparation. In this regard this report primarily addresses reparation within the context of court procedures, be they criminal, civil or administrative.

This report focuses on the right to a judicial remedy and the right to reparation for victims of gross human rights violations in Tunisia, as well as the related obligation on the State to investigate and prosecute the persons responsible for violations that constitute crimes under international or national law. In Tunisia, such human rights violations whether of the past or the present, for which remedy and reparation remain unfulfilled, include cases of torture and other ill-treatment, unlawful killings, arbitrary detention, and enforced disappearances.

The report considers the various elements of the Tunisian justice system, both criminal and civil components, as a process from the preliminary stage of initiating legal proceedings to the stage of awarding reparations. It provides an assessment of the Tunisian legal instruments and the way they are interpreted and applied in practice against international norms and standards. In doing so it considers the various legal and practical obstacles that prevent victims from realizing their right to a judicial remedy and reparation and hamper accountability. As international law not only requires the State to provide the theoretical possibility of a judicial remedy and reparation, but also requires such remedies to be effective in practice, the analysis of the actual practice by the various actors of the justice system, including Judicial Police, prosecutors and judges is as important as the evaluation of the laws. This review aims at identifying gaps and weaknesses and designing recommendations to address these problems, both in terms of changes to the legal framework and to practice.

This report does not address the right more generally to remedy and reparation for all human rights violations. It principally focuses on violations that constitute crimes under international or national law, and which therefore carry particular requirements in terms of the criminal character of the investigations and legal consequences for perpetrators. In addition, the report does not consider the rights of victims of crimes more generally; it focuses on crimes that are committed by State agents, such as security services, and which constitute violations of human rights under international law.

The first part of the report assesses the right to an effective remedy for victims in the context of the rules of criminal procedures in Tunisia and the related limitations of their right to see the perpetrators of violations held individually to account. The second part addresses other legal and practical obstacles that undermine individual criminal responsibility in Tunisia. The third part focuses mainly on the provision of other forms of remedy (civil and administrative) and how the right to substantive reparation is implemented in various court proceedings.

The methodology used for this report assessed the domestic legal framework and actual practice in Tunisia against international law and standards. This report reviewed the Tunisian legal framework as of the end of January 2016 and therefore did not take account of subsequent legislative amendments adopted after this date, such as Law No. 2016-5 of 16 February 2016 amending provisions of the Code of Criminal Procedure. It included a desk review and analysis of primary sources such as legislation, draft documents produced as part of the ongoing reform of the justice system in Tunisia, and other relevant legal instruments and policies to identify gaps and weaknesses in light of international standards. In addition, it relied on international law instruments, reports and jurisprudence of the main UN human rights mechanisms, as well as regional human rights courts to clarify the meaning and scope of the right to remedy and reparation or to provide information on the extent to which the Tunisian justice system complies with international norms. Furthermore, relevant reports and documents published by international and local NGOs as well as other organisations were used to complement this review.

The methodology also included field research and high-level missions to gather qualitative data on the way legislation and policies were interpreted and applied in practice through interviews and meetings with relevant judicial actors such as judges, prosecutors and lawyers. A first high-level mission was conducted by the ICJ in Tunisia in April 2012 and a follow-up mission took place in April 2014. Field research was carried out by ICJ staff in Tunisia from July 2012 to November 2014. The first high-level mission in 2012 was led by ICJ Commissioners Mr Roberto Garreton, a Chilean human rights lawyer, and Professor Monica Pinto, Professor of international law in Argentina. The second high-level mission was led by ICJ Commissioner Justice José Antonio Martín Pallín, Emeritus Judge of the Spanish Supreme Court.

The ICJ delegations also met with a wide range of actors, including the President of the NCA, Mr Mustapha Ben Jafaar; the former Minister of Human Rights and Transitional Justice, Mr Samir Dilou; the former Minister of Justice, Human Rights and Transitional Justice, Mr Hamed Ben Salah; the former Minister in charge of relations with the Constituent Assembly, Mr Abderrazak Kilani; as well as members of the Constituent Assembly. The delegations also met with members of the judiciary, human rights lawyers, representatives of the Bar Association and of the Association of Tunisian Magistrates, civil society organisations and victims of human rights violations and their families.

Field research carried out by ICJ staff in Tunisia included meetings with lawyers, including lawyers for victims and lawyers for accused in cases of human rights violations; associations of victims of past violations and of violations committed during the December 2010 to January 2011 uprising; as well as with victims of human rights violations and their families.

The field research, meetings and interviews also served to identify and document emblematic cases related to the issues pertaining to the right to remedy and reparation, from lack of investigation and unsuccessful complaints to court cases resulting in judgements. Throughout each section, this report refers to individual cases to illustrate the specific gaps and weaknesses of the Tunisian justice system and reflect the practice with regard to those rights in Tunisia.

Finally this report builds on earlier reports and papers published by the ICJ, including the ICJ's reports, "Enhancing the rule of law and guaranteeing human rights in the Constitution" and "The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future".⁵³

⁵³ ICJ reports, Enhancing the rule of law and guaranteeing human rights in the Constitution, 1 February 2013, available at: <http://icj.wpenetdna-cdn.com/wp-content/uploads/2013/02/TUNISIA-CONSTITUTION-REPORT-FINAL.pdf>, last accessed 22 January 2016.; and The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, May 2014, available at <http://icj.wpenetdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 22 January 2016.

1. THE RIGHT TO AN EFFECTIVE REMEDY IN THE RULES OF CRIMINAL PROCEDURE IN TUNISIA AND INDIVIDUAL CRIMINAL RESPONSIBILITY

As set out in the introduction, the right to a remedy and reparation for “gross” or “very serious” human rights violations includes access to a competent judicial authority to determine the claim, as well as a substantive remedy in the form of adequate, prompt and effective reparation in all forms necessary. The requirement to investigate and hold the responsible individuals to account for violations stems not only from the victims’ right to a remedy and reparation but also from the duty on the State to prevent and protect against human rights violations.

In the domestic law context, in relation to human rights violations that constitute crimes under international or national law, these rights and obligations are to be met in part through the criminal justice system. In particular, certain human rights violations should be defined as crimes in domestic criminal legislation. This chapter focuses on the procedural aspect of the remedy in the context of criminal proceedings. The question of reparations that may be awarded by a court as a result of those proceedings as well as reparations within civil and administrative proceedings will be addressed in chapter III on the right to reparation as the substantive component of the right to a remedy.

It is paramount to consider both the relevant domestic legal framework in Tunisia and the way it is being interpreted and applied in practice to assess whether victims of serious violations of human rights can actually benefit from a remedy in line with international standards. This analysis will include practical and legal obstacles that prevent victims from realizing their right to a judicial remedy in the specific context of criminal proceedings in Tunisia, as well as other types of challenges. In relation to each of these issues, Tunisian legal frameworks and practice will be assessed in light of international standards.

Everyone who claims to be a victim of a human rights violation of a criminal character has the right to have their claim considered by a competent judicial authority. States must ensure that certain human rights violations constitute a crime under their domestic law. Authorities must investigate all such allegations promptly, thoroughly and impartially. Where sufficient evidence exists, those responsible for violations that constitute crimes under international or national law must be prosecuted and, if convicted, punished accordingly. The various elements of the right to an effective judicial remedy in this context, and the obligation to investigate, prosecute and punish are addressed below.

Article 1 of the Tunisian Code of Criminal Procedure states that “any offence gives rise to criminal proceedings, aimed at applying penalties, and to a civil action if harm was caused.” Where human rights violations are codified in the Criminal Code, they are covered by article 1 of the Code of Criminal Procedure and are dealt with in the same way as other crimes.

A. Initiating criminal proceedings

i. Tunisian legal framework and practice

Under Tunisian legislation, criminal proceedings can be initiated in three ways: by the public prosecutor on his or her own motion, also known as *proprio motu*;⁵⁴ by the public prosecutor on the instruction of the Minister of Justice;⁵⁵ or, where the prosecutor decides not to proceed with an investigation, by the victim of a crime.⁵⁶

⁵⁴ Code of Criminal Procedure, article 2 and 20.

⁵⁵ Pursuant to article 23 of the Code of Criminal Procedure, 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”. 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”. Pursuant to article 1 of Law No. 87-80 of 29 December 1987 the competences of the Prosecutor-General of the Republic were transferred to the Attorney-Generals at the Courts of Appeal.

⁵⁶ Code of Criminal Procedure, articles 2 and 36.

Prosecutors are notified of offences through:

- reports received directly from public officials, who are required to report all offences they become aware of;
- reports from private individuals;
- complaints filed by victims of the crime;⁵⁷
- reports from the Judicial Police, who must inform the public prosecutor of all offences they become aware of and transfer all reports of offences to the public prosecutor;⁵⁸ and
- reports from the Higher Committee on Human Rights and Fundamental Freedoms.⁵⁹

Victims can file oral or written complaints with the Judicial Police, who must record them and transfer them without delay to the public prosecutor.⁶⁰ The Judicial Police are also responsible for discovering offences, collecting evidence, searching for suspected perpetrators and handing them over to the courts before an investigation is opened.⁶¹ The Judicial Police are made up of public prosecutors of the First Instance Tribunals and their deputies, district court judges, investigating judges and members of the police and of the National Guard.⁶²

The Judicial Police are placed under the authority of the Attorney-Generals to the Courts of Appeal.⁶³ However, the Ministry of the Interior is responsible for directing the work of the Judicial Police.⁶⁴ In addition, police and National Guard officials are institutionally under the authority of the Minister of the Interior as members of the Internal Security Forces (ISF).⁶⁵

In practice, the work of investigating judges, prosecutors and their deputies is often hindered by the refusal of members of the police and National Guard to execute orders. They frequently only respond to the orders of the Ministry of the Interior. For example, a prosecutor of the First Instance Tribunal of Tunis told the ICJ that arrest warrants relating to members of the ISF, both during an investigation and in order to enforce a sentence, were often not executed. Furthermore, the law does not provide for the division of responsibilities within the police and the National Guard between officers that carry out functions of the Judicial Police and those that carry out other law enforcement functions.⁶⁶ Consequently, police and National Guard officers who are responsible for human rights violations, or their colleagues from the same unit, may be involved in receiving and filing a complaint about the same violations. Although, in practice, a victim can request the investigating judge or public prosecutor to transfer the case to a different police or National Guard unit, no legal provision explicitly provides for such a request and no right to appeal is provided for should such a request be refused.⁶⁷ In addition, when investigations into offences committed by members of the ISF are carried out by members of the police or the National Guard they are often delayed and/or carried out in a superficial manner resulting in impunity. As a result, in sensitive cases such as cases involving acts of torture, the ICJ

⁵⁷ Article 26 of the Code of Criminal Procedure provides that “the public prosecutor is responsible for recording all offences and receiving all reports sent to it by public officials or private individuals, as well as complaints from injured parties”. In addition, article 29 of the Code of Criminal Procedure requires public officials to report all crimes that they become aware of to the public prosecutor.

⁵⁸ Code of Criminal Procedure, article 13.

⁵⁹ Law No. 2008-37 of 16 June 2008 on the Higher Committee for Human Rights and Fundamental Freedoms, article 2. The High Committee on Human Rights and Fundamental Freedoms was accredited with B status in November 2009.

⁶⁰ Code of Criminal Procedure, articles 18 and 19.

⁶¹ Code of Criminal Procedure, article 9.

⁶² Code of Criminal Procedure, article 10. The following individuals in the police and National Guard can act as Judicial Police: police commissioners, police officers, police station chiefs, National Guard officers, National Guard non-commissioned officers, National Guard station chiefs. Following an order of the Ministry of the Interior of 19 May 1975 determining the territorial jurisdiction of services and stations of the police and the National Guard, the police force is responsible for maintaining public order in non-rural areas of the Republic, and the National Guard is responsible for rural areas.

⁶³ Code of Criminal Procedure, article 10; and Law No. 87-80 of 29 December 1987, article 1.

⁶⁴ Decree No.75-342 of 30 May 1975 establishing the functions of the Ministry of the Interior, article 4 as amended by Decree No.2011-1454 of 15 June 2001.

⁶⁵ Law No.82-70 of 6 August 1982, article 2.

⁶⁶ Law No.82-70 of 6 August 1982 only specifies the rank required to act as a Judicial Police Officer (article 5).

⁶⁷ ICJ interview with civil party lawyers on 23 September 2014.

was informed that members of the OPP sometimes decide to carry out the investigation themselves so as to avoid relying on other members of the Judicial Police. In this way, they can guarantee a more independent investigation.

Criminal proceedings are not dependant on the existence of a complaint by the victim and they cannot generally be suspended or halted by the withdrawal of the complaint or by the settlement of a civil lawsuit.⁶⁸ A notable exception is domestic violence cases where a victim who is the spouse or older relative of the accused can withdraw the complaint to halt proceedings or the execution of the punishment.⁶⁹

If the prosecutor drops proceedings prior to an investigation being ordered, the civil party can either:

1. request the prosecutor to open a preliminary investigation; or
2. summon the accused directly before the First Instance Tribunal.⁷⁰

In both of these instances, the civil party must be prepared to pay the costs of the proceedings, otherwise the request will be declared inadmissible.⁷¹ This amount is decided in advance on a case-by-case basis, either by the investigating judge, where an investigation has been requested, or by the President of the First Instance Tribunal, where the accused has been summoned directly.⁷²

In addition to the costs of the investigation or court proceedings, the civil party can be fined where the accused has been summoned to appear directly before the First Instance Tribunal and is subsequently acquitted.⁷³ Where the prosecutor decides to open a preliminary investigation at the request of a civil party, and the investigating judge subsequently decides not to proceed with a prosecution, the accused can request compensation from the civil party before the First Instance Tribunal.⁷⁴ The accused can also file a claim for damages for defamation, regardless of whether or not compensation has been granted.⁷⁵

In practice, criminal proceedings concerning serious violations of human rights are usually triggered by the victim filing a complaint with the Judicial Police or public prosecutor. However, the civil party rights outlined above are rarely used if the Judicial Police or public prosecutor do not act on the complaint.

Aside from the potential costs implications, civil party lawyers informed the ICJ that, where proceedings were dropped, victims felt that there was political will acting to prevent these proceedings from being successfully prosecuted and it would therefore be hopeless to try to proceed with a request for a preliminary investigation or by summoning the accused, given the lack of independence of the judiciary. This perception is amplified by the fact that prosecutors rarely initiate proceedings against a public official without a complaint by the victim. The reason for this is the lack of independence of the prosecution service.⁷⁶ For example, according to the National Fact-Finding Commission⁷⁷, from

⁶⁸ Code of Criminal Procedure, article 3.

⁶⁹ Criminal Code, article 218.

⁷⁰ Code of Criminal Procedure, article 36 and article 206.

⁷¹ Code of Criminal Procedure, article 39.

⁷² Code of Criminal Procedure, article 39. In meetings with civil party lawyers in November 2014, the ICJ was informed that such costs usually amount to between 500 and 600 Tunisian Dinars (270 to 325 USD).

⁷³ Code of Criminal Procedure, article 46.

⁷⁴ Code of Criminal Procedure, articles 45 and 167(3).

⁷⁵ Code of Criminal Procedure, article 45.

⁷⁶ See, in particular, the Code of Criminal Procedure, including: article 22, which places the Prosecutor-General under the authority of the Minister of Justice; article 23, which grants the Minister of Justice the ability to report offences to the Prosecutor-General, to require the Prosecutor-General or another to initiate proceedings or to issue written instructions; and article 21, which requires all prosecutors to comply with written instructions. See also article 1 of Law No. 87-80 of 29 December 1987, which transferred the competences of the Prosecutor-General of the Republic to the Attorney-Generals at the appeal courts. And see article 15 of Law No.67-29, which places prosecutors under the direction and control of their superiors and under the authority of the Minister of Justice. See section 1.B below for further information.

⁷⁷ National Fact-finding Commission on the abuses recorded during the time from 17 December 2010 until achievement of its mandate, established by Decree 2011-8 of 18 February 2011. The Commission was headed by Taoufik Bouderbala

3 to 13 January 2011, 21 people were killed and 624 were injured by the police in the governorate of Kasserine.⁷⁸ Despite the large number of deaths and injuries, no proceedings were initiated by the prosecution and no investigations were carried out. Proceedings were only initiated following a complaint filed by a group of lawyers representing the victims and their families on 22 February 2011.

Victims also faced and continue to face significant obstacles when trying to file complaints. Under the Ben Ali regime, they were frequently exposed to threats and violence as punishment for speaking out and to put pressure on them to withdraw the complaint. In addition, some judges refused to register certain complaints or there were lengthy delays, as noted by the HRC in its 2008 Concluding Observations on Tunisia.⁷⁹

Since the toppling of the Ben Ali regime, some victims of torture have submitted complaints to the public prosecutor. However, many of the same practices continue and mistrust in the criminal justice system persists. In particular, the ICJ has been informed that the intimidation of victims of human rights violations committed by the ISF or armed forces is ongoing, including through the use of blackmail and the offer of payments to induce victims to withdraw complaints as well through threats against victims during proceedings. In addition, prosecutors and investigating judges working on cases involving acts of torture have reported being threatened by members of the ISF.

Other obstacles include the harassment of victims by law enforcement officials and public prosecutors, including lengthy questioning of victims without a break when they attempt to file a complaint and prosecuting victims who come forward. Many victims of violations committed by public officials during the uprising have been subjected to pressure not to file a complaint, through threats or promises of financial compensation. In interviews with family members of some of those killed and injured from the Tozeur governorate during the 2011 Uprising, the ICJ learned that, in the aftermath of the events, local authorities tried to dissuade family members from filing a complaint. Local authorities told the families of the victims that they would be compensated for their loss once the situation in the country was stable.

Intimidation of victims seeking to file a complaint

In the case of "Meriem Ben Mohamed" a young woman was raped by police officers in September 2012.⁸⁰ When the victim went to the police station to file a complaint, the police officers who had raped her a few hours previously were still on duty and were present at the police station. These police officers, together with some of their colleagues, tried to put pressure on her not to file a complaint and verbally harassed her while she attempted to do so.

The victim was questioned for 7 hours before her complaint was finally registered. A few days later she was charged with public indecency and summoned to appear before the First Instance Tribunal. Due to national and international pressure, the charge was subsequently dropped in November 2012.

ii. Assessment in light of international law and standards

Under international law, States must ensure that "access to justice and to mechanisms for seeking and obtaining redress are readily available and that positive measures ensure that redress is equally accessible to all persons".⁸¹ Consequently, States are required to secure in domestic laws the right of victims to access justice and to fair and impartial proceedings. For example, the International

(also known as the Bouderbala Commission), available in Arabic at http://www.leaders.com.tn/uploads/FCK_files/Rapport%20Bouderbala.pdf, last accessed 21 Jan 2016.

⁷⁸ Id, pp. 658-660 and 722-777.

⁷⁹ Concluding Observations of the HRC on Tunisia, UN Doc. CCPR/C/TUN/CO/5 (2008), para.11.

⁸⁰ Case No. 24993/13, Court of First Instance, Tunis.

⁸¹ Committee against Torture, General Comment No. 3, para.32. HRC, General Comment No. 31, paras.15 and 20; Basic Principles on the Right to a Remedy and Reparation, Principles 12, 24, 25.

Convention for the Protection of All Persons from Enforced Disappearances (ICPED) requires that in cases of enforced disappearances States shall “ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation.”⁸²

For a remedy to be effective it must be capable of providing real and practical access to justice as opposed to being merely theoretical.⁸³ Therefore, the filing of a well-founded complaint by a victim must trigger an effective and impartial investigation into whether a violation took place, in a process that will provide appropriate redress and result in prosecution when a complaint is proven. Furthermore, in order to guarantee access to effective remedies, States must “provide proper assistance to victims seeking access to justice”.⁸⁴ This includes ensuring that victims are informed of the remedial mechanisms and institutions available to them.⁸⁵ Accordingly, in securing the right of victims to a remedy the State must “disseminate, through public and private mechanisms information about all available remedies for gross violations of international human rights law”.⁸⁶ Remedial mechanisms should be easily accessible and should be available to all victims without discrimination. Specific measures may therefore be required to assist vulnerable and marginalized groups such as detainees, disabled persons, refugees and asylum seekers, or economically marginalised groups, to access in practice effective redress mechanisms.⁸⁷ This can be done by empowering marginalized and disadvantaged people through the implementation of promotional programmes to ensure that all persons are aware of and can exercise their legal rights and by making available services to enforce those rights.⁸⁸

Furthermore, the treatment of victims and others involved in the process throughout the entire process is crucial to the realization of a remedy. The State must therefore “[t]ake measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims”.⁸⁹ Victims should be treated with compassion and respect for their dignity and provided with proper assistance through the legal process.⁹⁰

The UN Impunity Principles provide that:

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organizational having a legitimate interest therein.⁹¹

Although victims should be informed of their right to a remedy and given all necessary assistance

⁸² ICPED, article 12(1). See similarly Basic Principles on the Right to a Remedy and Reparation, Principle 3 and HRC, General Comment No. 31, para 15.

⁸³ European Court of Human Rights: Case Airey v Ireland, Judgment of 9 October 1979, para.24.

⁸⁴ Basic Principles on the Right to a Remedy and Reparation, Principle 12.

⁸⁵ Basic Principles of Justice for Victims of Crime, article 5.

⁸⁶ Basic Principles on the Right to a Remedy and Reparation, Principle 12.

⁸⁷ HRC, General Comment No. 31, para.15 (“remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person”).

⁸⁸ International Commission of Jurists, “The ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems”, adopted in Geneva, Switzerland, 12 December 2012, para.3, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Congress-Declaration-adoptedFINAL.pdf>, last accessed 22 January 2016.

⁸⁹ Basic Principles on the Right to a Remedy and Reparation, Principle 12. See also article 12(1) of the ICPED; and Basic Principles of Justice for Victims of Crime, article 6(d).

⁹⁰ Basic Principles of Justice for Victims of Crime, articles 4 and 6(c).

⁹¹ Updated Impunity Principles, Principle 19.

to access this right, the failure of a victim to file a complaint does not release the State from its obligation to investigate a suspected violation and to prosecute and punish those responsible, as appropriate. Public authorities should open an investigation *ex officio* whenever they have knowledge of the violation, without the victim or their relative having to file a formal complaint.⁹² Indeed, the plain wording of article 12 of CAT, for instance, makes clear that the obligation to investigate torture arises no matter how the relevant information comes to the attention of authorities even if the alleged victim is not involved or contactable: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

Where the information is brought forward by an alleged victim, no threshold of "reasonable ground" applies. The State has a duty to respond to the complaint. Article 13 of CAT, for instance, has been interpreted as triggering the obligation to investigate by the mere allegation of the victim.⁹³ In *Blanco Abad v. Spain*, the Committee against Torture affirmed that "article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention."⁹⁴ Article 12(2) of the ICPED similarly requires that an investigation be conducted wherever there are reasonable grounds to believe that a person has been subjected to enforced disappearance, even if there has been no formal complaint.

As previously explained, Tunisian law provides for victims of violations to access a judicial remedy by filing a complaint with the Judicial Police or with the public prosecutor or, where the prosecutor drops proceedings prior to an investigation, by requesting a preliminary investigation or initiating proceedings directly against the accused.

However, the lack of independence of the prosecutor frequently prevents an investigation actually being opened when a complaint is filed. Furthermore, where law enforcement officials are responsible for the violations, the individuals involved in receiving, filing and investigating the complaint may be the same individuals, or their colleagues from the same police or National Guard unit. Consequently, filing a complaint does not necessarily lead to the opening of criminal proceedings. In such cases, the remedy available to victims remains merely theoretical as opposed to providing practical and real access to justice.

These defects are not remedied by the ability of victims to require the prosecutor to conduct a preliminary investigation or to summon the accused directly before the First Instance Tribunal. These powers are rarely used in practice. In addition, the potentially significant and uncertain costs associated with these procedures can only operate as a deterrent to victims invoking such procedures.

Similarly, although Tunisian law allows for criminal proceedings to be initiated even where there has been no formal complaint from the victim, in practice the lack of independence of prosecutors prevents proceedings from being instituted on the prosecutor's own initiative in cases involving human rights violations.

Furthermore, the lack of assistance to and the treatment of victims in accessing justice in Tunisia raise serious concerns as pointed out above. Public officials have frequently pressured victims not to file complaints and have subjected them to harassment when they attempt to do so, including subjecting

⁹² See for example, ICEPD, article 12; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 14th General Report on the CPT's activities covering the period 1 August 2003 to 31 July 2004, 21 September 2004, CPT/Inf (2004) 28, para. 27; and ECtHR, *Isayeva v. Russia*, 57950/00, 24 February 2005, para. 210.

⁹³ M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, p.450.

⁹⁴ Committee against Torture, *Blanco Abad v. Spain*, Communication No. 59/1996, CAT/C/20/D/59/1996, 14 May 1998, para.8.6.

them to violence, threats of violence and criminal proceedings.

As a result, and following a mission in 2011, the UN Special Rapporteur on torture noted with regret that “there is no clear strategy or timeline for addressing the huge backlog of cases and preserving the evidence of torture and abuse subject to adjudication as a matter of transitional justice. Furthermore, no official or institution seems to be in charge of these cases, nor of informing the public about the status of the complaints.”⁹⁵ He also noted the apparent lack of a plan to provide legal assistance to those victims who wished to file complaints.⁹⁶

To date, the transitional authorities have failed to develop a clear strategy for prosecuting the legacy of human rights violations. Instead, they have in some cases relied on an unstable security situation both to delay the victims’ right to a remedy and to limit this right to non-judicial compensation mechanisms in contravention of international standards.

The Tunisian authorities should undertake the necessary measures and reforms in order to establish:

- i) An effective criminal justice strategy to deal with the legacy of gross human rights violations;**
- ii) Prosecutorial guidance that ensures the investigation and prosecution of any gross human rights violation whenever there is reasonable ground to believe such a violation has occurred or an allegation of human rights violations is received, even where no formal complaint has been lodged;**
- iii) An information service to provide victims of human rights violations with information about all remedial mechanisms available, the applicable procedures and avenues for advice and assistance in accessing these mechanisms;**
- iv) A strict division of labour (either in general or specifically in relation to accusations of crimes committed by law enforcement officials), enshrined in law, between police and National Guard officers who carry out the functions entrusted to the Judicial Police and officers who carry out other law enforcement functions;**
- v) Sufficient powers for members of the prosecution service so as to enable them to oversee the work of those members of the police and National Guard who carry out the functions of the Judicial Police;**
- vi) Removal of the requirement that a civil party who either requests the prosecutor to conduct a preliminary investigation or summons the accused to appear before the First Instance Tribunal, bear the costs of the proceedings.**

B. The role of the public prosecutor and prosecutorial discretion

i. Tunisian legal framework and practice

In Tunisia, the Office of the Public Prosecutor (OPP) has always been considered part of the judiciary.⁹⁷ Consequently, under the legal framework that existed prior to the 2011 Uprising, prosecutors were subject to the same appointment, transfer, promotion and disciplinary system that applied to judges.⁹⁸ However, the executive controlled the judicial council, the *Conseil Supérieur de la Magistrature*, allowing for extensive executive interference in the work of the prosecutors (as well as the judiciary more generally).⁹⁹

⁹⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, 2 February 2012, para.75.

⁹⁶ *Id.*

⁹⁷ The 1959 Constitution made no distinction between judges (“*les magistrats du siège*”) and prosecutors (“*les magistrats du parquet*”) (article 65).

⁹⁸ Law 67-29, article 12.

⁹⁹ 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 (articles 6 and 7bis). Although decisions of the CSM were taken by majority vote, the president or, where appropriate, the vice-president was the tie-breaker (article 8).

Under the 2014 Constitution, the OPP continues to be considered part of the judiciary and enjoys the same constitutional guarantees as the judiciary.¹⁰⁰ Prosecutors have the same immunity as judges and, like judges, must act with competence, impartiality and integrity.¹⁰¹ A new High Judicial Council (HJC) with greater independence from the executive will oversee the career management and disciplinary system for prosecutors.¹⁰² In accordance with the 2014 Constitution, a draft law on the HJC is currently being reviewed by the General Legislation Commission of the ARP and the Ministry of Justice to establish a HJC having competencies over the security of tenure and transfer of judges (which will include prosecutors in as much as they are considered as judicial officers under Tunisian law). However, in its current version, this draft law falls short of international standards on judicial independence.¹⁰³

Despite reforms in the transitional period and in the 2014 Constitution, the OPP currently remains under the authority of the Minister of Justice. According to article 15 of Law No. 67-29 of 1967 on the organization of the judiciary, “prosecutors are placed under the direction and control of their superiors and under the authority of the Minister of Justice”. Article 22 of the Code of Criminal Procedure, enacted in 1968, placed the Prosecutor-General at the head of the prosecution service but specifically “under the authority of the Minister of Justice” in the exercise of his or her functions. The powers of the Prosecutor-General have, however, since been transferred to Attorney-Generals at the Courts of Appeal but the hierarchical authority of the Minister of Justice remains.¹⁰⁴

Furthermore, pursuant to article 23 of the Code of Criminal Procedure, the Minister of Justice can report crimes to an Attorney-General and can require him or her to initiate, or ask another prosecutor to initiate a prosecution, or to seize the relevant jurisdiction with written submissions.¹⁰⁵ By virtue of article 21 of the Code of Criminal Procedure, every public prosecutor is “required to comply with written submissions in accordance with instructions given to him under the conditions set out in article 23”.¹⁰⁶

Pursuant to article 20 of the Code of Criminal Procedure, the prosecution service initiates and conducts prosecutions. The Office of the Public Prosecutor is represented at the level of the Courts of Appeal by Attorney-Generals,¹⁰⁷ and at the level of First Instance Tribunals by public prosecutors.¹⁰⁸

Article 115 of the 2014 Constitution states that “prosecutors perform their duties in the framework of the criminal policy of the State”. However, there are no detailed guidelines for prosecutors to follow in the exercise of their functions.

¹⁰⁰ 2014 Constitution, article 115.

¹⁰¹ 2014 Constitution, articles 103 and 104.

¹⁰² Under the 2014 Constitution the new High Judicial Council consists of four bodies: the Judiciary Council, the Administrative Judicial Council, the Financial Judicial Council, and the Judicial Council’s Commission (article 112). Two-thirds of each of these bodies are to be composed of elected and appointed judges. Precisely what percentage of these judges are to be elected is not specified, 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 High Judicial Council is to be one of the senior judges, elected from among its members. Article 113 of the 2014 Constitution specifies that the High Judicial Council “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 (article 113). For a more detailed assessment of the new High Judicial Council, see the ICJ report: *The independence and accountability of the Tunisian judicial system: learning from the past to build a better future*, 13 May 2014.

¹⁰³ International Commission of Jurists, “Tunisia - The New Draft Law on the High Judicial Council in Light of International Law and Standards”, Position Paper, 14 September 2015, available at: <http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/2015/09/Tunisia-Final-HJC-Draft-Law-Advocacy-Position-Paper-2015-ENG.pdf>, last accessed 22 January 2016.

¹⁰⁴ Pursuant to article 1 of Law No. 87-80 of 29 December 1987 the competences of the Prosecutor-General of the Republic were transferred to the Attorney-Generals at the Courts of Appeal, who exercise these competences under the direct authority of the Minister of Justice.

¹⁰⁵ See also Law No. 87-80 of 29 December 1987, article 1, paragraph 2.

¹⁰⁶ Further details regarding the organisation of the prosecutorial service in Tunisia can be found in the ICJ’s report, *The independence and accountability of the Tunisian judicial system: learning from the past to build a better future*, 13 May 2014, available at <http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 22 January 2016.

¹⁰⁷ Code of Criminal Procedure, article 24.

¹⁰⁸ Code of Criminal Procedure, article 25.

Although articles 28 and 47 of the Code of Criminal Procedure require a preliminary and full investigation into all cases involving “crimes”,¹⁰⁹ article 30 states that public prosecutors must first appraise all complaints received by them. There are no criteria in the Code of Criminal Procedure as to how this appraisal should be exercised. This provision grants prosecutors significant discretion over whether to dismiss a complaint or a report of an offence.¹¹⁰ Nothing in the relevant Tunisian legislation requires the prosecutor’s decision to dismiss a complaint to be supported by any reason, nor is the decision susceptible to judicial review. However, as explained above, where the prosecutor dismisses proceedings a victim can request the prosecutor to open an investigation or can bring proceedings directly against the accused.¹¹¹

The Code of Criminal Procedure imposes requirements on the prosecutor to notify the victim of various decisions.¹¹² There is no obligation on the prosecutor to generally inform the victim of their rights, to consult with the victim or to take the victim’s views into consideration at any stage in the proceedings. A “referring judge” (*juge aiguilleur*)¹¹³ is responsible for providing persons who are party to proceedings with any information they need, particularly information concerning the applicable procedure.¹¹⁴ According to the Minister of Justice, the referring judge is “responsible for directing individuals wanting to know a specific procedure, the follow up of a case or how to overcome a difficulty which impedes the normal course of a case”.¹¹⁵ Victims have frequently reported being unable to access information regarding proceedings due to the unavailability of the referring judge.

In all cases the prosecutor, or Judicial Police officers to whom the task has been delegated, can conduct a preliminary inquiry by collecting evidence, questioning the suspect, taking witness statements and writing a report.¹¹⁶ In cases involving lesser offences the prosecutor, or his or her deputy, also carries out the full investigation. In cases involving serious offences the public prosecutor is obliged to refer the case to an investigating judge for investigation.¹¹⁷ An exception exists where the suspect is caught in the act, in which case the public prosecutor enjoys the same powers as the investigating judge and the investigating judge enjoys the same powers as the prosecutor.¹¹⁸

Once an investigation has been opened, the prosecutor is entitled to be present during the questioning of the accused and can intervene if authorized by the investigating judge.¹¹⁹ However, the Code of Criminal Procedure is silent on the role of the prosecutor where he or she believes that information has been obtained by unlawful means.

The lack of institutional or operational independence of prosecutors coupled with the broad discretion granted to them has frequently resulted in a failure to investigate and prosecute cases involving gross human rights violations. Following a visit to Tunisia in 2011 the Special Rapporteur on torture

¹⁰⁹ Under the Code of Criminal Procedure a “crime” is an offence that is punishable by the death penalty or imprisonment for more than five years (article 122).

¹¹⁰ Code of Criminal Procedure, article 30.

¹¹¹ Code of Criminal Procedure, article 36.

¹¹² Articles 38, 75, 87, 101, 109, 120, 213, 262, 293 of the Code of Criminal Procedure require the civil party to be notified of various decisions, including those taken by the investigating judge, the indictment chamber, the prosecutor, regarding decisions to appeal against first instance and appeal court judgments, and the Cassation Court.

¹¹³ The “referring judge” is a deputy prosecutor to the first instance tribunal. Deputy prosecutors are assigned to the role of referring judge on a rotation basis and fulfil the role in parallel with their prosecutorial functions. See Lawyers without Borders, “L’état de l’aide légale en Tunisie”, 29 April 2014, p. 64, available at http://www.asf.be/wp-content/uploads/2014/06/ASF_Tunisie_EtudeAideLe%CC%81gale_2014_6.pdf, last accessed 21 January 2016.

¹¹⁴ Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties under Article 9 of the Convention, Seventeenth periodic reports of States parties due in 2000, Addendum: Tunisia, CERD/C/431/Add.4, 1 October 2002, para. 77. See also Consolidated Periodic Report of Tunisia under the Terms of Article 62 of the African Charter on Human and Peoples Rights (1995-2006), para.70, available at http://www.achpr.org/files/sessions/42nd/state-reports/4th-9th-1995-2006/staterep4to9_tunisia_2006_eng.pdf, last accessed 21 January 2016.

¹¹⁵ Ministry of Justice website, “Questions d’ordre général”, available at <http://www.e-justice.tn/index.php?id=712>, last accessed 21 January 2016.

¹¹⁶ Code of Criminal Procedure, article 26.

¹¹⁷ Code of Criminal Procedure, article 28.

¹¹⁸ Code of Criminal Procedure, articles 26, 34 and 35.

¹¹⁹ Code of Criminal Procedure, article 73.

noted “a pattern of a lack of timely and adequate investigation of torture allegations by prosecutors or investigating 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”.¹²⁰

In a case involving the death of Faisal Baraket due to police torture, the Committee against Torture noted significant shortcomings on the part of the investigating judge, the public prosecutor and the Minister of Justice. In particular, the Committee criticised the public prosecutor for violating the duty of impartiality imposed on him by his obligation to give equal weight to both the prosecution and the defence “when he failed to appeal against the decision to dismiss the case” by the investigating judge.¹²¹ The Committee went on to note that, given the Minister of Justice’s authority over the public prosecutor, he could also have ordered the prosecutor to appeal, but failed to do so.¹²²

ii. Assessment in light of international law and standards

Two primary sources of international standards on prosecutors are the UN Guidelines on the Role of Prosecutors, adopted by the UN in 1990,¹²³ and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of the Prosecutor (“IAP Standards”), adopted by the International Association of Prosecutors (IAP) in 1999 and endorsed by the UN in 2008.¹²⁴ Additional standards have been developed by regional human rights systems and clarified by treaty monitoring bodies and through the jurisprudence of regional human rights courts.¹²⁵

The UN Guidelines recognise that prosecutors are “essential agents of the administration of justice”.¹²⁶ Prosecutors are key in ensuring access to justice for victims of human rights violations and combating impunity.¹²⁷

In order to allow them to fulfil their essential role, States must 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”.¹²⁸ Consequently, they must guarantee the functional independence and the impartiality of prosecutors and provide them with appropriate resources.¹²⁹ The IAP Standards also affirm that “[i]n order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against action by governments.”¹³⁰ To this end the IAP Standards refer to a number of guarantees, for instance in relation to conditions of service and

¹²⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, 2 February 2012, paras.29 and 32.

¹²¹ 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

¹²² Id.

¹²³ UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly Resolution 45/166 (1990), (hereinafter UN Guidelines on the Role of Prosecutors).

¹²⁴ UN Commission on Crime Prevention and Criminal Justice, resolution 17/2 (2008).

¹²⁵ See for example, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part F “Role of Prosecutors”; Recommendation (2000)19, adopted by the Committee of Ministers of the Council of Europe (CoM Recommendation (2000)19).

¹²⁶ UN Guidelines on the Role of Prosecutors, Guideline 3.

¹²⁷ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, 7 June 2012, para.35.

¹²⁸ UN Guidelines on the Role of Prosecutors, Guideline 4; IAP Standards, paragraph 6(a); see also ACHPR Principles and Guidelines, Principle F(a)(2); CoM Recommendation (2000)19, para.11.

¹²⁹ International standards on these issues and an assessment of the law and practice in Tunisia in light of these standards can be found in the ICJ’s May 2014 report on the independence and accountability of the judiciary in Tunisia. See ICJ report, *The independence and accountability of the Tunisian judicial system: learning from the past to build a better future*, 13 May 2014, available at <http://icj.wpenline.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

¹³⁰ IAP Standards, paragraph 6(a)

remuneration, tenure, career progression, and protection against arbitrary reprisal or removal from office; and the right to form and join professional associations.¹³¹

Prosecutors must play an active role in criminal proceedings, including the institution of prosecutions.¹³² They may also be required by the legal system to investigate crime, supervise the legality of investigations and supervise the execution of court decisions.¹³³ Prosecutors are required to “carry out their functions impartially”, avoiding any discrimination, and to “protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect”.¹³⁴ Furthermore, in carrying out their functions prosecutors must “respect and protect human dignity and uphold human rights”.¹³⁵

Prosecutors are essential for ensuring due process and upholding the rights of suspects throughout the investigation and prosecution process.¹³⁶ Furthermore, prosecutors must not use evidence known or believed to have been obtained by recourse to unlawful means, including torture and other ill-treatment, and must take positive steps to ascertain whether evidence has been obtained by such means, and ensure that those responsible for any use of such unlawful means are brought to justice.¹³⁷

The UN Guidelines and other international standards also recognise the role of prosecutors in relation to victims. In addition to taking account of the position of the victim, the UN Guidelines requires prosecutors to “consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights”.¹³⁸ The IAP Standards provide that Prosecutors are to:

consider the views, legitimate interest and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible.¹³⁹

Regarding the discretion afforded to public prosecutors in carrying out their role, the UN Guidelines on the Role of Prosecutors state that “[i]n countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.”¹⁴⁰ The IAP Standards provide:

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently, and be free from political interference.

¹³¹ IAP Standards, Standard 6 on “Empowerment”.

¹³² UN Guidelines on the Role of Prosecutors, Guideline 11. See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (g).

¹³³ *Id.*

¹³⁴ UN Guidelines on the Role of Prosecutors, Guideline 13(b). Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (i)(2); CoM Recommendation (2000)19, para.24. IAP Standards, Standard 4.

¹³⁵ UN Guidelines on the Role of Prosecutors, Guideline 12. IAP Standards, paragraph 1(h). See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (h).

¹³⁶ UN Guidelines on the Role of Prosecutors, Guideline 14. IAP Standards, paragraphs 4.3(c) and (d). See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (j); and CoM Recommendation (2000)19, para.27.

¹³⁷ UN Guidelines on the Role of Prosecutors, Guideline 16. IAP Standards, paragraphs 4.3(e), (f) and (g). Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (l); and CoM Recommendation (2000)19, paras.28 and 29.

¹³⁸ UN Guidelines on the Role of Prosecutors, Guideline 13(d). See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (i)(4); and see CoM Recommendation (2000)19, para.33.

¹³⁹ IAP Standards, paragraph 4.3(b). See also Basic Principles of Justice for Victims of Crime.

¹⁴⁰ UN Guidelines on the Role of Prosecutors, Guideline 17.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.¹⁴¹

The Committee of Ministers of the Council of Europe recommends that in order to promote “fair, consistent and efficient activity of public prosecutors” States should, among other things, “define general guidelines for the implementation of criminal policy”, and “define general principles and criteria to be used by way of references against which decisions in individual cases should be taken”.¹⁴² Such guidelines, principles and criteria should be made public and communicated to any person on request.¹⁴³

In terms of the content of these guidelines and criteria for prosecution, the UN Guidelines on the Role of Prosecutors is clear that gross human rights violations should be considered a high priority.¹⁴⁴ Guideline 15 states:

prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.¹⁴⁵

As was explained earlier, this requirement to investigate and, where appropriate, to prosecute human rights violations of a criminal character is supported by international treaty obligations and other standards as well as jurisprudence from regional human rights courts. The Council of Europe Guidelines on eradicating impunity for serious human rights violations therefore state “[s]tates have a duty to prosecute where the outcome of an investigation warrants this. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice.”¹⁴⁶

Furthermore, as public officials who are key players in the administration of justice, prosecutors should also be accountable to the public. At least in the case of gross human rights violations, interested parties should have a right to independent review of a decision by a prosecutor not to prosecute.¹⁴⁷

The Tunisian legal framework established a system where the OPP was subordinated to the executive. This undermined the independence and impartiality of prosecutors whose career progression depended on loyalty to the regime. Provisions in the 2014 Constitution that place oversight of prosecutors’

¹⁴¹ IAP Standards, “2. Independence”

¹⁴² CoM Recommendation (2000)19, para.36(a).

¹⁴³ CoM Recommendation (2000)19, para.36(c). See also, Bordeaux Declaration, “Judges and Prosecutors in a Democratic Society”, Council of Europe Committee of Ministers, CM (2009)192, 15 December 2009, Explanatory Note, para. 29.

¹⁴⁴ UN Guidelines on the Role of Prosecutors, Guidelines 15 and 14; see also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (k); CoM Recommendation (2000)19, para. 16.

¹⁴⁵ UN Guidelines on the Role of Prosecutors, Guideline 14; see also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (k); CoM Recommendation (2000)19, para.16.

¹⁴⁶ Eradicating impunity for serious human rights violations, Guidelines adopted by the Committee of Ministers of the Council of Europe on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies, Guidelines VIII.1.

¹⁴⁷ See e.g. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 86; see also CoM Recommendation (2000)19, para.34 and para.1 of the Bordeaux Declaration, “Judges and Prosecutors in a Democratic Society”, Council of Europe Committee of Ministers, CM (2009)192, 15 December 2009; EU Directive 2012/29/EU (25 October 2012) establishing minimum standards on the rights, support and protection of victims of crime, article 11 and Preamble para.43.

selection and careers in the hands of the High Judicial Council and require prosecutors to act with impartiality are an improvement (although, as noted earlier, the OPP would be best placed to fulfil its role if it were also strictly separated from judicial functions, in accordance with article 10 of the UN Guidelines on the role of Prosecutors and article F(f) of The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa). However, hierarchical control of the prosecution service in the hands of the executive remains, as does the Minister of Justice's ability to direct prosecutors and to issue instructions to prosecutors. Although international standards do not necessarily explicitly require the prosecution service to be institutionally independent from the executive it is imperative that prosecutors can carry out their functions in an independent and impartial manner.

The almost total absence of investigations and prosecutions of cases of gross violations of human rights committed by law enforcement officers in Tunisia, despite ample documentation, suggests that prosecutors lack independence and impartiality.¹⁴⁸ When coupled with the broad discretion granted to prosecutors to decide whether to pursue or dismiss a complaint, this lack of independence has resulted in numerous complaints of gross human rights violations being dismissed without an investigation.

The duty of prosecutors to act with objectivity and in the public interest, including by prosecuting cases against public officials and in particular gross human rights violations, is not explicitly reflected in Tunisian law or in domestic prosecutorial guidelines. Since the 2011 Uprising, there does not appear to have been a shift to address the failings of the past and to develop an appropriate policy focusing on gross human rights violations. Following a visit to Tunisia in November 2012, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stated: "Nothing in the visit persuaded the Special Rapporteur that a comprehensive prosecutorial strategy to deal with alleged cases of gross human rights violations had been set in place."¹⁴⁹

Prosecutors in Tunisia are not explicitly tasked by national laws or standards with ensuring due process and upholding the rights of defence as well as the rights of victims. For example, there is no express obligation in Tunisian law for prosecutors to consult with victims of human rights violations before dismissing proceedings or to inform victims of their rights. Furthermore, the general right for those parties to receive information from the reporting judge regarding criminal proceedings is largely ineffective. In practice, the rights of both suspects and victims are frequently ignored. Decisions of the prosecutor to dismiss a complaint cannot be challenged by way of judicial review. Although victims can request that the prosecutor opens an investigation or can bring a prosecution directly against the accused, this has not provided an effective alternative for victims of gross human rights violations. As detailed above at section A, this is due in part to the fact that the victim must from the outset bear the risk of indeterminate and possibly significant costs of such proceedings.

Tunisian authorities should reform the laws on the organisation of the judiciary, the statute for judges, the High Judicial Council and the Code of Criminal Procedure so as to enhance the independence of prosecutors.¹⁵⁰

In addition, in order to ensure that human rights violations that constitute crimes under international or national law are prosecuted and the rights of victims are respected, the Tunisian authorities should:

- i) Enact the necessary legal reforms to ensure that when carrying out their functions, prosecutors are empowered and required to:**
 - a. Act in an independent and impartial manner, avoiding any discrimination and be free from interference;**
 - b. Act to protect the public interest;**

¹⁴⁸ See also HRC, Concluding Observations on Tunisia, UN Doc. CCPR/C/TUN/CO/5, 23 April 2008, para.11.

¹⁴⁹ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/24/42/Add.1, 30 July 2013, para.45.

¹⁵⁰ Detailed recommendations in this regard are set out in the ICJ's report, The independence and accountability of the Tunisian judicial system: learning from the past to build a better future, 13 May 2014, pages 74-76. Available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 22 January 2016.

- c. **Take proper account of the position of the suspect and the victim;**
- d. **When making decisions that affect their personal interests, take into consideration the views and concerns of the victim and ensure that all victims are informed of their rights;**
- e. **Pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;**
- f. **Safeguard the principle of equality of arms, including by disclosing any information which they possess which may affect the justice of the proceedings;**
- g. **Respect and protect human dignity and uphold human rights;**
- h. **Do not use evidence known or believed to have been obtained by recourse to unlawful means, including torture and other ill-treatment, and in such circumstances are required to take steps to ensure that those responsible for the use of such unlawful means are brought to justice;**
- i. **Give reasons for any decision to dismiss a case without proceeding to an investigation;**
- ii) **Establish and publish comprehensive prosecutorial guidelines for the implementation of criminal justice policy and ensure that they are available to any person on request. These guidelines should include detailed principles and criteria against which decisions in individual cases should be taken, in particular the prosecutor's appraisal decision under article 30 of the Code of Criminal Procedure, and should include the following requirements:**
 - a. **To give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law; and**
 - b. **Not to initiate or continue prosecution, or to make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.**
- iii) **Establish a right of judicial review for victims of crime where the prosecutor decides to dismiss a case prior to opening an investigation.**

C. The investigating judge and the direction of the investigation

i. Tunisian legal framework and practice

Pursuant to article 49 of the Code of Criminal Procedure, the public prosecutor assigns the investigation to one of the investigating judges attached to the relevant court. The public prosecutor is able to assign a case to the investigating judge of his or her choice.¹⁵¹ Once an investigating judge has been assigned to a case he or she cannot be removed.¹⁵² Article 10 of the Code of Criminal Procedure places the investigating judges under the authority of the Attorney-Generals for the purpose of criminal investigations.¹⁵³

The ICJ was told during meetings with Tunisian lawyers that in politically sensitive cases the public prosecutor's choice of investigating judge was made on the basis of the nature of the case and of the allegiance of the investigating judge to the prosecutor and to the Minister of Justice. Moreover, in order to circumvent the prohibition on removing an investigating judge once he or she has been assigned to a case, the ICJ was informed that an investigating judge seized with a case could be subject to administrative transfer by a decision of the public prosecutor of the relevant jurisdiction and a replacement judge assigned to continue the investigation.¹⁵⁴

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has noted in relation to Tunisia that the authority of the Minister of Justice over prosecutors "combined

¹⁵¹ Code of Criminal Procedure, article 49.

¹⁵² Code of Criminal Procedure, article 51.

¹⁵³ Code of Criminal Procedure, article 10.

¹⁵⁴ ICJ interview with civil party lawyers on 23 September 2014.

with the discretionary power of the prosecutor to assign files to an investigating judge of his or her choice, led to a lack of effective investigations and prosecutions into gross human rights violations".¹⁵⁵

Upon receipt of a case, the investigating judge must open an investigation, research what happened and establish the facts that will serve as a basis for the court's decision.¹⁵⁶ The investigating judge is responsible for hearing witnesses. The civil party cannot be heard as a witness,¹⁵⁷ but the investigating judge can meet with the civil party for informational purposes.¹⁵⁸ The investigating judge has the power to conduct searches, to compel witnesses to attend for questioning and to seize evidence.¹⁵⁹ Despite these powers, interviews conducted by ICJ with lawyers representing victims and lawyers representing the accused indicate that the Ministry of the Interior has repeatedly refused to provide evidence to the investigating judge in cases concerning gross human rights violations committed during the uprising.

The investigating judge can order an expert report on any technical issue.¹⁶⁰ The order from the investigating judge defines the scope of an expert's powers and activities, including by defining the expected output of the expert, such as a report, and the powers granted to the expert.¹⁶¹ The rules applying to experts include forensic experts for whom no specific legal provisions apply.

A list of judicial experts, arranged according to specialization, is established each year by the Ministry of Justice.¹⁶² The investigative judge can only appoint experts from this list. The only exception provided for by the law is if the specialization required is not included in the list. It therefore does not grant discretion to the judge as to the appointment of independent experts who are not registered in the list. Regional commissions responsible for registering new judicial experts are controlled by the Minister of Justice.¹⁶³ The Minister of Justice refers complaints against experts who have been suspended or removed from the list to a disciplinary council, which is composed of three judges and two members appointed by the Minister.¹⁶⁴ The Minister decides on the appropriate disciplinary sanction against the expert, after consultation with the disciplinary council.¹⁶⁵ In the performance of their duties, judicial experts are considered to be public officials and can be prosecuted for corruption under articles 83 to 94 of the Criminal Code. Judicial experts can also be prosecuted for creating a false document, which is punishable by a maximum sentence of life imprisonment.¹⁶⁶

When conducting the investigation, the investigating judge can ask police officers or the National Guard as members of the Judicial Police to carry out certain investigative acts on his or her behalf, including hearing witnesses.¹⁶⁷ As referenced above, in some instances, police or National Guard officials would respond only to orders from the Ministry of the Interior, refuse to execute warrants (issued by a prosecutor or an investigating judge) against ISF members and would delay or carry out inadequate investigations into human rights violations involving ISF officials. Indeed, police or National Guard officials might be tasked with investigating a human rights violation allegedly committed by themselves or one of their colleagues from the same police unit.

¹⁵⁵ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/24/42/Add.1, 30 July 2013, para.57.

¹⁵⁶ Code of Criminal Procedure, article 50.

¹⁵⁷ Code of Criminal Procedure, article 43.

¹⁵⁸ Code of Criminal Procedure, article 63.

¹⁵⁹ Code of Criminal Procedure, articles 53, 59, 61, 93-100.

¹⁶⁰ Code of Criminal Procedure, articles 53 and 101.

¹⁶¹ ICJ interview with civil party lawyers on 23 September 2014.

¹⁶² Law No. 93-61, as amended by Law No. 2010-33.

¹⁶³ Law No. 93-61 of 23 June 1993 on judicial experts, article 5. Under the law, the Minister of Justice controls both the composition and the functioning of the regional commissions.

¹⁶⁴ Law No. 93-61 of 23 June 1993 on judicial experts, articles 19 and 21.

¹⁶⁵ Law No. 93-61 of 23 June 1993 on judicial experts, articles 20 and 25.

¹⁶⁶ Article 11 of Law No. 93-61 of 23 June 1993 and article 172 of the Criminal Code.

¹⁶⁷ Code of Criminal Procedure, Article 57. However, the investigating judge cannot delegate the power to execute warrants.

Lack of independence when investigating security services officers

For example, in cases involving individuals killed and injured in the town of El Dguech, Touzeur governorate, the Judicial Police officials carrying out the investigation were from the same unit of the National Guard as the suspect. The suspect was not suspended from his position during the investigation.

The investigating judge must investigate only those facts that the public prosecutor has included in the case file. The investigating judge can only investigate other facts where they have been disclosed in the course of the investigation and would constitute aggravating circumstances of the offence referred.¹⁶⁸ According to article 55 of the Code of Criminal Procedure, the investigating judge must follow the public prosecutor's written instructions throughout the investigation. If the investigating judge wishes to depart from these instructions, he or she must issue an order supported by reasons within three days of receiving the prosecutor's instructions.¹⁶⁹ The prosecutor can appeal this order before the indictment chamber.¹⁷⁰

Under article 104 of the Code of Criminal Procedure, upon completion of the investigation, the investigating judge submits his or her findings to the public prosecutor. Following consideration by the public prosecutor, the investigating judge issues an order, which must be supported by reasons.¹⁷¹

The investigating judge can order the dismissal of the case if he or she believes that the case is inadmissible, the facts do not constitute an offence, or there is insufficient evidence.¹⁷² If the investigating judge believes that the investigated facts constitute a "*crime*", he or she orders the accused to be referred to the indictment chamber.¹⁷³ The orders of the investigating judge to dismiss or refer the accused to the indictment chamber are executed by the public prosecutor.¹⁷⁴ An order to dismiss the case or to refer the accused to the indictment chamber can be appealed by the public prosecutor within four days from the issuing of the decision, or by the civil party or the accused, within four days of being notified of the order.¹⁷⁵ The appeal is decided by the indictment chamber, which hears the submissions of the public prosecutor.¹⁷⁶ Neither the accused nor the civil party are present, however they can make written submissions.¹⁷⁷ The decision of the indictment chamber can be appealed to the Cassation Court by any of the parties.¹⁷⁸ Upon receipt of a case, the indictment chamber can decide to: dismiss the case; refer it to the competent jurisdiction; order that the investigating judge or an advisor of the indictment chamber conduct further investigations; or, after consulting with the prosecution service, order the initiation of new criminal proceedings, conduct further investigations or request the investigation of further facts that were not already investigated.¹⁷⁹ If the investigated facts constitute a "*crime*", the indictment chamber refers the accused to the criminaltribunal.¹⁸⁰

In practice, investigations into gross human rights abuses have involved extensive delays.

¹⁶⁸ Code of Criminal Procedure, article 51, para.2.

¹⁶⁹ Code of Criminal Procedure, article 55, para.3.

¹⁷⁰ Code of Criminal Procedure, article 55, para.3.

¹⁷¹ Code of Criminal Procedure, article 104.

¹⁷² Code of Criminal Procedure, article 106.

¹⁷³ Code of Criminal Procedure, article 107.

¹⁷⁴ Code of Criminal Procedure, article 108.

¹⁷⁵ Code of Criminal Procedure, article 109.

¹⁷⁶ Code of Criminal Procedure, article 110.

¹⁷⁷ Code of Criminal Procedure, article 114.

¹⁷⁸ Code of Criminal Procedure, article 120.

¹⁷⁹ Code of Criminal Procedure, article 116.

¹⁸⁰ Code of Criminal Procedure, article 119.

Delays in investigations of gross human rights violations

Mohamed Kussaï Jaïbi was allegedly subjected to torture in 1991. Following the overthrow of the regime, he filed a complaint with the Judicial Police in July 2013. According to his lawyer, Mr Jaïbi was not interviewed by the Judicial Police until six months later, when the preliminary inquiry began. Two and a half years after the filing of the complaint, the trial has yet to start.

Another failing of the investigation process under the Ben Ali regime was the lack of autopsies or medical assessments. The UN Special Rapporteur on torture noted that “forensic assessments generally were not conducted or, if they were, their credibility was undermined by many deficiencies or falsified conclusions”.¹⁸¹

Lack of autopsies or medical assessments during investigations

Rachid Chammakhi was arrested on 24 October 1991 because of his suspected membership of Ennahda (at that time a political opposition movement that the authorities refused to recognise). On 27 October, before he was charged with an offence he died at the hospital of Nabeul where the doctors certified a death by natural causes (acute kidney failure). The hospital refused to release his body because it claimed it carried viruses that were a danger to public health. On 29 October, law enforcement officials brought the body in a coffin to the cemetery to bury it. It was transferred to family members on the condition that it was not to be opened. The coffin was nevertheless opened and witnesses saw traces of torture on the body of the victim, especially his head and chest. The father of the victim filed a complaint on 7 November 1991 with the public prosecutor of the First Instance Tribunal of Grombalia, in the Nabeul governorate. The investigating judge relied on the medical report issued by the hospital and dismissed the case on the basis that the facts did not constitute an offence. In 2011, a lawyer acting on behalf of the deceased’s family requested access to the file and found that the file was empty.

ii. Assessment in light of international law and standards

The duty to investigate gross human rights violations is set out in treaties to which Tunisia is a party as well as in numerous international soft law instruments.¹⁸² It has also been affirmed in the jurisprudence of UN treaty bodies and regional human rights courts.¹⁸³ As the HRC has pointed out in relation to the ICCPR, “a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”¹⁸⁴

The investigation must be conducted promptly, thoroughly and effectively through independent and impartial bodies.¹⁸⁵ Detailed criteria for ensuring an investigation meets these requirements have been

¹⁸¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, 2 February 2012, para.32.

¹⁸² See in addition to earlier-cited source, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ECOSOC resolution 1989/65 of 24 May 1989 1, Principle 9; Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, UN General Assembly resolution 43/173 of 9 December 1988 at Principles 33 and 34; and The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/10034 (1975), article 9; UN Principles on Investigation and Documentation of Torture, Principle 2; and the Updated Impunity Principles, Principle 19.

¹⁸³ HRC, General Comment No.6 on Article 6, 30 April 1982, UN Doc. HRI/GEN/1/Rev.9 (Vol I) p.176, para.4 (in relation to enforced disappearances); HRC, General Comment No.20 on Article 7, 13 March 1992, UN Doc. HRI/GEN/1/Rev.9 (Vol I) p.200, para.14 and *Case Rodríguez v Uruguay*, Views of 19 July 1994, UN Doc. CCPR/C/51/D/322/1988, para.12(3) (in relation to torture and other ill-treatment); Concluding Observations on Peru, 25 July 1996, UN Doc. CCPR/C/79/Add.67, para.22 (in relation to excessive use of force by police); Inter-American Court of Human Rights, *Case of Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988, Merits, para.174; European Court of Human Rights, *Case McCann v. the United Kingdom*, no.18984/91, Judgment of 27 September 1995, para.161; African Commission on Human and Peoples’ Rights, *Malawi African Association et al v Mauritania*, Communications 54/91 et al, recommendations, lit.1.

¹⁸⁴ HRC, General Comment No. 31, para.15.

¹⁸⁵ Basic Principles on the Right to a Remedy and Reparation, Principle 3.

set out in the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the UN Principles on Extra-legal Executions), the UN Principles on Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UN Principles on Investigation and Documentation of Torture) and in their respective implementing manuals.¹⁸⁶

In relation to the promptness requirement, the Special Rapporteur on torture has recommended that “investigations about torture should be dealt with immediately”.¹⁸⁷ The UN Principles on Extra-legal Executions and the UN Principles on Investigation and Documentation of Torture set out the purpose and information that should be uncovered by an investigation, including among other things, details of the violation and the circumstances surrounding the violation as well as responsibility for it.¹⁸⁸ In cases where the victim has died and a body has been recovered, the autopsy of the deceased’s body will form a vital part of any investigation. The UN Principles on Extra-legal Executions affirm the need for an “adequate autopsy” to be “conducted by a physician, who shall, if possible, be an expert in forensic pathology” and who shall have “the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred”.¹⁸⁹ Furthermore, it is imperative for those conducting the autopsy “to function impartially and independently of any potentially implicated persons or organizations or entities”.¹⁹⁰

In cases of torture and other ill-treatment, not leading to the death of the victim, medical examinations should be carried out. The UN Principles on Investigation and Documentation of Torture requires medical experts involved in such examinations to behave in conformity with the highest ethical standards and established standards of medical practice.¹⁹¹ In particular, “examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials”.¹⁹²

The requirement of independence means that authorities involved in the violation cannot carry out the investigation.¹⁹³ Furthermore, the authority in charge of the investigation must be “independent of the suspected perpetrators and the agency they serve, [...] competent and impartial.”¹⁹⁴ Therefore, implicated persons should be removed from positions of control or power over those conducting the investigations, as well as over complainants and witnesses.¹⁹⁵ If established investigation procedures

¹⁸⁶ Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Manual on Extra-legal Executions) E/ST/CSDHA/.12 (1991); and Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), Professional Training Series No.8/Rev.1 of UN OHCHR, 2004.

¹⁸⁷ Report of the UN Special Rapporteur on torture, 12 January 1995, UN Doc. E/CN.4/1995/34, para.926(g). A similar requirement can be found in article 8 of the Inter-American Convention to Prevent and Punish Torture, adopted by the Organization of American States on 9 December 1985 and entered into force on 28 February 1987.

¹⁸⁸ UN Principles on Investigation and Documentation of Torture, Principle 1 states: “(a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families; (b) Identification of measures needed to prevent recurrence; (c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.” UN Principles on Extra-Legal Executions, Principle 9 states: “The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.”

¹⁸⁹ UN Principles on Extra-Legal Executions, Principle 12. See also Principle 13 on the facts that the autopsy should discover.

¹⁹⁰ UN Principles on Extra-Legal Executions, Principle 14.

¹⁹¹ UN Principles on Investigation and Documentation of Torture, Principle 6(a).

¹⁹² UN Principles on Investigation and Documentation of Torture, Principle 6(a).

¹⁹³ African Commission on Human and People’s Rights: Case *Amnesty International and Others v. Sudan* (1999), para.51. See also Concluding Observations on Peru, 25 July 1996, CCPR/C/79/Add.67, para.22.

¹⁹⁴ UN Principles on Investigation and Documentation of Torture, Principle 2.

¹⁹⁵ Principle 15 of the UN Principles on Extra-legal Executions. See also article 12 of the ICPED; and see Concluding Observations on Peru, 25 July 1996, CCPR/C/79/Add.67, para.22.

are inadequate, the State may be required to establish commissions of inquiry.¹⁹⁶

Investigating authorities must have the necessary resources and powers required to carry out an effective investigation. For example, article 12 of the ICPED requires States to ensure that investigating authorities can access documentation and other relevant information, as well as places of detention.¹⁹⁷ Measures must also be available to prevent and sanction those that hinder investigations.¹⁹⁸ Investigations should be public with access to them available for both victims and their families who should be entitled to present evidence.¹⁹⁹

The method and findings of investigations should be documented²⁰⁰ and made public and, where sufficient evidence of human rights violations of a criminal character are revealed, must lead to the prosecution of those responsible.²⁰¹

In light of the legal and practical gaps identified above, investigations in Tunisia into gross human rights violations do not meet the requirements set out in international law, namely promptness, thoroughness, effectiveness and impartiality. The independence and impartiality of the investigation is undermined at the outset by a context in which the prosecutor's power to choose which investigating judge to assign to a case appears to have been abused by choosing judges known for their loyalty to the regime to investigate cases that are considered sensitive.

As noted by the HRC in 2008, investigations into gross human rights violations in Tunisia can take an unreasonable amount of time.²⁰² This has been confirmed since the 2011 Uprising by the Special Rapporteur on torture who stated in his 2012 report that he had "heard credible testimonies about a pattern of a lack of timely and adequate investigation of torture allegations by prosecutors or investigating judges."²⁰³

Investigations frequently fail to establish even basic facts and information, including by ensuring timely and adequate autopsies and that medical examinations are carried out by individuals who are sufficiently impartial and with functional independence. In particular, the selection and disciplining of forensic experts, as with other court experts, is under the control of the Minister of Justice.

Furthermore, although the investigating judge has the relevant powers to conduct searches, seize evidence and question witnesses, in practice in cases involving gross human rights violations, during the uprising, the Ministry of the Interior has refused to cooperate with orders of the investigating judge and to ensure access to evidence held by the Ministry.

Where law enforcement officials are alleged to have been responsible for violations, the independence and impartiality of investigations as a whole cannot be secured by the legal provisions and practices in place in Tunisia. Furthermore, there are no provisions in the Tunisian Code of Criminal Procedure to suspend suspected perpetrators from office while investigations are ongoing.

Another concern is the lack of sufficient resources to ensure effective investigations into all gross human rights violations. As the Special Rapporteur on torture noted: "The judiciary and the Prosecutor's

¹⁹⁶ UN Principles on Extra-legal Executions, Principle 11. See also the Istanbul Protocol, para.82.

¹⁹⁷ ICPED, article 12(3)(a) and (b). See also, UN Principles on Extra-legal Executions, Principle 10; and UN Principles on Investigation and Documentation of Torture, Principle 3(a).

¹⁹⁸ ICPED, article 12(4).

¹⁹⁹ ICPED, article 24(2); UN Principles on Investigation and Documentation of Torture, Principle 4; Istanbul Protocol, supra, para.81; UN Principles on Extra-legal Executions, Principle 16.

²⁰⁰ UN Principles on Investigation and Documentation of Torture, Principles 5(b) and 6(b); UN Principles on Extra-legal Executions, principle 17.

²⁰¹ HRC, General Comment No. 31, para. 18; Principle 19 of the Updated Principles on Impunity; and Principle 18 of the UN Principles on Extra-legal Executions.

²⁰² Concluding Observations of the HRC on Tunisia, UN Doc. CCPR/C/TUN/CO/5 (2008), para.11.

²⁰³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, 2 February 2012, para.29.

office currently lack the capacity to process the volume of cases of torture and ill-treatment".²⁰⁴

Reforms are required by the Tunisian authorities to ensure that gross human rights violations are promptly, thoroughly and effectively investigated through independent and impartial bodies. To this end, and given the specific history of manipulation, undermining, and ineffectiveness of investigations in Tunisia, the authorities should ensure that in cases of alleged human rights violations:

- i) Investigating judges are assigned to cases by the General Assembly of the relevant court and not the prosecutor;**
- ii) Guidelines are established for investigating judges detailing the timeframe and procedures for conducting investigations, which meet international standards, such as those set out in the UN Principles on Extra-legal Executions, the UN Principles on Investigation and Documentation of Torture and their accompanying manuals;**
- iii) In all cases where the victim has died, an autopsy is automatically and promptly carried out by an independent forensic expert in line with the UN Principles on Extra-legal Executions and the accompanying manual;**
- iv) In all cases where the victim has been subjected to torture or other ill-treatment not leading to death, a medical examination is automatically conducted by an independent medical expert in accordance with the UN Principles on Investigation and Documentation of Torture and the Istanbul Protocol;**
- v) Public officials, including law enforcement and security officials, are suspended from office where they are suspected or accused of gross human rights violations, pending the completion of investigations and, where they are subsequently indicted, pending a decision by the trial court;**
- vi) Special investigative mechanisms with additional guarantees for independence are available where the independence of the investigation would otherwise be compromised;**
- vii) Sufficient material and human resources are available for the investigations; and**
- viii) Investigating judges are able to enforce decisions to obtain and seize information relevant to an investigation, including by ensuring that law enforcement officers who exercise the responsibilities of the Judicial Police are not under the authority of the Ministry of the Interior.**

D. The role of the civil party

i. Tunisian legal framework and practice

Under the Tunisian Criminal Code of Procedure, a right of "civil action" belongs to "all those who personally suffered the harm caused directly by the offence".²⁰⁵ An individual who meets this test can apply to become a civil party to the criminal proceedings. Since September 2011, civil society organizations can also apply to become a civil party.²⁰⁶

The request to become a civil party is made in writing to the prosecution, the investigating judge or to the First Instance Tribunal, depending on the stage that the proceedings have reached.²⁰⁷ The application to become a civil party is decided by the investigating judge or by the trial court, depending on the stage of the proceedings.²⁰⁸ A decision of the investigating judge can be appealed by the prosecutor, the victim or the accused to the indictment chamber.²⁰⁹ A decision of the trial court

²⁰⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, 2 February 2012, para.75.

²⁰⁵ Code of Criminal Procedure, article 7.

²⁰⁶ Law decree 88 of 24 September 2011, article 14.

²⁰⁷ Code of Criminal Procedure, article 39.

²⁰⁸ Code of Criminal Procedure, article 38.

²⁰⁹ Code of Criminal Procedure, article 38. The prosecutor has 4 days from the date of the decision of the investigating judge to lodge an appeal. The victim and the accused have 4 days from the notification of the decision of the investigating

regarding the civil party cannot be appealed.

The civil party has various rights throughout the criminal prosecution process.

Where the prosecutor refers the case to an investigating judge for investigation, the victim can become a civil party without any payment required.²¹⁰ As previously discussed, if the prosecutor has dismissed a case prior to a referral to the investigating judge, the civil party can request that the prosecutor conduct a preliminary investigation or can summon the accused directly before the First Instance Tribunal. However, unless the accused is found guilty, the costs arising from the proceedings must be paid by the civil party to the State.²¹¹

During the investigation, the civil party can be summoned by the investigating judge for the purpose of giving information.²¹² In addition, although not guaranteed in law, the civil party is in practice able to submit information to the investigating judge throughout the investigation.²¹³ There is also a general right for the representatives of all parties to obtain information relating to the proceedings at any stage of the proceedings.²¹⁴ The civil party can make a complaint where he or she believes the investigating judge lacks jurisdiction.²¹⁵ The investigating judge decides on the complaint. This decision can be appealed to the indictment chamber. The civil party can also request that an expert chosen by the investigating judge recuse him or herself from the case.²¹⁶ Such a request is decided by the investigating judge without a possibility of appeal.²¹⁷

Where the investigating judge has completed an investigation and thereafter closes proceedings the civil party can appeal against this decision before the indictment chamber within four days of being notified of the order.²¹⁸

The civil party is entitled to obtain copies of all documents in relation to proceedings before the indictment chamber.²¹⁹ Unlike the prosecutor, the civil party is prohibited from attending the hearing before the indictment chamber and is limited to making written submissions, either on its own or through a lawyer.²²⁰

The civil party is also entitled to receive copies of all documents relating to trial proceedings before the First Instance Tribunal.²²¹ During the hearing, both the civil party and the accused can ask questions, including questions to witnesses, through the President of the tribunal.²²² However, in practice lawyers informed the ICJ that judges sometimes refuse this right, even before listening to the question.²²³ The civil party can also present its conclusions at the hearing and request the court to hear witnesses.²²⁴ In addition, where the prosecutor and the accused do not object, the civil party can give evidence during the hearing.²²⁵ The court decides on the request to hear witnesses. There is no right of appeal

judge in which to lodge an appeal.

²¹⁰ Code of Criminal Procedure, article 39, paragraph 2.

²¹¹ Code of Criminal Procedure, article 192.

²¹² Code of Criminal Procedure, article 63.

²¹³ ICJ interview with civil party lawyers, 23 September 2014.

²¹⁴ Code of Criminal Procedure, article 193.

²¹⁵ Code of Criminal Procedure, article 75.

²¹⁶ Code of Criminal Procedure, articles 75 and 101.

²¹⁷ Code of Criminal Procedure, article 101.

²¹⁸ Code of Criminal Procedure, article 109.

²¹⁹ Code of Criminal Procedure, article 114.

²²⁰ Code of Criminal Procedure, article 114.

²²¹ Code of Criminal Procedure, article 193.

²²² Code of Criminal Procedure, article 143.

²²³ ICJ interview with civil party lawyers, 23 September 2014.

²²⁴ Code of Criminal Procedure, articles 143 and 144.

²²⁵ Code of Criminal Procedure, article 160. This evidence is not given under oath.

against this decision.²²⁶ At any time during proceedings, the civil party can request a summons for a witness or the accused to appear at the hearing. If the summons is requested by the civil party, it must include the name, profession and address of the civil party.²²⁷

In interviews with lawyers representing civil parties in cases of gross human rights violations, the ICJ was told about numerous instances where judges demonstrated prejudice in favour of the accused over the civil party. In at least two cases, including cases involving victims of torture (Rached Jaïdane and Abderrazak Ounifi), the First Instance Tribunal accepted without question the defence counsel's requests for repeated adjournments of the case, despite the fact that the requests appear to have been made solely for the purpose of delaying proceedings. In addition, in the Rached Jaïdane case, the investigating judge at the Tunis First Instance Tribunal refused to hear some of the witnesses requested by the civil party, notably the head of the Presidential Guard and the President of the Chamber of Counsellors who were allegedly aware of the torture being inflicted on the victim at the "9 April" prison in Tunis, without providing reasons for the refusal.

Civil parties have faced similar obstacles before military tribunals where the same Code of Criminal Procedure applies. For example, lawyers representing civil parties in the cases of individuals killed and wounded during the 2011 Uprising in Thala and Kasserine informed the ICJ that their requests for access to information were managed differently by the First Instance Military Tribunal in El Kef. The Tribunal either refused to respond to requests, refused the request without reason, especially when the request was to summon a witness, or sent the requests to the Ministry of the Interior, which in turn did not always claim that such requests were impossible to implement because the evidence was burnt when the premises were set on fire. The information the lawyers requested access to was essential for identifying those responsible and included: the lists of law enforcement and security officers in service in the different governorates during the uprising; and phone and other communication records between senior officials at the Ministry of the Interior and those in command in the field.

The civil party can lodge an appeal to the Court of Appeal and to the Court of Cassation, but only as regards matters pertaining to the civil claim.²²⁸ Furthermore, the civil party can only appeal to the Court of Cassation where the prosecutor has already lodged an appeal.²²⁹

Under Law No. 2002-52, both the accused and the civil party can apply for legal aid.²³⁰ Legal aid can cover some or all of the costs of the procedure, including court fees, expert reports, notary fees, travelling to the crime scene, summonses and notifications, translation and lawyers' fees.²³¹ A Legal Aid Bureau, established in each First Instance Tribunal, decides on the applications.²³² This decision cannot be appealed.²³³ Legal aid is granted if the applicant has no income or has an annual income which is limited and not sufficient to cover the legal costs and costs of enforcing the judgment without affecting the applicant's essential needs in a substantial way.²³⁴ According to civil party lawyers that the ICJ met with, this provision is not interpreted strictly.

However, the legal aid system is largely ineffective and the resources dedicated to it are insufficient to meet the demand. According to a recent study, the Legal Aid Bureau which should take responsibility for examining the requests both to cover legal costs and lawyers' fees, in reality does not discharge this function and the decisions are in fact taken by deputy prosecutors designated by the public

²²⁶ Code of Criminal Procedure, article 144.

²²⁷ Code of Criminal Procedure, article 135.

²²⁸ Code of Criminal Procedure, articles 210 and 258.

²²⁹ Code of Criminal Procedure, article 260.

²³⁰ Law No. 2002-52 of 3 June 2002 on the granting of legal aid, article 1.

²³¹ Law No. 2002-52 of 3 June 2002 on the granting of legal aid, article 14.

²³² Law No. 2002-52 of 3 June 2002 on the granting of legal aid, article 4.

²³³ Law No. 2002-52 of 3 June 2002 on the granting of legal aid, article 13.

²³⁴ Law No. 2002-52 of 3 June 2002 on the granting of legal aid, article 3.

prosecutor.²³⁵ While some civil society organizations offer legal assistance to victims, this is only done infrequently and on emblematic cases.

ii. Assessment in light of international law and standards

Under international standards, the State is responsible for “Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information”.²³⁶ The right to information applies to all phases of the proceedings and includes access to information regarding the procedures followed, the substance of investigations, the content of decisions and the reasons for those decisions.

Victims’ participation is also central and closely linked to the right to information.²³⁷ In its General Comment on redress, the Committee against Torture “emphasizes the importance of victim participation in the redress process”.²³⁸ Consequently, judicial remedies should involve victims at all stages of the procedure, including during the investigation process and during the trial itself. This is affirmed by the Principles on Extra-legal Executions: “Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence”.²³⁹ Similarly, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sets out various criteria for ensuring that judicial processes respond to the needs of victims and require States to ensure information and participation.²⁴⁰

Specific rights exist for victims and family members in relation to autopsies and medical examinations. For example, where the victim has died as a result of the violation, the family should be notified immediately upon identification of the body and has the right to insist that a medical or other qualified representative be present at the autopsy.²⁴¹

International law, including article 14 of the ICCPR, is clear that in relation to all proceedings before the courts all parties have the right to equality of arms.²⁴² As the HRC has explained, “this means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant”.²⁴³

In order for victims to be able to participate in proceedings, international standards recognise the obligation on States to provide appropriate assistance to victims throughout the legal process.²⁴⁴ Such

²³⁵ Avocats Sans Frontières and ATL MST/SIDA, *L’état de l’aide légale en Tunisie*, 29 April 2014, page 60, available at: <http://www.asf.be/blog/publications/letat-de-laide-legale-en-tunisie/>, last accessed 22 January 2016.

²³⁶ Basic Principles of Justice for Victims of Crime, para.6; See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle P(f).

²³⁷ UN Principles on Extra-legal Executions, Principle 16. See also UN Principles on Investigation and Documentation of Torture, Principle 4; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guidelines 7(e); and Updated Principles on Impunity, Principle 19, which affirms that “States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein”.

²³⁸ Committee against Torture, General Comment No.3, para.4.

²³⁹ UN Principles on Extra-legal Executions, Principle 16. See also UN Principles on Investigation and Documentation of Torture, Principle 4; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guidelines 7(e); and Updated Principles on Impunity, Principle 19, which affirms that “States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein”.

²⁴⁰ Basic Principles of Justice for Victims of Crime, Principle 6(b). See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle P(f)(2).

²⁴¹ UN Principles on Extra-legal Executions, Principle 16.

²⁴² See also article 3 of the ACHPR; article 24 of the ACHR; article 14 of the ECHR and Protocol No.12; and article 7 of the UDHR.

²⁴³ *Id.*, para.13.

²⁴⁴ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle P(f)(3). Basic Principles of Justice for Victims of Crime, Principle 6(c).

assistance may include the provision of legal assistance, where appropriate.²⁴⁵ As stated by the HRC in relation to the ICCPR, “The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3(d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it.”²⁴⁶ In this regard, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems affirm that “Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime”.²⁴⁷

As a civil party in Tunisian criminal proceedings, victims have the ability to challenge various decisions, receive information relating to proceedings and to participate in court proceedings. However, these rights are restricted in numerous ways in law and practice thereby impairing their effectiveness. In particular, the ability of civil parties to submit information and to participate in the investigation process is entirely at the discretion of the investigating judge. The limited time-frame of four days during which victims can challenge the investigating judge’s decision to close a case poses an additional obstacle, particularly given the lack of notice victims may have regarding the time limit. Exclusion from access to the hearing of the indictment chamber and the lack of the ability to make oral submissions also prevents the victim from effectively challenging such a decision.

Victims, including family members, also lack rights in relation to the conducting of autopsies and medical examinations. Furthermore, investigating judges have complete discretion both regarding the appointment of experts and to determine whether an expert should recuse him or herself from a case, with no right of appeal against such a decision. The numerous reports of false autopsies and medical reports in relation to cases involving gross human rights violations demonstrates the need to enhance the rights of victims in this regard.

Although victims can present conclusions during trial proceedings and can summon witnesses, the latter is dependent on approval of the judge. The apparent bias of the trial judge in certain cases, taking decisions against civil parties and in favour of the accused without providing objective and reasonable grounds for the decision, has undermined the ability of victims to access justice, including by ensuring key witnesses are heard, and is contrary to international standards on equality of arms between parties to a judicial proceeding and the requirement for judges to act without bias.

The ICJ welcomes the fact that victims of human rights violations are able to apply for and receive legal aid. However it is concerned about the effectiveness of this system. A recent study highlighted how only a very limited number of individuals within the statistical sample benefited from legal aid, largely due to the fact that many individuals do not know about its existence.²⁴⁸ In addition, the absence of criteria to determine the insufficiency of income to qualify for legal aid leaves great discretion to the deciding body and does not guarantee equality of treatment between applicants.

In light of the above, Tunisian authorities should enact the necessary legal and policy reforms, including to the Code of Criminal Procedure to:

- i) Ensure that the civil party has a formal right to submit information during the investigation process;**

²⁴⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle P (f)(3). See also the Basic Principles on the Right to Remedy and Reparation, Principle 12(c).

²⁴⁶ HRC, General Comment No.32 “Article 14: Right to equality before courts and tribunals and to a fair trial”, UN Doc. CCPR/C/GC/32, 23 August 2007, (hereinafter HRC, General Comment No.32) para.10.

²⁴⁷ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 4 and Guideline 7. Guideline 7(c) of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems details the obligation on States in this regard, including the requirement to ensure that, “Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation”. See also the Basic Principles on the Right to Remedy and Reparation, Principle 12(d); and see Principle 14 of the Basic Principles of Justice for Victims of Crime, which requires the State to provide the necessary “material, medical, psychological and social assistance” for victims; ICC Rules, Rule 90(5) and Charter of Fundamental Rights of the European Union, 2000, article 47.

²⁴⁸ Avocats Sans Frontières and ATL MST/SIDA, *L’état de l’aide légale en Tunisie*, 29 April 2014, pages 85 and following, available at <http://www.asf.be/blog/publications/letat-de-laide-legale-en-tunisie/>, last accessed 22 January 2016.

- ii) **Extend the four-day time period within which parties must lodge an appeal against a decision of the investigating judge to dismiss or proceed with a case (article 109 of the Code of Criminal Procedure);**
- iii) **Ensure that victims are provided with full information regarding the applicable procedure throughout the investigation and prosecution process, their rights in relation to the investigation and trial, and any time-limits for exercising these rights;**
- iv) **Ensure that, in cases resulting in the death of an individual, the family are notified immediately upon identification of the body and have the right to insist that an independent medical or other qualified representative be present at the autopsy;**
- v) **Ensure that all parties can request an expert, in particular a medical examiner, to be appointed and can appeal against any decision of an investigating judge to refuse such request;**
- vi) **Ensure that all parties can appeal against the decision of the investigating judge, where a request for recusal of an expert is dismissed;**
- vii) **Given the history of prosecutors failing to act in the interests of victims, consider providing a right for all parties, including the civil party, to attend the hearing of the indictment chamber and to make oral submissions before the indictment chamber;**
- viii) **Ensure adoption of a code of conduct for prosecutors, developed by or in consultation with the judiciary, conforming to international standards such as the UN Guidelines on the Role of Prosecutors and the IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of the Prosecutor;**
- ix) **Ensure adoption of a code of conduct for judges, developed by or in consultation with the judiciary, conforming to international standards such as the Bangalore Principles and including the requirement to ensure equality of treatment to all parties and not to manifest bias or prejudice to any group or person on any irrelevant grounds; and**
- x) **Strengthen the role of the Legal Aid Bureaux in assisting victims and in ensuring individuals know about the possibility to be granted legal aid, and ensure the decision about granting legal aid is taken by the Legal Aid Bureaux and not by Deputy Prosecutors; and**
- xi) **Set clear criteria for entitlement to legal aid, particularly in relation to determining income, which comply with international standards such as the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.**

E. Victim and witness testimony and protection

i. Tunisian legal framework and practice

During the course of the investigation, the investigating judge can question any witness whose testimony is considered useful.²⁴⁹ The investigating judge can order a witness who fails to attend for questioning to pay a fine. If the witness fails to attend for a second time the investigating judge can order that the witness is brought before the court.²⁵⁰ The investigating judge can also order that a witness be brought face to face with other witnesses or with the accused.²⁵¹ Witnesses can also be required to testify during trial proceedings.²⁵²

No provisions for the protection of witnesses and victims are included in the Code of Criminal Procedure. Consequently, in cases involving gross human rights violations there are generally no protection mechanisms available for witnesses and victims. Protection measures are only available for witnesses and victims in relation to “terrorism” cases brought pursuant to the new Law on Counter-Terrorism

²⁴⁹ Code of Criminal Procedure, article 59.

²⁵⁰ Code of Criminal Procedure, article 61.

²⁵¹ Code of Criminal Procedure, article 65.

²⁵² Code of Criminal Procedure, article 135.

No. 26-2015 that abrogated the Law No. 2003-75 providing similar measures.²⁵³

In cases subject to the new Law on Counter-Terrorism, the investigating judge can question the witness separately and decide not to bring the witness face to face with the defendant or any other witness, at the witness' request or if the judge believes the witness's testimony is not the most important.²⁵⁴ Law No. 26-2015 also allows for "necessary measures" to be taken to protect victims and witnesses and their respective family members.²⁵⁵ Article 73 also stipulates that the investigating judge or the president of the court could decide in cases of imminent danger to move the location of the investigation or questioning. In addition, under Law No. 26-2015, witnesses in terrorism cases can testify anonymously and either via video link or via recorded audio evidence. Where the witness is testifying anonymously, the accused or his or her attorney can request to know the identity of the witness. The judicial authority in charge of the case rules on this request. Such a ruling can be appealed.²⁵⁶

In practice, the lack of protection for witnesses, victims and their families in human rights cases has resulted in their subjection to harassment and threats by the accused, family members of the accused and law enforcement officials. Such harassment was pervasive under the Ben Ali regime.

Lack of victim and witness protection

In the case of Rachid Chammakhi, the victim was arrested on 24 October 1991, having been convicted *in absentia*, earlier that year, because of his suspected membership of Ennahda. On 28 October 1991, the victim's father was informed that his son had died in custody, allegedly from jaundice. After the victim's father filed a complaint with the public prosecutor, his home was repeatedly subjected to night raids by law enforcement officials and his family was subjected to harassment and threats. On 21 November 1991 the investigating judge closed the case on the basis that he had apparently received a medical report stating that the victim died of acute kidney failure.

Harassment of victims and witnesses has also been used since the overthrow of the regime in an attempt to pressure victims and family members to drop charges. In some cases involving individuals killed or injured during the 2011 Uprising, victims and/or their families have been targeted by family members of the accused and by law enforcement officials, who have threatened them with retaliation or offered money in exchange for the charges being dropped. In cases brought before the First Instance Military Tribunal of El Kef for the killing and injuring of individuals in Thala and Kasserine during the 2011 Uprising, victims, family members and civil party lawyers were threatened by security officers. Throughout proceedings, the accused law enforcement officials remained in their position.

In other examples, as examined below, Judicial Police and other investigating authorities have demonstrated a complete insensitivity to the rights of victims, as well as to their physical and psychological well-being.

Re-traumatization of victims during investigations

In June 2013, Mohamed Kussaï Jaïbi filed a complaint regarding torture that took place in 1991 in Ariana police station in the north of Tunis. Six months after filing the complaint Mr Jaïbi was interviewed by the Judicial Police for the purposes of the preliminary inquiry. According to Mr Jaïbi's lawyer, Mr Jaïbi requested that his lawyer accompany him but this request was refused.

²⁵³ Law on Counter-Terrorism and Suppression of Money Laundering (Loi organique N°22/2015 relative à la lutte contre le terrorisme et la répression du blanchiment d'argent) of 7 August 2015 and Law 2003-75 of 10 December 2003 on the support of international efforts to fight terrorism and money laundering.

²⁵⁴ Law No.26-2015, article 46.

²⁵⁵ Law No.26-2015, article 71.

²⁵⁶ Law No.26-2015, article 76.

Furthermore, the police interview lasted for five hours, throughout which Mr Jaïbi was not permitted to take a break, to eat or to call his family.²⁵⁷ The interview was held in the same police station where the alleged torture took place. The victim reported significant re-traumatization as a result of this experience.

During interviews conducted by the ICJ with victims of human rights violations committed during the uprising in the Grand Tunis, Thala and Kasserine regions, the victims repeatedly shared their sense of frustration and injustice regarding the hostile attitude of the judicial authorities. In particular, the attitude of the military judiciary with regards to the families of those killed and injured during the uprising is at the heart of a deep frustration with and mistrust of the criminal justice system held by victims. In one interview held with family members of victims, the ICJ was told: "The military judges treat us as if we were the enemy, the ones who did something wrong".²⁵⁸

ii. Assessment in light of international law and standards

Under international law, States must protect victims and their families from re-traumatisation and from all forms of violence and intimidation.²⁵⁹ As recognised by the Basic Principles on the Right to a Remedy and Reparation, victims should be treated "with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families."²⁶⁰ Furthermore, victims "should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation,"²⁶¹ by avoiding, for example, unnecessary repeated questioning of the victim.

Moreover, in ensuring the victims' right to access justice, the State should offer sufficient protection to alleged victims of human rights violations, witnesses and their families throughout the criminal justice process. As was made clear by the Committee against Torture, "[f]ailure to provide protection stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy."²⁶²

The obligation to provide sufficient protection is explicitly recognised in article 13 of the CAT, according to which "[s]teps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given", and is similarly recognised under article 12(1) of the ICPED. Furthermore, the HRC has recognized that the right to liberty and security of the person enshrined in article 9(1) of the ICCPR may require protection for victims where there are threats to their personal security.²⁶³ In addition, the prevention of intimidation of victims and witnesses is key to ensuring the right to a fair hearing, which is enshrined in article 14 of the ICCPR.²⁶⁴ The Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration)

²⁵⁷ ICJ interview held on 13 May 2014 with Najet Labidi, civil party lawyer in the cases of Barraket Essahel, Abderrazek Ounifi and Koussaïd Jaïdi.

²⁵⁸ ICJ interview held on 28 February 2013, with Ali Mekki, President of the "Association for the protection of the Rights of the Martyrs and the Injured of the Tunisian Revolution Lan Nansakoum (We will not forget you)" and whose brother was killed during the uprising. The case concerned those injured and killed in Thala and Kasserine and was being heard before the First Instance Military Tribunal of Sfax.

²⁵⁹ Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289 (2011) para.62. See also the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions UN Doc. A/63/313, 20 August 2008, para.14, which states: "The provision of adequate assistance to witnesses, family members, and others against whom retaliation is feared, is thus a necessary condition for breaking the cycle of impunity."

²⁶⁰ Basic Principles on the Right to a Remedy and Reparation, Principle 10. See also ACHPR Principles and Guidelines, Section P, Principle (a); Basic Principles of Justice for Victims of Crime, article 4.

²⁶¹ Basic Principles on the Right to a Remedy and Reparation, Principle 10.

²⁶² Committee against Torture, General Comment No. 3: Implementation of article 14 by States parties, CAT/C/GC/3, 13 December 2012, para.31.

²⁶³ Decision of the HRC, *Rajapakse v Sri Lanka*, Communication No. 1250/2004, CCPR/C/87/D/1250/2004, para.9.7.

²⁶⁴ See also General Comment No.32 of the HRC: Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 2007, where the HRC recognised that it may be necessary to appoint a lawyer for the accused "to

specifically recognizes the role of judges in this regard.²⁶⁵ In particular, the duty to protect victims and witnesses requires States to take measures to ensure the physical and psychological well-being of victims.²⁶⁶ Examples of measures that may be required to protect victims and witness include, among others, provision of a contact officer so intimidation can be reported, physical screens hiding witnesses from suspects during identity parades, court orders aimed at preventing harassment of the victim or witness, separate waiting facilities for victims in court buildings and police stations, allowing victims to give evidence via video or closed-circuit television and restrictions on public reporting of the identity or certain other private details of the victim.²⁶⁷ Any measures taken to protect victims and witnesses must be consistent with the rights of the accused and the requirements of a fair trial.²⁶⁸

The duty on the State to ensure that victims and witnesses are afforded adequate protections throughout the entirety of the criminal justice process is not fulfilled in Tunisia. The only protection mechanisms available are restricted to those cases that are designated as “terrorism” cases, within the definition of the new Law on Counter-Terrorism No. 26-2015. Some of the measures provided for may not be compatible with the rights of the accused and requirements of the right to a fair trial. Meanwhile, no protection mechanisms exist for victims or witnesses concerning cases of gross human rights violations more generally. Given the risk of protection issues in such cases, a detailed law on protection of victims and witnesses in human rights cases should be adopted to ensure the safety and security of victims and witnesses.

In many instances, victims of gross human rights violations in Tunisia are not treated with dignity and humanity by criminal justice actors. Nor are they provided with the physical and psychological support they should be afforded in accordance with international standards. Instead, they are routinely harassed verbally and physically and subjected to intimidation and to long and extensive questioning without a break, often in an attempt to persuade them to drop their complaint. Not only does this deny their right to access justice, it also results in their re-traumatization.

Extensive reforms are required to ensure the protection of witnesses and the physical and psychological well-being of victims of gross human rights violations. To this end the Tunisian authorities should:

- i) While taking into account the rights of the accused and the requirements of a fair trial, take the necessary legal and policy reforms to minimize the risk of re-traumatization or other forms of further harm to victims and their representatives, protect against unnecessary interference with their privacy, and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings, including by:**
 - a. Implementing legal and administrative measures to protect victims and witnesses of human rights violations, whether by enacting new provisions or by extending the provisions of Law No. 2003-75 to such victims and witnesses after reforming the provisions of Law No. 2003-75 to better respect fair trial**

protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused”.

²⁶⁵ Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration), Principle 37. The Singhvi Declaration, which also formed a basis for the UN Basic Principles on the Independence of the Judiciary, was formally recommended to States by the Commission on Human Rights in Resolution 1989/32, UN Doc. E/CN.4/RES/1989/32.

²⁶⁶ Basic Principles on the Right to a Remedy and Reparation, Principle 12(b). See also, ACHPR Principles and Guidelines, Section P, Principle (f)(4); Basic Principles of Justice for Victims of Crime, para.6(d); UN Principles on Investigation and Documentation of Torture, Principle. 3(b); and The Updated Principles on Impunity, Principle 10. See also, Human Rights Council, Resolution 12/12: Right to the truth, A/HRC/RES/12/12, 12 October 2009, para.6

²⁶⁷ United Nations High Commissioner for Human Rights, Report on the Right to the Truth (protection of witnesses), UN Doc A/HRC/15/33 (28 July 2010); and Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions A/63/313, 20 August 2008, paras.15-47.

²⁶⁸ High Commissioner for Human Rights, Report on the Right to the Truth (protection of witnesses), UN Doc A/HRC/15/33 (28 July 2010), para.5; European Court of Human Rights: A.S. v Finland (40156/07), (2010) para.55, Perez v France (47287/99), Grand Chamber (2004) paras.70-72; CoE Committee of Ministers Recommendation No. R (97)13 paras.2, 6; Special Rapporteur on human rights and counter-terrorism, UN Doc. A/HRC/20/14 (2012) paras.42, 67(g); See Prosecutor v Milošević (IT-02-54), ICTY Trial Chamber, Decision on Prosecution Motion for Provisional Protective Measure Pursuant to Rule 69 (19 February 2002) para.23.

rights;

- b. Establishing training and guidelines for law enforcement officials to ensure victims and witnesses are treated with humanity and respect for their dignity and human rights and that independent complaints mechanisms are available where these standards are not met;**
- c. Providing a contact officer to victims and witnesses who is independent from any suspect or government agency in the case;**
- d. Establishing separate waiting facilities for victims in court buildings and police stations;**
- e. Empowering judges to be able to issue court orders to protect victims and witnesses and to impose reporting restrictions to protect the identity and privacy of the victim, on the basis of clearly-defined criteria that comply with the fair trial rights of the accused and the rights of other persons; and**
- f. Ensuring that the professional codes of conduct for judges and prosecutors include the requirement to ensure the fair conduct of the trial and to inquire fully into any allegations made of a violation of the rights of a party or of a witness.**

2. OTHER LEGAL AND PRACTICAL OBSTACLES TO INDIVIDUAL CRIMINAL RESPONSIBILITY

Having addressed the procedural mechanism through which victims of gross human rights violations secure their right to a judicial remedy insofar as it applies in the criminal justice context and through which those responsible are held to account, this section examines other legal and practical obstacles that exist in the Tunisian criminal justice system, which hamper the ability of victims to claim their right to a judicial remedy.

A. Definition of offences

States are under an obligation to ensure that human rights violations that constitute crimes under international law are punishable as an offence under domestic criminal law. The failure of States to enact legislation that criminalizes such violations of human rights obstructs the victim's capacity to access a remedy, including for those responsible to be held to account.

Although Tunisia has ratified most international human rights treaties, including the ICCPR, the CAT and the ICPED, it has failed to ensure that its national legislation criminalizes all human rights violations of a criminal character in line with the definitions of such offences under international law.²⁶⁹ In addition, although the 2014 Constitution introduces explicit prohibitions of gross human rights violations it does not explicitly recognise the non-derogable nature of certain rights in times of emergency, in line with article 4(2) of the ICCPR.²⁷⁰

i. Extrajudicial executions

1. Tunisian legal framework

Article 22 of the 2014 Constitution states "the right to life is sacred, it cannot be infringed upon except in extreme cases provided for by law".

The Criminal Code punishes homicide, when it is both intentional and premeditated, with the death penalty.²⁷¹ Premeditation "consists of a plan, developed before the action, to carry out an attack against another person".²⁷² Homicide that is intentional but not premeditated is punishable with life imprisonment.²⁷³ If the author of the offence intentionally injures the victim and the injuries lead to the death of the victim, the perpetrator can face up to 20 years imprisonment.²⁷⁴ Unintentional homicide caused by clumsiness, carelessness, negligence, distraction or failure to comply with regulations is

²⁶⁹ Tunisia has ratified the CAT, the ICCPR, the ICPED, the CEDAW, CERD, ICESCR, Convention on the Rights of Persons with Disabilities (CRPD), and the CRC. In addition, it has accepted individual complaint procedures for the CAT, the ICCPR, CEDAW, and the CRPD.

²⁷⁰ Article 4 of the ICCPR provides in relevant part as follows: "1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision." The listed articles include among other things the right not to be arbitrarily deprived of life, the prohibition of torture, the prohibition of retroactive criminal laws, and the right to freedom of thought, conscience and religion. The Human Rights Committee has highlighted additional non-derogable aspects of other rights (such as aspects of the right to fair trial under article 14 or the prohibition of arbitrary detention under article 9) in its General Comment no. 29 on states of emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 Aug 2001).

²⁷¹ Criminal Code, article 201. Capital punishment is provided for by article 5 of the Criminal Code. Since 1991, death sentences have been commuted to prison sentences following a decision of the official commutation commission on a case-by-case basis. In December 2012, Tunisia voted in favour of a United Nations General Assembly's Resolution on a moratorium on death penalty. See General Assembly, Resolution A/RES/67/176, 20 March 2013. Details of the vote are available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/67/PV.60, last accessed 25 January 2016.

²⁷² Criminal Code, article 202.

²⁷³ Criminal Code, article 205.

²⁷⁴ Criminal Code, article 208.

punishable with two years imprisonment and a fine of 720 dinars.²⁷⁵

The majority of extrajudicial killings in Tunisia are caused by torture or by the excessive use of force by law enforcement officials, particularly in relation to protests and demonstrations.

The law on the ISF affirms that all use of firearms by police forces must be in accordance with the provisions of the Criminal Code relating to self-defence (article 39), the protection of property (article 40), acts carried out pursuant to other laws or orders from the competent authority (article 42) and in accordance with Law No. 69-04.²⁷⁶

Article 39 on self-defence states that “there is no crime when the person was faced with a circumstance that exposed his life or that of his relatives to an imminent danger and when this danger could not be otherwise avoided”.²⁷⁷ This was subsequently clarified by the Court of Cassation as meaning: “there is no crime when the victim puts the life of the accused or the accused’s relative at risk through an imminent danger”.²⁷⁸ If the person is not a relative the judge has discretion to “assess the degree of responsibility”. However article 40 provides for broader circumstances for anyone to use lethal force, including in case of defence against persons trespassing on or involved in looting and theft carried out with violence. Article 42 states that acts committed pursuant to a law or an order of the competent authority are not punishable. In relation to orders given to members of the ISF by their superiors, article 46 of the law on the ISF states that its officers “are responsible for the tasks they have been entrusted and the execution of orders given to them by their superiors within the bounds of legality”.²⁷⁹

Law No. 69-04 on public meetings, processions, parades, public gatherings, and assemblies, contains specific provisions on the use of firearms by law enforcement officers.²⁸⁰ According to article 20, law enforcement officers may use firearms in three cases:

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

Law No. 69-04 also contains a procedure for law enforcement officials to follow where a public gathering is “unlawful”. The definition of “unlawful” includes all armed public gatherings and non-armed public gatherings, which are considered likely to disturb the peace.²⁸¹ If the protesters refuse to disperse in spite of warnings, law enforcement officers are permitted to use force. Article 21 permits the following methods to be used in the order in which they are listed: (1) water cannons or striking with batons; (2) teargas; (3) firing into the air; (4) firing above the heads of the protesters; (5) firing towards their legs.²⁸² According to article 22 of Law No. 69-04, if “the protesters try to achieve their goal by force despite having used all of these means,” then “the security agents will fire directly on them”.

In practice, law enforcement officials do not respect this sequence for escalation procedure before using firearms. In addition, force is often used disproportionately.²⁸³ Although members of the ISF

²⁷⁵ Criminal Code, article 217.

²⁷⁶ Law No. 82-70 on the ISF, article 3.

²⁷⁷ Relatives are ascendants or descendants, brothers and sisters and husbands and wives.

²⁷⁸ Court of Cassation, Decision No.31839, 6 March 1990, page 156.

²⁷⁹ Law No. 82-70, article 46.

²⁸⁰ Law No. 69-04 of 24 January 1969, regulating public meetings, processions, parades, public gatherings, and assemblies, articles 15-19. The use of force by the ISF is also regulated by article 3 of the Law No. 82-70.

²⁸¹ Law No. 69-04 of 24 January 1969, regulating public meetings, processions, parades, public gatherings, and assemblies, article 13.

²⁸² Law No. 69-04 of 24 January 1969, regulating public meetings, processions, parades, public gatherings, and assemblies, article 21.

²⁸³ See for example, Human Rights Watch, “Tunisia: Riot Police Fire Birdshot at Protesters”, 1 December 2012, available

can be subject to disciplinary or criminal sanctions for misconduct committed in the exercise of their duties, such measures and sanctions were rarely used in practice.²⁸⁴

Unlawful killings and excessive use of force: Case No. 95646 –First Instance Tribunal of the Permanent Military Court of El Kef

This case comprised several separate incidents that took place from 8 to 10 January 2011 in Kasserine, from 8 to 12 January in Talah and on 14 January in Kairouan and Tajerouine. According to the Court, these incidents resulted in the death of 22 persons and injuries to 615 persons. This section considers the judgment of the Court in relation to the three principal perpetrators convicted of killings and attempted killings.

Wissam Al Wartatani (Head of the National Security Centre in Kasserine)

The accused, who was Head of the National Security Centre in Kasserine, was charged with premeditated intentional killing and attempted premeditated intentional killing (articles 32, 59, 201 and 202 of the Criminal Code).

The Court found that the accused opened fire on Abdel Basset Al Qassimi, hitting him in the chest and stomach, which caused his death.²⁸⁵ The Court also found that the accused attempted to kill Naim Assahili when he shot him in the thigh once and fired other bullets at him, which missed.²⁸⁶ The Court concluded that the accused was guilty of intentional killing because “he opened fire at demonstrators and he intentionally killed Al Qassimi”.

In relation to the attempted killing of Assahili, he was found to have escaped death by stepping backwards so that the bullets hit the wall. The Court therefore noted that the survival of Assahili was due to circumstances that were beyond the will of the accused. On the question of premeditation, the Court took into account a series of factors, including the fact that he continued to fire on Assahili after an officer in the Intervention Unit ordered him to shoot Assahili in the head. The Court found the accused guilty of premeditated attempted murder and intentional murder pursuant to articles 59, 201, 202 and 205.²⁸⁷

Bachir Bettibi (Lieutenant Colonel in the Intervention Units)

The accused was charged with premeditated intentional murder of Wajdi Assaihi on the 12 of January 2011.

The Court found that the killing could not be premeditated since it was not planned in advance and instead was due to the circumstances of the moment, namely confrontations between security forces and demonstrators.

The Court found that the material element of intentional murder was present since the deceased died because the accused used a lethal weapon against him.²⁸⁸ The Court also found that the “moral element” was present since the accused aimed at Assaihi using a lethal weapon and opened fire.²⁸⁹ Therefore, the Court found the accused guilty of intentional murder pursuant to article 205 of the Criminal Code.

at <http://www.hrw.org/news/2012/12/01/tunisia-riot-police-fire-birdshot-protesters>, last accessed 25 January 2016; Human Rights Watch, “Tunisia: Protesters Describe Teargas Attacks, Beatings”, available at <http://www.hrw.org/news/2013/07/29/tunisia-protesters-describe-teargas-attacks-beatings>, last accessed 25 January 2016.

²⁸⁴ Law No. 82-70, articles 49 and 22.

²⁸⁵ Case No. 95646, Judgment, p.717.

²⁸⁶ Case No. 95646, Judgment, p.718.

²⁸⁷ Case No. 95646, Judgment, p.719.

²⁸⁸ Case No. 95646, Judgment, p.721.

²⁸⁹ Case No. 95646, Judgment, p.722.

Mohamed Al Moujahid Balhoula (Captain in the Intervention Unit)

The accused was transferred to Kasserine on 4 January 2011. On 8 January 2011 he was appointed to supervise Azouhour neighbourhood.

The accused was found by the Court to have been carrying a gun and to have opened fire on Mohamed Amin Al Mubarak. The Court noted that the accused used the weapon without respecting the requirements of article 21 of Law No. 4 of 1969. The Court found that since the accused opened fire at the head of the accused the material element of the crime of intentional killing was met. In addition, the Court found that the accused had the intention to kill since: he used a lethal weapon; he aimed at an area of the body that is vulnerable; and the strength of the wound demonstrated an intention to kill.²⁹⁰

The accused was convicted of intentional murder pursuant to article 205 of the Criminal Code.

2. *Assessment in light of international law and standards*

As enshrined by article 6 of the ICCPR, everyone is entitled to the right to life, which shall be protected by law. No one shall be arbitrarily deprived of his or her life.²⁹¹ The right to life is a supreme right, it cannot be derogated from even "in time of public emergency which threatens the life of the nation".²⁹² The right to life obliges States to take measures "not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. [T]he law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."²⁹³

Extra-judicial, arbitrary and summary executions encompass numerous violations of the right to life including the unlawful application of the death penalty, deaths in custody, deaths due to abuse of power by law enforcement officials and violations of the right to life during armed conflicts.

According to the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution, States must criminalize all extrajudicial, arbitrary and summary executions, make such crimes punishable by appropriate penalties, and bring the perpetrators to justice.²⁹⁴ The HRC has similarly held that article 2 of the ICCPR requires that states ensure that all those responsible for acts of summary or arbitrary killing in violation of article 6 are brought to justice through criminal investigations and prosecutions which, in turn, implies criminalization of all such acts.²⁹⁵

International law and standards recognise that in some circumstances law enforcement officials may need to use force to fulfil their duties. However, the use of force must be tightly controlled and these controls enforced.²⁹⁶ The circumstances in which the use of force may be permitted, limits on its use, and accountability requirements are elaborated upon in non-treaty instruments such as the Code of Conduct for Law Enforcement Officials,²⁹⁷ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (the Basic Principles on the Use of Force).²⁹⁸

²⁹⁰ Case No. 95646, Judgment, p.725.

²⁹¹ See also, article 3 of the UDHR.

²⁹² ICCPR, article 4. See also HRC General Comment No.6: Article 6 (Right to life) 1982, para.1; and see HRC General Comment No.14: Article 6 (Right to life), 1984, para.1. In situations of armed conflict to which rules of international humanitarian law are applicable, however, the question whether a deprivation of life is "arbitrary" within the meaning of article 6 may fall to be determined by more specific rules of international humanitarian law.

²⁹³ HRC General Comment No.6, para.3.

²⁹⁴ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Principles 1, 18 and 19.

²⁹⁵ HRC, General Comment No.31, para.18.

²⁹⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 1 April 2014, UN Doc. A/HRC/26/36, para.26.

²⁹⁷ General Assembly resolution 34/169 of 17 December 1979.

²⁹⁸ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and welcomed by General Assembly resolution 45/166 (1990), para.4.

The Code of Conduct for Law Enforcement Officials states that any use of force by law enforcement officials is only permissible “when strictly necessary and to the extent required for the performance of their duty”.²⁹⁹ More detailed provisions are incorporated in the Basic Principles on the Use of Force.³⁰⁰ These provisions make clear that the use of force is a last resort. Furthermore, “[w]henver the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment”.³⁰¹

The Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force incorporate both a necessity and a proportionality test when determining whether and what level of force is permissible, as explained by the UN Special Rapporteur on extrajudicial killings.³⁰² The UN Basic Principles on the Use of Force also specifically limit the use of firearms against persons “except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.”³⁰³

The principles also strictly prescribe the limits on the intentional lethal use of firearms: “In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”³⁰⁴ Furthermore, when using firearms, officers must “identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident”.³⁰⁵ These principles have been recognised by the UN Special Rapporteur on extrajudicial killings as reflecting rules accepted by States as principles of customary international law.³⁰⁶ The HRC also uses these instruments in interpreting state obligations under the ICCPR,³⁰⁷ as does the African Commission on Human and Peoples’ Rights in interpreting state obligations under the African Charter.³⁰⁸

Pursuant to the Basic Principles on the Use of Force, governments and law enforcement agencies should adopt and implement rules and regulations on the use of force and firearms by law enforcement officials.³⁰⁹ Furthermore, governments should ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under national law.³¹⁰ Exceptional

²⁹⁹ Code of Conduct for Law Enforcement Officials, Principle 3.

³⁰⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 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, (Hereinafter Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), Principle 4.

³⁰¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 5.

³⁰² Interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions submitted by Philip Alston, Special Rapporteur, UN Doc. A/61/311, 5 September 2006, para.41.

³⁰³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9. See also Code of Conduct for Law Enforcement Officials, para.(c) of the Commentary to Principle 3.

³⁰⁴ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9. See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on police oversight mechanisms, UN Doc. A/HRC/14/24/Add.8, 28 May 2010, para.8.

³⁰⁵ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 10.

³⁰⁶ Interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions submitted by Philip Alston, Special Rapporteur, A/61/311, 5 September 2006, para.35.

³⁰⁷ See e.g. Concluding Observations on the United States of America, UN Doc CCPR/C/USA/CO/4 (23 April 2014), para.11.

³⁰⁸ See e.g. Resolution No. 281, on the Right to Peaceful Demonstrations, Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights in Luanda, Angola, 28 April to 12 May 2014.

³⁰⁹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 1.

³¹⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 7.

circumstances cannot be used as a basis for departing from the Basic Principles on the Use of Force.³¹¹

Tunisian law does not adequately protect the right to life. Article 22 of the Constitution is vague and, by not defining the “extreme cases provided for by law” in which the right to life may be infringed upon, risks undermining the essence of the right. Furthermore, as mentioned earlier, the Constitution does not explicitly recognise the non-derogable character of the right to life and prohibition of arbitrary deprivation of life, including in times of emergency, thereby potentially opening the door for unlawful derogations of the right to life.

Although various forms of homicide are criminalized under the Criminal Code, the defences under the Criminal Code and the laws that permit law enforcement officers to use force, including lethal force, do not conform to international standards. In particular, criminal responsibility for the use of force to defend the life of persons other than oneself or family members is entirely at the discretion of the judge. Article 40 of the Criminal Code grants extremely wide discretion for anyone to use lethal force, including against persons trespassing or involved in theft and looting carried out with violent means, without there necessarily being any threat to life or serious injury. Neither article 39 nor article 40 contain any requirements that the use of force is necessary and proportionate in the particular circumstances in which it is used. Article 42 is also extremely broad, permitting any use of force pursuant to laws or orders of a competent authority, and contains no limitations. This defence is examined in more detail in the section below on superior orders.

Articles 20 and 21 of Law No. 69-04 also permit law enforcement officers to use force far beyond the limited circumstances contemplated by international standards. In particular, pursuant to article 20, firearms can be used in numerous circumstances where there is not necessarily any threat of death or serious injury to a person. Tunisian law enforcement officers are permitted to use force to defend any building or to arrest a suspect no matter how trivial the suspected offence is, and to stop a vehicle or other mode of transport. Although under Law No. 69-04, firearms can only be used where other means will be ineffective, there is no requirement to limit the use of force to that which is strictly necessary and in proportion to the seriousness of the threat and the legitimate objective to be achieved.

The use of force to deal with public gatherings also does not meet international standards. The Basic Principles on the Use of Force state that for unlawful but non-violent assemblies law enforcement officials shall avoid the use of force or, if that is not practicable, must restrict any force to the minimum extent necessary.³¹² The general limitations on recourse to firearms under the Basic Principles mean that firearms could never be justified in dispersing non-violent assemblies. For violent assemblies, firearms can only be used when less dangerous means are not practicable and only if necessary. Furthermore, conditions set out in Principle 9 of the Basic Principles on the Use of Force must also be met.³¹³

In Tunisia, under article 21 of Law No. 69-04, force can be used not only to disperse all public gatherings that are armed, but also “un-armed” public gatherings considered “likely to disturb the peace”, both types of gathering being prohibited under article 13 of that law. The use of various methods of force, including ultimately intentional lethal force, is permitted for the purpose of dispersing protestors with no requirements of necessity or proportionately. Indeed, the reason given by the First Instance Military Tribunal of Tunis in Case No. 71191 for why certain law enforcement officials who fired on protestors were not protected by article 21 was that they had not gone through the full procedure required by the law, implying that the use of lethal force would have been permissible if other forceful methods had been tried first, without any analysis of whether such force was strictly unavoidable in

³¹¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 8.

³¹² Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 13.

³¹³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9 reads as follows: “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

order to protect life. In Case No. 95646 the First Instance Military Tribunal of El Kef also found that the use of firearms fell within the framework of Law No. 69-04 but not within articles 20 and 21. As regards Wissam Al Wartatani, the fact that Law No. 69-04 applied was reason enough to disprove premeditation.

Reforms are therefore required to adequately protect the right to life by strictly delimiting the circumstances and way in which force can be used by law enforcement officials in line with international standards. Disciplinary and criminal sanctions should apply where such restrictions are not followed.

Tunisian authorities should comply with their international obligations related to the right to life and the use of force by law enforcement officials, and to this end they should:

- i) Establish a clearly defined legal framework that delimits the use of force by law enforcement officials, including by reforming article 3 of Law No. 82-70, articles 39, 40 and 42 of the Criminal Code and articles 20, 21 and 22 of Law No. 69-04 to require law enforcement officials, at a minimum:**
 - a. to apply, as far as possible, non-violent means before resorting to the use of force and to resort to force only if other means remain ineffective or without any possibility of achieving the intended result;**
 - b. when the use of force is unavoidable, only to use force that is proportionate to the seriousness of the offence and the legitimate objective to be achieved and to minimize damage and injury and respect and preserve human life;**
 - c. to use firearms only in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives;**
 - d. to resort to the intentional use of lethal force only where strictly unavoidable in order to protect life; and**
 - e. to identify themselves as law enforcement officials and to give clear warning of intent to use firearms and sufficient time for the warning to be observed, unless this would unduly place officials at risk or create a risk of death or serious harm to persons or would be clearly inappropriate or pointless in the circumstances;**
- ii) Reform article 21 of Law No. 69-04 to:**
 - a. avoid the use of force when dispersing non-violent unlawful assemblies, except where that is not practicable, and to restrict any force to the minimum extent necessary; and**
 - b. limit the use of firearms in dispersing violent assemblies to situations where less dangerous means are not practicable, and then only to the minimum extent necessary and in accordance with the general restrictions on the use of force and lethal force outlined above;**
- iii) Ensure that this legal framework for the use of force applies to law enforcement in all circumstances, including in situations of internal political instability or other public emergencies; and**
- iv) Ensure disciplinary sanctions and/or criminal offences apply, as appropriate, for failure to comply with restrictions on the use of force and that the arbitrary or abusive use of firearms is criminalized.**

ii. Torture and other ill-treatment

1. Tunisian legal framework and practice

Article 23 of the 2014 Constitution prohibits and criminalizes “all forms of psychological and physical torture”. Article 23 requires the “protection of the dignity of individuals and their physical integrity”, while article 30 requires that detainees be treated with humanity and dignity.³¹⁴

³¹⁴ Article 30 of the 2014 Constitution states: “Every prisoner shall have the right to humane treatment that preserves

Although Tunisia ratified the CAT in 1988, it did not introduce a specific crime of torture into the Criminal Code until 1999.³¹⁵ The 1999 amendment defined torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or when such pain or suffering is inflicted for any other reason based on discrimination of any kind.” This definition closely followed the definition in article 1 of the CAT.

This provision was subsequently amended in 2011 by Law-Decree No. 2011-106. Article 101bis of the Criminal Code, as amended, defines torture as:

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

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

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

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

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

Attempted torture and complicity in torture are also criminalized through the general provisions of the criminal code in force prior to 1999. Under article 59 of the criminal code attempt to commit an offence is criminalized when the offence is punishable by a sentence of more than 5 years in prison (as is the case for the offence of torture). Article 32 defines complicity and article 33 provides that accomplices are sentenced to the same punishment as foreseen for the perpetrators of the offence.

Sentences for torture range from 8 years to life imprisonment or the death penalty.

Law-Decree No. 2011-106 also introduced provisions which either exempt an individual from liability for torture or mitigate the sentence. Article 101ter states: “is exempted from criminal liability a public officer, or other person acting in an official capacity, who took the initiative, before the competent authorities become aware of the case, and after he received an order to commit torture, was incited to commit torture or became aware of acts of torture, of informing, the administrative or judicial authorities thereby disclosing the offence or avoiding its commission. The applicable penalty is halved if the disclosure of information enables an end to be put to the torture, to identify those responsible or to avoid injury to or the death of the victim. A life imprisonment sentence for torture leading to death, provided for by article 101bis, is reduced to twenty years.”

Other acts of violence committed by public officials are criminalized by articles 101 and 103 of the Criminal Code. Article 101 criminalizes violence committed without a legitimate reason by a public servant or other person acting in an official capacity, or through an intermediary.³¹⁶ Article 103, as amended by Law-Decree No. 2011-106, criminalizes any public official who prejudices the personal freedom of another person without legitimate justification, or resorts to violence or ill-treatment, in person or by instigating another official, against an accused, a witness or an expert, because of a declaration made or in order to obtain information or a confession. Offences under articles 101 and

his or her dignity.”

³¹⁵ Law No. 99-89 of 2 August 1999. This was later modified by Law-Decree No. 2011-106 of 22 October 2011.

³¹⁶ According to Article 82 of the Criminal Code, a public servant is “any person holding public authority or performing duties in connection with one of the services of the State or a local authority or a public office or a public institution or public company, or performing functions in connection with any other person involved in the management of a public service. Is assimilated to public official, anyone with the quality of public officer or holding an elective public service mandate, or designated by the court to perform judicial duties.”

103 are punishable with a maximum sentence of five years imprisonment and a fine. Prior to the inclusion of torture in the Criminal Code in 1999, these offences served as the only basis on which to prosecute acts of torture.

During Ben Ali's regime, prosecutions for acts of torture were rare. According to the Special Rapporteur on torture, "during the period from 1999 to 2009 (September), 246 police officers were prosecuted for ill-treatment and misconduct. Out of 246 initiated prosecutions, 228 final judgments were handed down during the same period. Reportedly, only seven criminal convictions for acts of torture and ill-treatment were handed down against law-enforcement and prison officials under article 53 of the statute of the Internal Security Forces."³¹⁷

Since the uprising, only a few complaints of torture, the majority of them referring to violations that took place during the Ben Ali regime, have been filed with the judicial authorities and fewer still have been adjudicated.

Charging and sentencing practice in cases of torture: Case No. 74937 - Barraket Essahel

This case involved 244 officers who were arrested in 1991 by the Central Military Administration and accused of belonging to Ennahda and of plotting to overthrow President Ben Ali. They were stripped of their uniforms and of their ranks and transferred to the Directorate of State Security (DSS) of the Ministry of the Interior where they were subjected to torture by officers of the State Security branch.

The DSS and the Central Military Administration worked together to investigate the officers, with the Director of the DSS submitting daily and detailed reports to the Director-General of Military Security and to the Minister of Defence. In addition, several meetings were held between Ministry of the Interior officials and senior military officers during the investigations.

After weeks of torture, the majority were released without charge but were forced to retire from the army. Ninety-three individuals were prosecuted for plotting against the State and belonging to criminal organizations. They were sentenced to between 1 and 16 years imprisonment following an unfair trial. In particular, the accused were not informed of the charges against them, they did not have access to a lawyer during the trial, the trial took place before a military court, convictions were based on confessions made under torture and the Court did not take into account exculpatory evidence. All the officers, including those released without charge, were forced to retire from the armed forces. In addition all the officers and their families were subjected to harassment, including through the imposition of administrative controls by the police and pressure on employers either not to hire them for, or to fire them from, employment. Some of the officers were also forced to report to the police station up to eight times a day. This harassment continued until the overthrow of the Ben Ali regime.

On 11 April 2011, following the 2011 Uprising, some of the victims filed a complaint of torture under articles 101 and 101bis of the Criminal Code with an investigating judge against the police officers who carried out the acts of torture as well as former President Ben Ali, the former Ministers of Defence and Interior, government officials from the Ministries of Defence and Interior and members of the military.³¹⁸

³¹⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc. A/HRC/19/61/Add.1, 2 February 2012, para.33.

³¹⁸ The complaint listed the following individuals: Former President Ben Ali, Abdallah Kallel (Minister of Interior in 1991); Habib Boulaaress (Minister of Defence in 1991); Mohamed Ali Ganzoui (Director of Intelligence Services in 1991); Ezzeddine Jenayah (Director of National Security in 1991); five officers from National Security (Abderrahmane Ben Salem Guesmi, Mohamed Naceur Alibi, Zouhayer Ben Chedli Redissi, Hassan Ben Salah Jallali and Bechir Essaidi); Director-General of Military Security, Mohamed Hefayadh Ferz; senior military officials (General Mohamed Hedi Ben Hassine, General Ridha Attar and General Mohamed Chedli Cherif); the Prosecutor-General Director of Military Justice, Mohamed Guezguez; and police officers Fawzi Aloui, Mustapha Ben Moussa, and Moussa Khalfi.

The investigating judge at the First Instance Tribunal in Tunis opened the investigation on 2 May 2011 before subsequently transferring the case to the military court system on 27 October 2011. Before the First Instance Military Tribunal of Tunis, the accused were reduced to nine persons, including former President Ben Ali, officials from the Ministry of the Interior and the officers from National Security who carried out the acts of torture.³¹⁹ Officials from the Ministry of Defence and the military were not prosecuted. Four of the accused were remanded in custody pending trial, the other five evaded arrest.³²⁰ The accused were charged with acts of violence, under article 101 of the Criminal Code, punishable with a maximum of five years imprisonment. Consequently, the case was transferred by the indictment chamber to the criminal chamber (*chambre correctionnelle*), which deals with lesser offences (*délits*).

Judgment of the First Instance Military Tribunal of Tunis

Lawyers representing some of the victims argued that the *chambre correctionnelle* of the Military Court was not competent to hear the case, since the crimes committed were felonies pursuant to article 219(2) (acts of violence), 221 (the crime of castration), and 250 and 251 (arrest, detention or abduction) of the Criminal Code and not lesser offences. The Court dismissed the claim on the basis that the issue was not raised before the investigating judge and the Public Prosecutor made no request to charge the accused with these crimes. However, the Court stated that “the parties’ right to raise this claim is unaffected and they are entitled to make it in the separate proceedings according to the law if they wished to”.

On 29 November 2011 the accused were all found guilty and sentenced to prison sentences of five years or less.³²¹

Judgment of the Military Court of Appeal

On 7 April 2012, the Military Court of Appeal in Tunis heard an appeal by the four accused who were not tried in absentia.

Lawyers for the civil parties once again requested that the Court recuse itself because the crimes in question were felonies. They argued that the crimes amounted to torture or fell under articles 219 (acts of violence) or 114 (increased penalties for a crime, where it is committed by a public official by virtue of their position) of the Criminal Code.

The Court dismissed these claims on the basis that, as civil parties, their right to intervene in criminal proceedings was restricted to the issue of compensation and they were therefore not entitled to make submissions on the criminal qualification of the facts. Consequently, the Court found that it was not obliged to respond to these requests.³²² However, it stated that it would do so, only in order to show that the legal reasoning of the civil parties was wrong.

In relation to the claim that the facts amounted to torture, the Court noted that the CAT was ratified by the Tunisian State on 11 July 1988 and, as a Convention, represents an engagement by States to criminalize torture within their national legislation. However, the Court stated that the CAT does not contain provisions spelling out specific penalties that courts can apply in such cases. Since article 101bis was introduced into national legislation on 2 August 1999, after the facts of the case had occurred, it could not be relied on due to the principle of non-retroactivity, as set out in article 1 of the Criminal Code.

The Court found that the accused were “public employees” within the meaning of article 82 of

³¹⁹ The accused before the First Instance Military Tribunal were Ben Ali, Abdallah Kallel, Mohamed Ali Ganzoui, Ezzeddin Jenaieh, Abderrahmane Ben Salem Gasmi, Mohamed Ennacer Alibi, Zouhir Ben Chedli Rdissi, Houssine Ben Salah Jallali, Bechir Essaidi.

³²⁰ Ben Ali, Ezzeddin Jenaieh, Zouhir Ben Chedli Rdissi, Houssine Ben Salah Jallali, and Bechir Essaidi.

³²¹ Permanent First Instance Military Court of Tunis, Case No. 74937, p.42.

³²² Military Appeals Court, Case No. 334, p.45-46.

the Criminal Code when the crimes were committed.³²³ The Court then noted that the violence committed was unlawful since the Tunisian legislator prohibits such acts in all its “criminal apparatus”. The Court found the accused guilty.³²⁴

Although the Military Court upheld the convictions of the four accused who had appealed, it reduced each of their sentences on the basis that there was “no obstacle” to doing so.

On 23 October 2012, the military chamber at the Cassation Court upheld the decision of the Military Court of Appeal.

Charging and sentencing practice in cases of torture: Case No. 95646 – First Instance Tribunal of the Permanent Military Court of El Kef

This case concerned the killing and injuring of individuals in separate incidents during the 2011 Uprising (see section A.i.1 above for further details). As part of the case, the Court considered charges against Rabah Assamari, Assistant to the Head of the National Security Centre in Talah, and Azzahabi Al Abidi, Head of Najdeh Police Station in Talah.

Rabah Assamari

The Court found that between 17 December 2010 and 14 January 2011 the accused inflicted

violent acts on the children, Mohamed Annajlawy, Rida Arratibi and Ahmed Atouti.³²⁵ The Court convicted the accused pursuant to article 101 of the Criminal Code.

Azzahabi Al Abidi

The Court found that the accused violently assaulted three victims, one of whom lost his front teeth as a result. The Court held that the material element and the “moral element” of the crime were present with regard to his official capacity.³²⁶ The accused was therefore convicted pursuant to article 101 of the Criminal Code.

In neither case did the Court provide any further information concerning the circumstances surrounding the use of force and at no point did the Court question whether or not the acts of the accused could have amounted to torture, pursuant to article 101bis of the Criminal Code.

2. Assessment in light of international law and standards

International law prohibits torture and other ill-treatment in all circumstances.³²⁷ The CAT requires States to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”³²⁸ This includes ensuring that torture is an offence under its criminal law.

The definition of torture in domestic criminal law must cover at a minimum all the conduct covered by the definition in article 1 of the CAT.³²⁹ Article 1 defines torture as follows:

³²³ Military Appeals Court, Case No. 334, p.55.

³²⁴ Id.

³²⁵ Case No. 95646, Judgment, pp.719-720.

³²⁶ Case No. 95646, Judgment, p.730.

³²⁷ CAT, articles 2 and 16; ICCPR, articles 7 and 4(2); ACHPR, article 5; Arab Charter on Human Rights, articles 8 and 4(2); ICRC, Study of Customary International Humanitarian Law (2005), Rule 90 and commentary.

³²⁸ CAT, article 2(1).

³²⁹ CAT, articles 1 and 4(1). See also Committee against Torture, General Comment No.2, UN Doc. CAT/C/GC/2, 24 January 2008, paras.8 and 9.

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

The reference to “lawful sanctions” in article 1 of the CAT has been held to cover only those sanctions that are lawful under *both* national *and* international law, i.e. any such suffering that arises from the fact of being imprisoned even in conditions that comply with international standards.³³⁰

Article 4(1) of the CAT requires that all attempts to commit torture and all complicity or participation in torture also be criminalized.³³¹ The Special Rapporteur on torture has suggested that, under the approach adopted by the Committee against Torture, “participation” or “complicity” in torture within the meaning of article 4(1) can include “acts that amount to instigation, incitement, superior order and instruction, consent, acquiescence and concealment”.³³² He has further stated:

According to article 4, paragraph 1, of the Convention, interpreted in line with international criminal law jurisprudence, ‘complicity’ contains three elements: (a) knowledge that torture is taking place, (b) a direct contribution by way of assistance and (c) that it has a substantial effect on the perpetration of the crime. Thus, individual responsibility for complicity in torture arises also in situations where State agents do not themselves directly inflict torture or other ill-treatment but direct or allow others to do so, or acquiesce in it.³³³

The prohibition on torture and other ill-treatment is absolute and non-derogable.³³⁴ Furthermore, an individual who commits an act of torture cannot seek to justify the conduct by arguing that it was conducted pursuant to an order from a superior officer or a public authority.³³⁵ The Committee against Torture has urged the investigation and establishment of responsibility of both direct perpetrators and persons in the chain of command.³³⁶

In light of this absolute prohibition on torture and other ill-treatment, the Committee against Torture has noted that “[s]tates parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.”³³⁷ In particular, “amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”.³³⁸

It is also imperative that crimes of torture are not prosecuted as lesser offences. For example, as the Committee against Torture has noted “it would be a violation of the Convention to prosecute conduct

³³⁰ UN Special Rapporteur on Torture, UN Doc A/60/316 (30 August 2005), paras.26-28.

³³¹ CAT, article 4(1). See also para.13 of HRC, General Comment No.20, Article 7 (1992), which states: “Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.”

³³² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/25/60 (2014), para.48, citing Committee against Torture, General Comment No. 2, para.17.

³³³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/25/60 (2014), para.50.

³³⁴ See Committee against Torture, General Comment No. 2, UN Doc. CAT/C/GC/2, (2008), (hereinafter Committee against Torture, General Comment No.2), paras.1 and 3; See also, HRC, General Comment No. 20, article 7 (1992), para.3 and HRC, General Comment 29 (2001), para.7.

³³⁵ CAT, article 2(3). See also, HRC, General Comment 20, Article 7 (1992), para.3.

³³⁶ Committee against Torture, General Comment No.2,)para.9.

³³⁷ Committee against Torture, General Comment No.2, para.4.

³³⁸ Committee against Torture, General Comment No.2, para.5. See also HRC, General Comment No. 31, para.18.

solely as ill-treatment where the elements of torture are also present.”³³⁹

States parties are also required to keep their national laws and performance under review and to improve them.³⁴⁰

In addition to the prohibition of torture, article 16 of the CAT requires States to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. The HRC has further stated that the obligation to bring perpetrators of certain violations of the ICCPR to justice applies “in respect of those violations recognized as criminal under either domestic or international law, such as torture *and similar cruel, inhuman and degrading treatment* (article 7)” (emphasis added).³⁴¹

Under Tunisian law, criminal law provisions concerning the crime of torture continue to fail to meet international standards. Prior to 1999, there was no specific crime of torture in Tunisian law. The revised 2011 definition of torture broadened the scope of the offence in some respects beyond the 1999 definition, including by explicitly providing for criminal liability of all public officials or other persons acting in an official capacity who “order, incite, approve and remain silent about torture”. However, the 2011 definition also narrowed the scope of the offence in other ways, as it for instance removed any reference to punishment as a possible purpose of torture and limited discrimination to racial discrimination only. Article 101bis and other provisions of Tunisian criminal law must therefore be amended to ensure that at least all those acts and omissions covered by articles 1 and 4 of the CAT are criminalised under Tunisian law.

Furthermore, article 101ter is loosely worded and potentially grants exemption from prosecution to persons who commit acts of torture but subsequently disclose such acts to the administrative or judicial authorities before they are aware of them. Any such exemption for torture is akin to an amnesty and is contrary to international standards. Article 101ter should therefore be re-worded to prevent any exemption from liability for persons who are responsible for torture.

In addition to an inadequate definition of torture, in practice, those responsible for torture are frequently charged with lesser offences. In the case of Barraket Essahel the reason for this was that the crime of torture was not enacted in Tunisian law at the time the offence was committed. This argument of non-retroactivity is considered in further detail in section E below. In other cases brought since 1999, including the prosecution of Assamari and Al Abidi in Case No. 95646, where retroactivity arguments do not apply, individuals responsible for torture are still being charged with lesser offences. Prosecutorial guidelines must ensure that persons responsible for torture are not charged with lesser offences.

Tunisian law should also criminalize other forms of intentional cruel or inhuman or degrading treatment that are similar to but do not constitute torture (for instance because the acts do not have one of the purposes contemplated by article 1 of the CAT), committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Articles 23 and 30 of the Tunisian Constitution are not comprehensive in this regard. In particular article 23 is limited to dignity and physical integrity, while article 30 is restricted only to detainees. Various provisions of the Criminal Code also do not meet the requirements of article 16 of the CAT. Articles 101, 218 and 219 of the Tunisian Criminal Code are limited to the use of “violence”. In addition, articles 218 and 219 are limited to private persons as opposed to public officials or persons acting in an official capacity. Article 103 is limited to prejudicing personal freedom and to violence or ill-treatment as a result of a declaration or in order to extract information or a confession.

The Tunisian legal framework on torture and other ill-treatment must be reformed in order to comply with international law and standards. To this end, Tunisian authorities should:

i) Reform article 101bis of the Criminal Code so that at minimum it extends to all

³³⁹ Committee against Torture, General Comment No.2, para.10.

³⁴⁰ Committee against Torture, General Comment No.2, para.4.

³⁴¹ Human Rights Committee, General Comment No.31, para.18.

- conduct covered by the definition of torture in article 1 of the CAT, including by ensuring that the act of torture extends to intentional infliction of severe pain or suffering for any reason based on discrimination of any kind;**
- ii) Reform article 101ter to remove any exemption from liability for persons who are responsible for torture;**
 - iii) Ensure cases of torture are prosecuted as such and not as lesser offences, including by developing prosecutorial guidelines that recognise this requirement; and**
 - iv) Ensure that the Criminal Code criminalizes intentional cruel, inhuman or degrading treatment, when committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.**

iii. Enforced disappearances and secret detention

1. Tunisian legal framework and practice

Tunisia ratified the International Convention for the Protection of all Persons from Enforced Disappearance on 29 June 2011.³⁴² Among other things, the Convention reaffirmed with legal force the provision in the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance that “[a]ll acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”, including in relation to a wide range of forms of participation or complicity in, and superior responsibility for, enforced disappearances.³⁴³ The Convention also specifies that “No one shall be held in secret detention” and that sanctions must be imposed on anyone who delays or obstructs family members or other interested parties from obtaining information about detentions, who fails to record the deprivation of liberty of any person or records untrue information about the detention, or who otherwise refuses to provide information on the deprivation of liberty of a person, or provides inaccurate information, even though the legal requirements for providing such information have been met.³⁴⁴

As of 2015, however, no specific crime of enforced disappearance is included in the Criminal Code of Tunisia and no legislation explicitly designated as implementing the Convention was adopted after its ratification.

Article 237 of the Criminal Code criminalizes anyone who abducts or attempts to abduct a person through violence or threats, while article 250 of the Criminal Code punishes “everyone who, without a judicial order, catches, arrests, detains or abducts a person”. Aggravating factors resulting in increased sentences are listed at article 251. One such aggravating factor is where the “victim” is a “public employee”.

Even in the absence of a provision defining enforced disappearance as a separate offence in Tunisian legislation, Law No. 2013-53 on Transitional Justice includes enforced disappearances as within the jurisdiction of the specialized chambers charged with hearing criminal complaints involving gross human rights violations committed from 1 July 1955 to 24 December 2014.³⁴⁵ In addition, the Transitional Justice Law establishes a Truth and Dignity Commission and charges it with investigating on-going cases of enforced disappearance.³⁴⁶ The Transitional Justice Law does not explicitly refer to domestic criminal law provisions nor to international law in terms of how the term “enforced disappearance” is to be interpreted.

The vast majority of cases involving enforced disappearances in Tunisia relate to the secret and/or

³⁴² Law Decree No.2011-2 of 19 February 2011, approving the ICPED. Notification of ratification was formally deposited with the UN on 29 June 2011.

³⁴³ Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, article 4(1). See ICPED articles 4, 6 and 7.

³⁴⁴ ICPED, articles 18 and 22.

³⁴⁵ Law No.2013-53 of 24 December 2013 on the establishment of transitional justice and its organisation, article 8.

³⁴⁶ Law No.2013-53 of 24 December 2013 on the establishment of transitional justice and its organisation, article 39.

incommunicado detention of individuals. Secret and/or incommunicado detention was frequently used under the Ben Ali regime against individuals arrested or charged under the 2003 Law on counter-terrorism. As reported by the Special Rapporteur on the protection of human rights while countering terrorism, “terrorist” suspects were routinely held in secret in a building of the Ministry of the Interior in Tunis.³⁴⁷ The Special Rapporteur also affirmed that, according to the testimonies of detainees and their families, police custody for suspects held for terrorism related charges lasted “several days to a number of weeks”.³⁴⁸

The Code of Criminal Procedure requires police officers to inform the family of a suspect that an individual has been detained in police custody and to maintain registers regarding detainees held in police custody; however, these requirements are frequently not met in practice.³⁴⁹ Further, the law does not recognise the rights of detainees in police custody to have access to a lawyer or to family visits.³⁵⁰ Consequently, Tunisian law provides no explicit protection against incommunicado detention in police custody and police authorities reportedly often refuse such access in practice.

2. *Assessment in light of international law and standards*

Article 4 of the ICPED, to which Tunisia is party, requires member States to “take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”. This codified the earlier similar provision in the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance. In 2004, the Human Rights Committee also expressly affirmed that pursuant to articles 2, 6, 7 and 9 of the ICCPR, States parties must ensure that those responsible for enforced disappearance are brought to justice through criminal proceedings.³⁵¹

Article 2 of the ICPED defines enforced disappearance for the purposes of the Convention as: “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”³⁵²

Under the ICPED, criminal responsibility must extend to, “Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”. Superior responsibility is also required for persons who have effective authority and control over principal perpetrators or exercise effective responsibility and control over activities concerned with enforced disappearance where they fail to take all necessary and reasonable measures to prevent such a crime or to submit the matter to the competent authorities for investigation and prosecution.³⁵³

No exceptional circumstances, including internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.³⁵⁴ Furthermore, “no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced

³⁴⁷ 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, 28 December 2010, para.24.

³⁴⁸ 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, 28 December 2010, para.23.

³⁴⁹ Code of Criminal Procedure, article 13bis.

³⁵⁰ A draft law, No.13/2013, drafted by the Ministry of Justice provides for amendments to the Criminal Code of Procedure to grant access to a lawyer during police custody. The draft law was submitted for discussion in February 2013 and Ministry officials addressed the NCA general legislation commission in December 2013 and February 2014. However, since February 2014 there have been no further discussion on the draft law in the NCA and it has yet to be adopted.

³⁵¹ HRC, General Comment No.31, para.18, codifying earlier jurisprudence. See also European Court of Human Rights, *El-Masri v. the former Yugoslav Republic of Macedonia*, App no 39630/09 (13 December 2012), paras.242-243, 258-262,

³⁵² ICPED, article 2.

³⁵³ ICPED, article 6(b). Further information on superior responsibility is set out at section G below.

³⁵⁴ ICPED, article 1(2).

disappearance”.³⁵⁵

Despite having ratified the ICPED, Tunisian authorities have not criminalized enforced disappearances in Tunisian criminal law, as required by article 4 of the ICPED and as mandated, since 1992, by the earlier UN Declaration. Existing crimes that prohibit abduction (Criminal Code, article 237) and arrest, detention or abduction without a judicial order (Criminal Code, article 250) do not necessarily cover all the conduct that must be criminalized under the definition in article 2 of the ICPED because, in particular, both offences are restricted in the type of deprivation of liberty, unlike article 2, which, in addition to arrest, detention and abduction, also criminalizes “any other form of deprivation of liberty”. The offences under Tunisian law also differ from the Convention definition in so far as they relate to any person, as opposed to specifically “agents of the State” or “persons acting with the authorization, support or acquiescence of the State”. Furthermore, neither Tunisian offence recognises another essential element of the crime of enforced disappearance, the “refusal to acknowledge the deprivation of liberty” or the “concealment of the fate or whereabouts of the disappeared person”. Instead, article 250 is restricted to cases where no judicial order has been obtained.

The Committee on Enforced Disappearances considers that “only the criminalization of enforced disappearance as a separate offence” can enable a State party to comply with its obligation under article 4 and other related provisions of the Convention.³⁵⁶ Further, as the Inter-American Court of Human Rights affirmed, “[c]onsidering the particularly grave nature of forced disappearance of persons, the protection offered by criminal laws on offenses such as abduction or kidnapping, torture and homicide is insufficient. Forced disappearance of persons is a different offense, distinguished by the multiple and continuing violation of various rights protected by the Convention.”³⁵⁷

While article 32 of the Criminal Code extends liability for all offences to individuals who provoke or order a crime, as well as individuals who facilitate the crime, the ways in which an individual can provoke an act are limited in nature. Consequently, there may be other methods of soliciting or inducing an enforced disappearance that are not covered by article 32 of the Criminal Code. Furthermore, the law should make clear that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

In addition, there is nothing in Tunisian law that ensures that the prohibition on enforced disappearance is non-derogable, even in times of emergency.

The Tunisian authorities should fully implement their obligations under the ICPED and other international instruments and commitments by, among other things:

- i) Legislating to include within the Criminal Code a specific crime of enforced disappearance, the definition of which accords with article 2 of the ICPED;**
- ii) Ensuring that liability for the crime of enforced disappearance extends to all persons who commit, order, solicit or induce the commission of, attempt to commit, are an accomplice to or participate in an enforced disappearance;**
- iii) Ensuring that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance;**
- iv) Ensuring that all persons deprived of liberty have a legal right to prompt access to communicate confidentially with and receive visits from an independent lawyer, to have their family notified of the fact and place of detention; and**
- v) Ensuring that the prohibition of enforced disappearances cannot be derogated from, even in times of emergency.**

³⁵⁵ ICPED, article 6(2). For the issue on period of limitations, see section F below.

³⁵⁶ See e.g. Committee on Enforced Disappearances, Concluding Observations on Serbia (13 February 2015), para.10.

³⁵⁷ Inter-American Court of Human Rights, *Heliodoro Portugal v Panama*, Judgment of 12 August 2008, para.181.

iv. Arbitrary detention

1. Tunisian legal framework and practice

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

Article 250 of the Criminal Code criminalizes “everyone who, without a judicial order, catches, arrests, detains or abducts a person”. Article 103, as amended by Law-Decree No. 2011-106, criminalizes any public official who prejudices the personal freedom of another person without legitimate justification, or resorts to violence or ill-treatment, in person or by instigating another official, against an accused, a witness or an expert, because of a declaration made or in order to obtain information or a confession.

The Code of Criminal Procedure does not provide sufficient guarantees against arbitrary detention. In particular, under the Code, police custody can last up to six days.³⁵⁸ Although officers are required by law to inform the suspect of the measures taken against him or her, the reasons for and duration of these measures and the guarantees provided by the law, including the right to request a medical examination, the law does not specify when such information must be provided to suspects.³⁵⁹ Furthermore, although police officers must inform the family of the suspect of the measures taken against their relative, there is no right of access to a lawyer or to family visits during police custody.³⁶⁰

The police or National Guard officers must complete a written report (*procès-verbal*) recording the information provided to the suspect, the rights that the suspect has been notified of, whether the family has been notified, and any request for a medical examination made by the suspect. In addition, the report must state the date and time of the beginning and end of police custody and of any questioning and its purpose that the suspect is submitted to.³⁶¹ Police and National Guard officers are also required to keep a register in the places of custody. For each detainee the register must state: their identity, the date and time of the beginning and of the end of the custody, whether the family has been notified and any request for a medical examination. The register is signed by the public prosecutor.³⁶²

In practice, the safeguards that exist in the law are routinely flouted. For example, detainees are not systematically informed of their rights while in police custody.³⁶³ Furthermore, Judicial Police officers do not always record accurate or adequate information in the register³⁶⁴ and do not promptly notify the prosecutor of the detention of a suspect.³⁶⁵ As reported by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, “dates of arrest are routinely post-dated, thereby circumventing the rules about the allowed length of police detention and taking detainees out of the protection framework.”³⁶⁶ Moreover, in numerous cases, particularly prior to the 2011 Uprising, requests by detainees to be examined by a doctor were

³⁵⁸ Code of Criminal Procedure, article 13bis.

³⁵⁹ Code of Criminal Procedure, article 13bis.

³⁶⁰ The right of the accused to communicate with his or her lawyer is only expressly permitted after the accused has had his first appearance before the investigating judge (article 70 of the Code of Criminal Procedure). In addition, Law No.2001-52, on the organisation of prisons, which grants detainees access to lawyers and family visits does not apply to police custody.

³⁶¹ Code of Criminal Procedure, article 13bis.

³⁶² Code of Criminal Procedure, article 13bis.

³⁶³ See Human Rights Watch, *Cracks in the system: conditions of pre –charge detainees in Tunisia*, November 2013, p.40.

³⁶⁴ See Human Rights Watch, *Cracks in the system: conditions of pre –charge detainees in Tunisia*, November 2013, p.41.

³⁶⁵ European Commission, *Final report, Mission UE de Diagnostic du système judiciaire et pénitentiaire*, December 2011, p.125.

³⁶⁶ 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, 28 December 2010, para.27

often disregarded by police officers.

Such failings on the part of the responsible law enforcement officials are not specifically punishable as a disciplinary or criminal offence. Although officers from the ISF can be disciplined for misconduct committed in the exercise of their duties, in practice these provisions are not used to sanction officers who failed to respect the rights of detainees.³⁶⁷

2. *Assessment in light of international law and standards*

The prohibition of the arbitrary deprivation of liberty is widely recognised under international law, and secured through fundamental procedural guarantees including the right to challenge the lawfulness of any deprivation of liberty before a court.³⁶⁸ The essence of the prohibition of arbitrary detention (against any form of unreasonable or unnecessary detention), and the right to challenge the lawfulness of detention is not subject to derogation even in times of emergency.³⁶⁹

The prohibition of arbitrary detention is broad in nature. According to article 9, paragraph 1, of the ICCPR, “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”³⁷⁰ The HRC in its General Comment No. 8, has noted that article 9(1) applies to “all deprivations of liberty”.³⁷¹ Furthermore, the Working Group on Arbitrary Detention (WGAD) has affirmed that “[a]ny confinement or retention of an individual accompanied by restriction on his or her freedom of movement, even if of relatively short duration, may amount to de facto deprivation of liberty”.³⁷²

In relation to the prohibition of arbitrary detention under article 9 of the ICCPR and under international law more generally:

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.³⁷³

Detention may be considered arbitrary on the basis of the law itself or based on the conduct of government officials. As the WGAD has held: “[a] detention, even if it is authorized by law, may still be considered arbitrary if it is premised upon an arbitrary piece of legislation or is inherently unjust, relying for instance on discriminatory grounds.”³⁷⁴

For the purposes of its work, the WGAD has developed five categories of arbitrary detentions, including when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (Category

³⁶⁷ Article 49 of Law No.82-70 on the ISF.

³⁶⁸ UDHR, article 9; ICCPR, article 9; ACHPR, article 6; ACHR, article 7(1); Arab Charter on Human Rights, article 14, ECHR, article 5(1).

³⁶⁹ HRC, General Comment No.35 (Liberty and security of person, (article 9), UN Doc. CCPR/C/GC/35 (2014), (hereinafter HRC, General Comment No.35), paras.64 to 67; HRC, General Comment No.29: (States of Emergency (article 4)), UN Doc. CCPR/C/21/Rev.1/Add.11, (2001), (hereinafter HRC, General Comment, No.29), paras.11 and 16. Arab Charter on Human Rights, articles 4(2) and 14(6); African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle M(5)(e); Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, Series A No. 8 (1987). In situations of international armed conflict to which rules of international humanitarian law are applicable, the question of whether a deprivation of liberty is “arbitrary” within the meaning of article 6 may fall to be determined by more specific rules of international humanitarian law.

³⁷⁰ See also UDHR, article 9.

³⁷¹ HRC, General Comment No. 8: (Liberty and security of person, article 9) UN Doc. HRI/GEN/1/Rev.1 at 8 (1994), 1982), para.1.

³⁷² Deliberation No.9 of the Working Group on Arbitrary Detention, 24 December 2012, UN Doc. A/HRC/22/44, para.55. See also Deliberations Nos.1, 4, 5, and 7, and UN Doc. E/CN.4/1998/44, para.41.

³⁷³ HRC, General Comment No. 35 (2014), para 12; see also Working Group on Arbitrary Detention, Deliberation No.9, 24 December 2012, UN Doc. A/HRC/22/44, para.61. Both are based on several decades of jurisprudence from the Human Rights Committee interpreting article 9 of the ICCPR.

³⁷⁴ Deliberation No.9 of the Working Group on Arbitrary Detention, 24 December 2012, UN Doc. A/HRC/22/44, para.63.

I); where the legal provisions upon which it is based are incompatible with fundamental rights and freedoms guaranteed under international human rights law (Category II); and when the violation of international norms relating to the right to a fair trial is of such gravity as to make detention arbitrary (Category III).³⁷⁵

As a guarantee against arbitrary detention, as well as torture or other ill-treatment and enforced disappearance, under article 9(3) of the ICCPR anyone deprived of liberty on suspicion of involvement in crimes must be brought promptly before a judge or other judicial officer authorized by law to exercise judicial power.³⁷⁶ The HRC has said that “[w]hile the exact meaning of ‘promptly’ may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest”; that “any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances”.³⁷⁷ Further, anyone deprived of liberty on any grounds must have the right to challenge the legality of the deprivation of liberty before a court of law and to be released if the detention is found to be unlawful, sometimes known as the right to *habeas corpus*.³⁷⁸ Furthermore, to enable arrested persons to avail themselves of *habeas corpus* and other judicial remedies,³⁷⁹ individuals must be informed at the time of their arrest of the reasons for the arrest and must be promptly notified of any charges against them.³⁸⁰ They must also be notified of the right to legal counsel, to be granted prompt access to legal counsel, including during interrogation,³⁸¹ and to notify family members, or have them notified, of their arrest and to have access to them.³⁸²

Not every case of arbitrary detention necessarily constitutes a gross violation of human rights or a crime under international law; however, in addition to other remedies applicable in all cases of arbitrary detention,³⁸³ international law clearly requires prosecution and punishment of those responsible for certain cases of arbitrary detention.

Where unlawful imprisonment or other unlawful severe deprivation of liberty is knowingly committed as part of a widespread or systematic attack against any civilian population, for instance, it is recognised as a crime against humanity for which investigations and prosecutions are required.³⁸⁴

³⁷⁵ Report of the Working Group on Arbitrary Detention, 24 December 2012, UN Doc. A/HRC/22/44, para.38.

³⁷⁶ ICCPR, article 9(3); Arab Charter on Human Rights, article 14(5); ECHR, article 5(3); ACHR, article 7(5). On the definition of promptly and the 48 hour requirement, see HRC General Comment No.8, (1982), Article 9, HRI/GEN/1/Rev.9 (Vol. I), p.179, para.2; and HRC Concluding Observations: El Salvador, UN Doc. CCPR/C/SLV/CO/6 (2010) para.14.

³⁷⁷ HRC, General Comment No.35, para.33, adding also that, “An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles.”

³⁷⁸ ICCPR, article 9(4); Arab Charter on Human Rights, article 14(6); ECHR, article 5(4); ACHR, article 7(6).

³⁷⁹ HRC, Communication 43/1979, *Drescher Caldas v. Uruguay*, para.13.2.

³⁸⁰ ICCPR, article 9(2); Arab Charter on Human Rights, article 14(3); ECHR, article 6(3); ACHR, article 7(4); Principles 10 and 16 of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 9 December 1998, adopted by the UN General Assembly resolution 43/173 of 9 December 1988. See also HRC, General Comment No.32, (article 14: Right to equality before courts and tribunals and to a fair trial), 23 August 2007, UN Doc. CCPR/C/GC/32, para.31; and see HRC, General Comment No.13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art 14), para.8.

³⁸¹ See, HRC, General Comment No.32, article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, UN Doc. CCPR/C/GC/32, para.34; See also UN Basic Principles on the Role of Lawyers, 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, Principle 7, “Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.”

³⁸² Article 17.2(d) ICPED; Article 10.2, UN Declaration on the Protection of All Persons from Enforced Disappearance; Principle 16, Body of Principles for the Protection of all persons deprived of their liberty.

³⁸³ See e.g. HRC, General Comment No.35, paras.8, 49-52; United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, Working Group on Arbitrary Detention, UN Doc A/HRC/30/37 (2015).

³⁸⁴ Article 7(e) of the Rome Statute of the ICC includes “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”, as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. See also Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, 20 May 2010 (hereafter the UN mechanisms Joint Study on Secret Detention), UN Doc. A/HRC/13/42 (2010), para.30.

The WGAD and the HRC have highlighted the particular gravity of incommunicado detention and of secret detention, including that prolonged incommunicado detention facilitates the perpetration of torture and other cruel, inhuman and degrading treatment and may itself amount to such treatment.³⁸⁵

The joint study on global practices in relation to secret detention in the context of countering terrorism undertaken by a number of UN Special Procedures (the Joint Study on Secret Detention) concluded that all allegations of secret detention should be investigated promptly by independent institutions, and that anyone “found to have participated in secretly detaining persons and any unlawful acts perpetrated during such detention, including their superiors if they ordered, encouraged or consented to secret detentions, should be prosecuted without delay and, where found guilty, given sentences commensurate with the gravity of the acts perpetrated”.³⁸⁶

An arbitrary detention can constitute a gross human rights violation due to its prolonged character.³⁸⁷ The prolonged character of an arbitrary detention, particularly when combined with other factors, can give rise to an obligation to conduct criminal investigations and prosecutions against those responsible.³⁸⁸

The Tunisian Constitution theoretically sets out an exhaustive list of grounds on which individuals can be arrested and detained and guarantees certain rights. However, in practice, the Tunisian Code of Criminal Procedure and Criminal Code do not sufficiently protect against arbitrary detention, guarantee the rights of detainees or sanction those who abuse the rights of detainees. The Criminal Code criminalizes arrest, detention or abduction by any individual when not done pursuant to a “judicial order” (article 250) or with “legitimate justification” (article 103). However, these provisions are rarely used to prosecute cases of arbitrary detention.

In addition, the WGAD has previously found violations of the prohibition on arbitrary detention in relation to Tunisia amounting to category II violations, thereby suggesting that the current domestic legal framework was not able to ensure compliance with the international prohibition of arbitrary detention.³⁸⁹

So far as the ICJ is aware, the existing provisions on torture and “ill-treatment” in the Criminal Code have not been used to investigate or prosecute persons responsible for cases of prolonged incommunicado or secret detention.

There are also no criminal or disciplinary sanctions that apply to violations of the rights of detainees that are explicitly recognised in the Code of Criminal Procedure, such as failing to complete the required registers and written reports or completing them with inaccurate information and failing to inform family members of an individual’s detention. In this regard, the ICPED explicitly requires State parties to “take the necessary measures to prevent and impose sanctions” for a wide range of conduct related to obstacles to the right to a judicial remedy for those being detained.³⁹⁰

Tunisian authorities should:

i) Conduct a comprehensive review of detention procedures and guarantees for

³⁸⁵ Report of the Working Group on Arbitrary Detention, 19 January 2011, A/HRC/16/47, para.54; 24 December 2012, UN Doc. A/HRC/22/44, para.60. HRC, General Comment No.35, paras.35, 56 and 58, and HRC Communications: 1782/2008, *Aboufaied v. Libya*, paras.7.4, 7.6; 1781/2008, *El-Megreisi v. Libyan Arab Jamahiriya*, para. 5.4; *Berzig [Djebrouni] v. Algeria*, para. 8.5; and 176/1984.

³⁸⁶ The UN mechanisms Joint Study on Secret Detention, para.292(e).

³⁸⁷ See e.g. ‘Definition of Gross and Large-scale Violations of Human Rights as an International Crime’, UN Doc. E/CN.4/Sub.2/1993/10 (8 June 1993); ‘Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms’, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, para.13; ‘Recognition of Gross and Massive Violations of Human Rights Perpetrated on the Orders of Governments or Sanctioned by them as an International Crime’, UN Doc E/CN.4/Sub.2/1997/29 (28 May 1997).

³⁸⁸ E.g. HRC, *Mulezi v. Democratic Republic of the Congo*, Communication No. 962/2001 (2004), para.7.

³⁸⁹ WGAD Opinion No.29/2013, A/HRC/WGAD/2013/29; Opinion No.41/2005, A/HRC/4/40/Add.1. In both cases the detention was held to be arbitrary within the meaning of category II.

³⁹⁰ ICPED, article 22.

detainees under the Code of Criminal Procedure and enact the necessary reforms to bring them in line with international standards, including by ensuring that all persons who are arrested or otherwise deprived of liberty are:

- a. informed at the time of their arrest of the reasons for the arrest and are promptly notified of the charges against them;**
- b. notified of the right to legal counsel, and are granted prompt and confidential access to legal counsel, including prior to and during interrogation;**
- c. able to notify family members, or have them notified, of their arrest and to have access to them, to communicate with them, and receive visits from them;**
- d. brought promptly before a judge or judicial officer, i.e. as soon as practicably possible and in all cases within no more than 48 hours of their arrest;**
- e. ensured the right to challenge the legality of their detention before a court of law and to be ordered released if the detention is found to be arbitrary or otherwise unlawful;**
- ii) Ensure that persons who undermine or deny the above measures and guarantees designed to protect detainees from arbitrary detention and enforced disappearance are subject to appropriate sanctions, in line with article 22 of the ICPED, including in appropriate cases, criminal prosecution; and**
- iii) Ensure that all allegations of prolonged secret or incommunicado detention are independently and impartially investigated and, where the evidence establishes that the detention amounted to torture or other cruel, inhuman or degrading treatment or punishment, that the persons responsible are prosecuted for such crimes.**

B. Sentences not commensurate with the crime

i. Tunisian legal framework and practice

The Tunisian Criminal Code provides for a variety of sentences in relation to gross human rights violations. These range from the death penalty to a number of years of imprisonment. The Criminal Code also grants the judge broad discretion to reduce the stated sentence.³⁹¹

This section will examine the sentences in the Criminal Code that apply to various gross human rights violations before examining the sentencing discretion afforded to judges and how this has been applied in practice.

Extrajudicial killing that is prosecuted as murder carries a range of sentences, including: the death penalty for intentional murder with aggravated circumstances; 20 years imprisonment for intentional injury that leads to death; and 2 years imprisonment for unintentional death.

Prior to 2011, torture pursuant to article 101bis was punishable by 8 years imprisonment. Following the enactment of Law-Decree No.2011-106, sentences for torture are set out at article 101bis of the Criminal Code. A public officer or other person acting in an official capacity who committed torture in the pursuit or in connection with the pursuit of his or her functions is liable to 8 years of imprisonment and a fine of 10,000 dinars. The sentence is increased to 12 years imprisonment and a fine of 12,000 dinars if the torture led to the amputation or fracture of a limb or caused a "permanent disability". Heavier penalties also apply if the victim of torture is a child. If the torture leads to the death of the victim, the sentence increases to life imprisonment or to the death penalty, if the case falls within the definition of murder under articles 201 to 204 of the Criminal Code, as set out above at section A.i.1.³⁹²

Offences falling under article 101 (violence against the person) and under article 103 of the Criminal Code (the use of violence or threats against an accused, witness or expert) are punishable with a maximum of 5 years imprisonment. For article 103 offences, the sentence is reduced to 6 months

³⁹¹ Criminal Code, article 53.

³⁹² See also article 208 of the Criminal Code.

imprisonment if the victim is subject to threats without physical acts of violence being inflicted.

Sentences for abduction pursuant to article 237 of the Criminal Code are punishable with 10 years imprisonment. This increases to life if the abduction results in a physical disability or illness of the victim. Crimes for arrest, detention or abduction pursuant to article 250 of the Criminal Code are punishable with 10 years imprisonment. If any of the aggravating factors apply, including where the crime is carried out against a public employee, the sentence can be increased to either 20 years or life imprisonment, or result in the death penalty if the victim dies.³⁹³

Pursuant to article 53 of the Criminal Code, judges have broad judicial discretion to impose lighter offences than the ones provided for in the Code. Article 5 of the Criminal Code divides the different types of sentences into six levels: the death penalty, life imprisonment, a fixed term of imprisonment, community service, a fine and punitive damages. The judge has discretion to impose a sentence which is two levels lower than the maximum sentence set out in law. Consequently, a death sentence can be reduced to a time-limited prison sentence, life imprisonment can be reduced to community service and a time-limited prison sentence can be reduced to a fine.³⁹⁴

The discretion of the judge is curtailed by certain minimum requirements that the judge must meet when imposing a reduced sentence.³⁹⁵

Finally, the judge can suspend the sentence if it is the accused's first conviction and the sentence imposed by the judge is less than two years imprisonment.³⁹⁶

Even after the 2011 Uprising there have been numerous examples of individuals accused of gross human rights violations being convicted of lesser offences and/or awarded minimal sentences.

Charging and sentencing practices not reflecting the gravity of the human rights violations

In a case involving crimes committed during the 2011 Uprising in the town of El Dguech, Touzeur governorate, the accused was initially sentenced, on 6 February 2013, by the military tribunal of Sfax to 15 years imprisonment for the murder of three persons and attempted murder of two others. On 29 May 2014, the Military Court of Appeal upheld the three counts of murder and two counts of attempted murder but reduced the sentence to 8 years imprisonment.

Charging and sentencing practices not reflecting the gravity of the human rights violations: Case No. 74937 - Barraket Essahel

On the basis of findings of fact that clearly would have supported convictions for multiple acts of torture, the accused were convicted only of violence against the person, on the ground that the torture provisions could not be applied retroactively (the acts in question dating from 1991).³⁹⁷ Consequently, the maximum sentence provided for at the time of the acts was held to be five years imprisonment. However, only the five individuals tried in absentia were given the maximum sentence. One of the remaining accused was sentenced to three years imprisonment, while the other accused were sentenced to four years imprisonment.

³⁹³ Criminal Code, article 251.

³⁹⁴ Criminal Code, article 53.

³⁹⁵ Criminal Code, article 53.

³⁹⁶ Criminal Code, article 53-16.

³⁹⁷ As noted earlier, Tunisia did not introduce a specific crime of torture until 1999 although it ratified the Convention against Torture in 1988. The non-retroactivity provision of the ICCPR provides that "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Torture was clearly recognised as criminal under the general principles of law recognised by the community of nations in 1991: see history set out in, e.g., International Criminal Tribunal for the former Yugoslavia, Furundžija (IT-95-17/1), judgment of 10 December 1998.

An appeal brought by the four accused who were not tried in absentia resulted in further reductions for these individuals. Despite upholding their convictions, the Military Court of Appeal reduced each of their sentences to two years. The Court stated: “[w]ith regards to the penalties imposed in the first instance, this Court, acting within the scope of its substantive authority to evaluate the punishment, does not see an obstacle in commuting the sentence and therefore reducing the penalties on each one of the accused to two years.” No further reasoning for commuting the sentences was given.

ii. Assessment in light of international law and standards

International standards are clear that gross human rights violations must be punished by appropriate penalties that reflect the grave nature of the offences concerned. This principle is set out explicitly in the CAT at article 4(2), and the ICPED at article 7(1), as well as other international and regional conventions.³⁹⁸ It is also incorporated in numerous declaratory instruments.³⁹⁹ In their Concluding Observations, the HRC and the Committee against Torture have advised that States should set out appropriate penalties for relevant human rights violations in criminal legislation and should sanction those who are found guilty with appropriate criminal sanctions.⁴⁰⁰ Both the HRC and the Committee against Torture have also affirmed that purely disciplinary sanctions are not sufficient in such cases.⁴⁰¹ The Committee against Enforced Disappearances has expressed concern about legal provisions that would allow someone convicted of enforced disappearance to be sentenced only to payment of a fine, or do not provide for any minimum sentence of imprisonment or a minimum sentence of only two years imprisonment.⁴⁰²

In its case law, the Committee against Torture has repeatedly stated that sentences of up to one, three and five years imprisonment are not commensurate with the gravity of the crime of torture.⁴⁰³

³⁹⁸ CAT, article 4(2) states “[e]ach State party shall make these offences punishable by appropriate penalties which take into account their grave nature”. ICPED, article 7(1) states “[e]ach State party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness”. See also, article 3(3) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 6 of the Inter-American Convention to Prevent and Punish Torture; article III of the Inter-American Convention on Forced Disappearance of Persons. And see Statute of the International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, article 24(2), U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, article 23(2), UN Doc S/RES/955 (1994); Rome Statute of the International Criminal Court article 78(1), July 17, 1998, 2187 U.N.T.S. 90.

³⁹⁹ Article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance; Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Paragraphs 84-89 of the Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; and Definition A. “impunity” and Principle 1 of the Updated Principles on Impunity.

⁴⁰⁰ See, for example, HRC, Concluding Observations: Angola, UN Doc. CCPR/C/AGO/CO/1, 29 April 2013, para.15; Belgium, UN Doc. CCPR/C/BEL/CO/5, 16 November 2010, para.14. And see, Committee against Torture, Concluding Observations: Gabon, UN Doc. CAT/C/GAB/CO/1, 17 January 2013, paras.7-8; Mexico, UN Doc. CAT/C/MEX/CO/5-6, 11 December 2012, para.8(b); Qatar, UN Doc. CAT/C/QAT/CO/2, 25 January 2013, para.8; Russian Federation, UN Doc. CAT/C/RUS/CO/5, 11 December 2012, para.16; and Togo, UN Doc. CAT/C/TGO/CO/2, 11 December 2012, para.9(b). See also at the regional level, Interim Resolution ResDH(2002)98, Action of the security forces in Turkey, Progress achieved and outstanding problems, General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey listed in Appendix II (Follow-up to Interim Resolution DH(99)434, 10 July 2002); European Court of Human Rights, *Okkali v. Turkey*, Judgment of 17 October 2006, para.75; and Inter-American Court of Human Rights, *Velasquez Rodriguez v Honduras*, Judgment of 29 July 1988, para.174.

⁴⁰¹ Case *Nydia Erika Bautista v. Colombia*, Views of 13 November 1993, UN Doc. CCPR/C/55/D/563/1993, para.8.2; Case *José Vicente y Amado Villafañe Chaparro et al v Colombia*, Views of 29 July 1997, UN Doc. CCPR/C/60/D/612/1995, para 8.2. Committee against Torture, Concluding Observations, Togo, UN Doc. CAT/C/TGO/CO/2, 11 December 2012, para.11(b).

⁴⁰² Committee on Enforced Disappearances, Concluding Observations on The Netherlands, CED/C/NLD/CO/1, 10 April 2014, paras. 16 and 17; Concluding Observations on Uruguay, CED/C/URY/CO/1, 8 May 2013, paras. 11 and 12.

⁴⁰³ Committee Against Torture, Concluding Observations: Kenya, UN Doc. CAT/C/KEN/CO/2, 19 June 2013, para.8, in sentence of up to 12 months and/or a fine; Syria, UN Doc. CAT/C/SYR/CO/1, para.6, sentence of up to 3 years imprisonment; Tajikistan, UN Doc. CAT/C/TJK/CO/2, 21 January 2013, para.6, sentence of up to 5 years imprisonment; Estonia, UN Doc. CAT/C/EST/CO/5, 17 June 2013, para.8, sentence of up to 5 years imprisonment; and Germany, UN Doc. CAT/C/DEU/CO/5, 12 December 2011, para.11, sentence of up to 5 years imprisonment. See also, Case *Guridi v. Spain*, Communication No. 212/2002, UN Doc. CAT/C/34/D/212/2002, para.6.7 where the civil guards responsible

In relation to a one year sentence received by a British soldier who pleaded guilty to inhumane treatment, the Committee recalled “penalties commensurate with the gravity of the crime of torture are indispensable in order to have a successful deterrent effect”.⁴⁰⁴ In relation to a case involving enforced disappearance, the Inter-American Court of Human Rights held “that the State’s response to the unlawful conduct of an agent must be commensurate with the juridical rights affected” and that “the rule of proportionality requires that the States, in exercising their duty to prosecute, impose penalties that truly contribute to prevent impunity, taking into account various factors such as the characteristics of the offense, and the participation and guilt of the accused.”⁴⁰⁵

The sentence for gross human rights violations must additionally not be low in relative terms, compared to the overall sentencing policy of the State for other similarly serious crimes. For example, in Mauritius, where the criminal law provided for a maximum fine of 150,000 rupees and for imprisonment for a term not exceeding 10 years for the offence of torture, the Committee against Torture noted its concern that “penalties for other crimes, such as drug trafficking, are higher than those for torture”.⁴⁰⁶

In addition, aggravating circumstances should also be taken into consideration when sentences are awarded in cases involving gross human rights violations. In its Concluding Observations regarding Mauritius, the Committee against Torture also noted that “some aggravating circumstances, such as the permanent disability of the victim, are not taken specifically into account”.⁴⁰⁷

It is also imperative that gross human rights violations are not prosecuted as less serious offences when sufficient evidence is available to proceed with the more serious offence. The Committee against Torture has expressed concern over the willingness of public prosecutors and judges who receive complaints of torture either disregarding them or classifying the acts in question as constituting less serious offences.⁴⁰⁸ For example, in relation to Morocco, the Committee against Torture noted with concern: “that police officers are, at the most, prosecuted for assault or assault and battery, but not for torture, and that the information provided by the State party indicates that the administrative and disciplinary penalties imposed on officers for such acts do not seem to be commensurate with their seriousness.”⁴⁰⁹

Provisions of the Tunisian Criminal Code that codify gross human rights violations as crimes under Tunisian law frequently provide the possibility for judges to impose serious punishments, including lengthy prison sentences. However, contrary to international standards, where persons responsible for such violations are successfully prosecuted, the sentences they actually receive are rarely appropriate to the gravity of the crimes committed. This is due to two reasons. First, such persons are convicted of less serious offences, such as violence against the person instead of torture, which carries a lesser punishment. Second, judges have in some cases used their broad discretion, pursuant to article 53 of the Criminal Code, to reduce the sentence imposed. For example, even following the 2011 amendments to the crime of torture, a person convicted of torture for the first time (in a case where the victims did not suffer amputation, fracture or a “permanent disability”), could theoretically see a prison sentence of 8 years reduced to a 6-month suspended sentence. Furthermore, the judges need not base this reduction on any objective factors such as the degree of participation and guilt of the accused in the crime. Consequently, the Military Court of Appeal in the case of Barraket Essahel reduced the original sentences of four and three years, to two years, without providing any reasoning

were sentenced to four years imprisonment, reduced on appeal to one year before being subsequently pardoned. The Committee noted: “the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment”.

⁴⁰⁴ Committee against Torture, Concluding Observations, United Kingdom, UN Doc. CAT/C/GBR/CO/5, para.17.

⁴⁰⁵ Inter-American Court of Human Rights, *Heliodoro Portugal v Panama*, Judgment of 12 August 2008, para.203.

⁴⁰⁶ Committee against Torture, Concluding Observations, Mauritius, UN Doc. CAT/C/MUS/CO/3, 15 June 2011, para.8.

⁴⁰⁷ Committee against Torture, Concluding Observations, Mauritius, UN Doc. CAT/C/MUS/CO/3, 15 June 2011, para.8.

⁴⁰⁸ Committee against Torture, Concluding Observations: Mexico, UN Doc. CAT/C/MEX/CO/5-6, 11 December 2012, para.16; Russian Federation, UN Doc. CAT/C/RUS/CO/5, 11 December 2012, para.7; Turkey, UN Doc. CAT/C/TUR/CO/3, 20 January 2011, para.7.

⁴⁰⁹ Committee against Torture, Concluding Observations, Morocco, UN Doc. CAT/C/MAR/CO/4, 21 December 2011, para.16.

to support this decision and despite affirming the guilt of the accused for what amounted to torture.

Some provisions of the Criminal Code require that where aggravating circumstances are present, a more serious punishment should be imposed. However, it is not clear whether the aggravating factors listed for torture (article 101bis) and abduction (article 237) extend to serious psychological consequences resulting from the acts. Article 101bis refers to “amputation or fracture of a limb” or a “permanent disability” while article 250 lists “physical disability or illness of the victim”. In addition, persons convicted under article 103 are subject to a lesser sentence in cases where the acts involved “threats without physical acts of violence being inflicted”, without consideration of the mental consequences of the threats.

The Tunisian authorities should therefore:

- i) Ensure that all provisions criminalizing gross human rights violations provide for minimum and maximum sentences commensurate the gravity of the crime and that are in line with sentencing policy for the most serious offences in Tunisian law;**
- ii) Establish prosecutorial guidelines that require gross human rights violations to be prosecuted as the most serious offences applicable under domestic criminal law and not as more minor offences that carry lesser sentences; and**
- iii) Ensure that aggravating factors in cases involving gross human rights violations can result in a more serious sentence and that aggravating factors can include serious mental, as well as physical, consequences, including by reforming articles 101bis, 237 and 103.**

C. Application of international law by the court

i. Tunisian legal framework and practice

The 1959 Constitution recognised the supremacy of international law over domestic law but was silent as to the status of international law vis-à-vis the Constitution.⁴¹⁰ Article 20 of the 2014 Constitution clearly states that international treaties approved by the Parliament and subsequently ratified shall have a status superior to legislation but inferior to the Constitution. International treaties enter into force once they have been ratified.⁴¹¹

The 1959 Constitution did not state whether international human rights treaties ratified by Tunisia could be applied directly in national courts. The 2014 Constitution is also silent on this issue.

In relation to Tunisia’s fifth periodic report on its compliance with the ICCPR, the HRC asked the Tunisian authorities how the provision of the Constitution, according to which treaties rank higher than laws, has been applied and whether, and with what results, it has been invoked directly before the courts or the administrative authorities.⁴¹² In its response to the HRC, the Tunisian authorities stated that “Once an international treaty has entered into force by means of an approving act and a ratifying decree, it becomes part of the national legal system and a binding higher source of law”, and that “[e]veryone, including the courts” had to abide by this rule. Consequently, the courts “are obliged to take account of treaties and apply them as soon as they form an integral part of current legislation.” In addition, all courts must “ensure that the rights embodied in international conventions are respected”.⁴¹³

In terms of whether the courts directly apply international treaties the Tunisian authorities referred to

⁴¹⁰ 1959 Constitution, article 32.

⁴¹¹ 2014 Constitution, article 67.

⁴¹² HRC, List of issues to be taken up in connection with the consideration of the fifth periodic report of Tunisia, UN Doc. CCPR/C/TUN/Q/5, 28 November 2007, question 1.

⁴¹³ HRC, Replies of the Tunisian Government to the list of issues (UN Doc. CCPR/C/TUN/Q/5) to be taken up in connection with the consideration of the fifth periodic report of TUNISIA (UN Doc. CCPR/C/TUN/5), UN Doc. CCPR/C/TUN/Q/5/Add.1 25 February 2008, Reply to question 1.

the “traditional position” as being that treaties that have been ratified and approved create obligations only for the States parties and therefore cannot be invoked directly before national courts. However, the reply went on to note that this approach has gradually been abandoned and that courts “in a variety of cases have espoused the view that international instruments, including human rights instruments, may be directly invoked by litigants”.⁴¹⁴ The reply cited various rulings from 1994 onwards by both the ordinary courts on family law issues and the Administrative Court to support this finding.⁴¹⁵ Despite there being no constitutional obstacle to the direct application of international treaties that have been signed and ratified, in the vast majority of criminal cases involving gross human rights violations judges have not done so. Indeed, judges have in such cases seemed not even to be willing to use international treaties ratified by Tunisia or customary international law as a secondary source of guidance in interpreting domestic legislation.

These failures have had particular implications for victims of torture, given the lack of an offence of torture until 1999 and the inadequate definition of torture since 1999.

Lack of application of international law by domestic courts: Case No. 74937 - Barraket Essahel

In this case 244 army officers were arrested and tortured in 1991. A criminal complaint was lodged by some of the victims in 2011. Further details regarding the facts and legal proceedings are set out above at section A.ii.1.

Despite the extensive torture suffered by the victims in the case, the investigating judge restricted the investigation to the lesser offence of article 101 (violence against the person) as opposed to torture. This was on the basis that the torture took place in 1991, prior to the introduction of the crime of torture into the Criminal Code. The Military Court of First Instance affirmed the approach of the investigating judge in its judgment. No reference was made to the CAT, including Tunisia’s ratification of it, nor to the prohibition of torture as a matter of customary international law.

In the instances international law has been referred to in cases related to gross human rights violations, judges lack knowledge and understanding of the relevant standards.

Limited knowledge and understanding of international law by domestic courts: Case No. 71191

This case related to various incidents of killings and injuring of persons during the 2011 Uprising. In its judgment, the First Instance Military Tribunal of Tunis stated that in “comparative and international law” inaction over crimes would suffice to engage the responsibility of “High Commanders of the country, including the President”.⁴¹⁶ No specific international standards or jurisprudence was cited to support this finding. As set out in more detail below (section G.ii.1) this is not a complete statement of the superior responsibility test under international law. Later in its judgment, the Military Court referred to the “Havana Convention” before citing various provisions from the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, a soft law instrument adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana. Despite referencing these provisions, the Court did not then apply them when examining the liability of the accused.⁴¹⁷

⁴¹⁴ Id.

⁴¹⁵ The Reply cited the following cases before ordinary courts: Case No.34,179 of 27 June 2000 in the Tunis Court of First Instance; Case No.7,602 of 18 May 2000 in the Tunis Court of First Instance; Decision No.7286 of 2 March 2001 of the Court of Cassation; Case No.53/16,189 of 2 December 2003 in the Court of First Instance of La Manouba; Case No.120 of 6 January 2004, in the Tunis Court of Appeal. It also cited the following cases before the Administrative Court: Case No. 2,193 of 1 June 1994 at first instance; Case No.18,600 of 14 April 2001 at first instance; Case No. 3,643 of 21 May 1996 at first instance; Case No.13,918 of 13 May 2003 at first instance; and Case No.16,919 of 18 December 1999 at first instance.

⁴¹⁶ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.900.

⁴¹⁷ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.901.

While the Court's willingness to cite international standards as a positive source of law is welcome, and in some respects the Court's description of the international standards may have implied a relatively wide and binding character for the standards, the lack of more detailed knowledge and understanding may have led the Court to be reluctant actually to apply the international standards, or could in future cases led the Court to ignore or misapply international standards in a way detrimental to justice and protection of human rights.

ii. Assessment in light of international law and standards

International law is clear that where a State is party to a treaty it must act in accordance with the treaty and cannot rely on its internal law or policies to avoid its obligations under the treaty.⁴¹⁸ These principles are codified in the Vienna Convention on the Law of Treaties, to which Tunisia has been a party since 1971 and which entered into force in 1980.⁴¹⁹ Article 26 of the Vienna Convention provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". Pursuant to article 27 of the Vienna Convention, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

The HRC, in its General Comment No. 31, referred to both articles 26 and 27 of the Vienna Convention when examining the nature of the obligations imposed on States by the ICCPR. In particular, the HRC affirmed that "[t]he obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole". It went on to note that this obligation extends to "all branches of government" "at whatever level".⁴²⁰ Furthermore, the HRC affirmed that "[a]lthough article 2, paragraph 2, allows States parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty".⁴²¹

In its Concluding Observations on Togo, the Committee against Torture highlighted its concern regarding the assertion that Togolese Courts had no legal means to punish torture and that no court was able to directly apply the provisions of the CAT, even where there was evidence of torture before the court, because of the lack of legislation criminalizing and punishing such acts. In its recommendations, the Committee reminded Togo of article 27 of the Vienna Convention and the requirement not to invoke its internal law as purported justification for its failure to meet its obligations under the CAT.⁴²²

In this regard, international instruments highlight the role of domestic courts in the implementation of international human rights law. For example, the Bangalore Principles on the Domestic Application of International Human Rights Norms emphasized that domestic courts should draw on international human rights law where domestic law is uncertain or incomplete.⁴²³ The Singhvi Declaration provides that "[j]udges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the

⁴¹⁸ See rulings of the Permanent Court of International Justice and the International Court of Justice: Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 167; and I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para.47.

⁴¹⁹ Article 26 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331, acceded to by Tunisia 23 June 1971, entry into force 27 January 1980.

⁴²⁰ HRC, General Comment No.31, para.4.

⁴²¹ HRC, General Comment No.31, para.4. See also, HRC, Concluding Observations, Libya, UN Doc. CCPR/C/LBY/CO/4/CRP.1, 30 October 2007, para.8.

⁴²² Committee against Torture, Concluding Observations, Togo, UN Doc. CAT/C/TGO/CO/2, 11 December 2012, para.11.

⁴²³ Commonwealth Secretariat, Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India, 1988, reprinted 'The Bangalore Principles on the Domestic Application of International Human Rights Norms', 1988 Commonwealth Law Bulletin 14, p.1196.

limits set by their national constitutions and laws".⁴²⁴ The Commentary to the Bangalore Principles on Judicial Conduct, which also include a requirement for judges to remain informed of international human rights instruments, provides that "the powers entrusted to a judge must be exercised not only in accordance with domestic law but also, to the full extent that domestic law permits, in a way consistent with the principles of international law recognized in modern democratic societies."⁴²⁵

The Conclusions and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in 1992 referred to the binding nature of the African Charter and the fact that domestic laws could not be invoked as an excuse for failure to perform an obligation imposed by the treaty.⁴²⁶ It highlighted that where a conflict arose between the Charter and national legislation the Charter provision would prevail.⁴²⁷ The Conclusions and Recommendations further noted that national courts should "have regard to international obligations which a country undertakes whether or not they have been incorporated in domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions and laws written or unwritten."⁴²⁸ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights in 2003, provide that "[s]tates shall ensure that judicial officials have appropriate education and training and should be made aware of ... human rights and fundamental freedoms recognized by national and international law" and that everyone has the right to seek a remedy for violations of the African Charter before competent national courts.⁴²⁹ The Inter-American Court of Human Rights in its jurisprudence has gone one step further, finding that the general provisions of the American Convention on Human Rights effectively impose a duty directly on domestic courts to ensure the enforcement of Convention rights within the domestic legal system.⁴³⁰

The Tunisian Constitution clearly provides for the primacy of international law over domestic legislation. In addition, there is nothing in the Constitution that prevents treaties that have been ratified from being directly applied by the courts. The reply of the Tunisian authorities to the HRC in 2008 confirmed that there is no domestic constitutional impediment to the direct application of ratified conventions by Tunisian courts. Indeed, if, as was explained by the Tunisian delegation, ratified treaties become a "binding higher source of law", that "[e]veryone, including the courts" must abide by this rule, and courts must "ensure that the rights embodied in international conventions are respected", it would appear that the delegation was effectively saying that the courts in Tunisia are obliged by Tunisian law to directly apply all ratified conventions. This approach is supported by decisions of administrative and ordinary courts since 1994 onwards that directly apply international standards in certain domestic proceedings. This demonstrates the possibility for similar approaches in criminal cases, civil cases concerning human rights violations, and other constitutional matters.

In addition, cases brought since the 2011 Uprising demonstrate the lack of understanding and knowledge as to the precise content of international standards in relation to gross human rights

⁴²⁴ Singhvi Declaration (Draft Universal Declaration on the Independence of Justice), Principle 40.

⁴²⁵ Bangalore Principles on Judicial Conduct, Principle 6.4 and commentary (Judicial Integrity Group / UN Office on Drugs and Crime, 2007), p. 137. See ECOSOC resolutions 2006/23, 2007/22.

⁴²⁶ Conclusion and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in the Internal Legal Systems in Africa, organised in October 1992 in Banjul, The Gambia by the African Commission on Human and Peoples' Rights, together with the Raoul Wallenberg Institute on Human Rights and Humanitarian Law, Sweden, October 1992. Reprinted in the Sixth Annual Activity Report of the African Commission 1992-1993, ACHPR/RPT/6th, para.1(c).

⁴²⁷ Conclusion and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in the Internal Legal Systems in Africa, para.1(b).

⁴²⁸ Conclusion and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in the Internal Legal Systems in Africa, para.4(b). See also the Outcome of Bangkok Judicial Colloquium on the Domestic Application of International Human Rights Norms, meeting from 23 to 25 March 2009, and attended by Justices and Judges from Cambodia, Malaysia, the Philippines, Sri Lanka and Thailand, as well as by observers of the Lao PDR and the Philippines, paras.1(b) and (c).

⁴²⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles B and C.

⁴³⁰ Inter-American Court of Human Rights, Case of *Almonacid-Arellano et al v. Chile*, Judgment of September 26, 2006, para.124. See also Inter-American Court of Human Rights, *Heliodoro Portugal v Panama*, Judgment of 12 August 2008, para.180; *International Responsibility for the Issuance and Application of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, para.35; and Case of *Boyce et al. v. Barbados*, Judgment of November 20, 2007, para.113.

violations. There is therefore the need for judges to receive adequate and regular information on such standards and for judges to keep themselves informed about relevant developments.

In light of the above, the ICJ recommends that:

- a) Legislative amendments expressly codify that ratified conventions are directly applicable by the Courts in domestic legal proceedings, that when several interpretations of a domestic legal provision are possible, the interpretation that best accords with Tunisia's international legal obligations should be adopted, and that in the event of a conflict between domestic law and international obligations, international obligations must prevail;**
- b) The High Judicial Council should ensure that there is on-going information and training for judges on international law and standards; and**
- c) A judicial code of conduct should be adopted that provides that judges are required to keep themselves informed about relevant developments regarding international law and standards.**

D. Ne bis in idem

i. Tunisian legal framework and practice

Article 132bis of the Tunisian Code of Criminal Procedure states "[n]o one who has been acquitted may be prosecuted again for the same acts, even if they are classified as a different offence".

It is possible to re-open a case which has already been adjudicated if new evidence is found. However, this provision only applies where the new evidence is to the benefit of the accused.⁴³¹ Under the law, the case can be reopened if its review is justified by the occurrence or disclosure of a fact or the presentation of unknown documents, which are likely to establish the innocence of a convicted person or that the offence was less serious than the one he or she was convicted of. A case can only be re-opened at the request of the Minister of Justice, after consultation with two Attorney-Generals from the Ministry of Justice and two judges of the Cassation Court designated by its First President.⁴³²

Where the investigating judge or the indictment chamber has dismissed a case, the suspect cannot be investigated again for the same facts, unless "new charges" arise, which are defined as "witness statements, documents and minutes that could not be submitted for the consideration of the investigating judge or the indictment chamber that are likely to strengthen the charges that would have been deemed too weak or to give to the facts new developments useful in ascertaining the truth".⁴³³ Only the public prosecutor or the attorney-general of the relevant jurisdiction are competent to file new charges in relation to a suspect.⁴³⁴

The 2014 Constitution provides an exception to the *ne bis in idem* principle in the context of the "transitional justice system". Article 148(9) of the Constitution states: "The State commits to implement the transitional justice system in all its areas within the timeline set by relevant legislation. In this context, claims of retroactivity of laws, previous amnesty laws, the force of *res judicata*, or the applicability of statutes of limitation for the crime or the sentence are inadmissible" (*ne bis in idem* being covered by *res judicata*).

The scope of cases that are considered to fall under the "transitional justice system" is not clear from article 148(9) of the 2014 Constitution. However, the exception set out at article 148(9) is also found at article 42 of Law No.53-2013 of 24 December 2013 on the establishment of transitional justice and its organisation (the Transitional Justice Law) according to which cases referred by the Truth and Dignity Commission to the public prosecutor cannot be challenged by reliance on the principle of *res judicata*. Pursuant to this law, cases of deliberate killings, torture, rape and all forms of sexual

⁴³¹ Code of Criminal Procedure, article 277.

⁴³² Code of Criminal Procedure, article 278.

⁴³³ Code of Criminal Procedure, article 121.

⁴³⁴ Code of Criminal Procedure, article 121.

violence, enforced disappearance, and executions without fair trial guarantees can be prosecuted before specialized chambers, composed of judges trained in transitional justice and sitting as courts of first instance within the Courts of Appeal.

Cases will be referred by the Truth and Dignity Commission established by the same Transitional Justice Law. The Transitional Justice Law is not clear on how these chambers will function and how they will relate to the work of the Commission. In particular, it is to be confirmed whether beside the cases referred to the chambers by the Commission, victims in other cases could also go directly before those chambers. It is also not clear if the specialized chambers will only be competent to adjudicate violations committed between the 1 July 1955 until the day of enactment of the law, thereby mirroring the mandate of the Truth and Dignity Commission, and if they will function for a fixed period of time, as is the case for the Commission, (the mandate of which is four years and renewable for a further year).⁴³⁵

ii. Assessment in light of international law and standards

The principle of *ne bis in idem* is set out at article 14(7) of the ICCPR: “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” Similar provisions are incorporated in other regional human rights instruments.⁴³⁶

Principle 26(b) of the Updated Impunity Principles state that:

The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.⁴³⁷

The Rome Statute of the International Criminal Court (ICC) incorporates a similar exception with respect to crimes under the jurisdiction of the ICC.⁴³⁸

Further, as is clear from the wording of article 14(7), in order for the *ne bis in idem* principle to apply, there must have been a final judgment given in the criminal proceedings.⁴³⁹ The question of when proceedings are “final” has been considered in relation to the equivalent article in Protocol No. 7 to the European Convention on Human Rights (ECHR). The Explanatory Report to Protocol No.7 states that a decision is final “if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them”.⁴⁴⁰ The European Court of Human Rights has held that the discontinuance of proceedings by a public prosecutor does not amount to either a conviction or an acquittal.⁴⁴¹

⁴³⁵ Law No. 53-2013, of 24 December 2013 on the establishment of transitional justice and its organisation, article 8.

⁴³⁶ ACHR, article 8(4); Protocol No.7 to the ECHR, article 4; Arab Charter on Human Rights, article 19(1); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle No.8.

⁴³⁷ Principle 26(b); See also Principle 22 of the Updated Principles on Impunity, which states: “[s]tates should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, *non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity.”

⁴³⁸ ICC, Rome Statute, article 20(3).

⁴³⁹ *Schweizer v. Uruguay* (66/1980) (R.16/66), ICCPR, A/38/40 (12 October 1982) 117 at para.18.2.

⁴⁴⁰ Explanatory Report to Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.22, itself citing the European Convention on the International Validity of Criminal Judgments. This definition has been affirmed by the European Court of Human Rights. See for example, *Häkkä v. Finland*, No. 758/11, Judgment, para.43; and *Nikitin v. Russia*, No. 50178/99, Judgment, para.37.

⁴⁴¹ European Court of Human Rights cases: *Marguš v. Croatia*, No. 4455/10, Judgment of the Grand Chamber, 27

The *ne bis in idem* principle enshrined in article 14(7) of the ICCPR and in most other regional human rights instruments refers to “the offence” for which a person has been tried and either acquitted or convicted, as opposed to the facts that constitute the offence. It is therefore silent on a situation where the same individual is tried for a different offence stemming from the same facts. An exception to the focus on the offence rather than on the facts or conduct at question is the American Convention on Human Rights, which refers to the “same cause”⁴⁴² and the Rome Statute of the ICC, which at article 20(1) provides: “[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.”

The European Court of Human Rights has adopted this broader approach when interpreting article 4 of Protocol No. 7 to the ECHR: “the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having a different legal classification it risks undermining the guarantee [...] [a]ccordingly, the Court takes the view that Article 4 of Protocol No.7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same.”⁴⁴³ In applying this test the Court held that it should “focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings”.⁴⁴⁴

In its General Comment No. 32, the HRC examined the scope of the *ne bis in idem* principle and noted that the prohibition enshrined in article 14(7) “is not at issue if a higher court quashes a conviction and orders a retrial” and “does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal”. Protocol No. 7 to the ECHR recognises similar limits on the scope of the *ne bis in idem* principle through its article 4(2), which states that the principle “shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.”

In addition to the exception contained in article 4(2) of Protocol No. 7, the European Court of Human Rights has held, in the case of *Marguš v. Croatia*, that the *ne bis in idem* principle must be read consistently with other obligations of States, namely those that require the prosecution and punishment of gross human rights violations.⁴⁴⁵ The Court in this case, referring to its previous case law and international standards, highlighted the importance of prosecuting cases of torture or ill-treatment, intentional killings and war crimes and precluding amnesty, pardons and time bars on prosecution or sentencing in such cases.⁴⁴⁶ The Court found that by bringing a fresh indictment against the applicant, who had previously been amnestied for crimes involving torture and murder, the State had acted in accordance with its obligation to protect the right to life and the right not to be subject to torture or other ill-treatment and consistently with international standards. The *ne bis in idem* principle was considered not to be applicable.⁴⁴⁷

May 2014, para.120; Smirnova and Smirnova v. Russia (dec.), Nos. 46133/99 and 48183/99, 3 October 2002; and Harutyunyan v. Armenia (dec.), No. 34334/04, 7 December 2006.

⁴⁴² ACHR, article 8(4). In *Loayza-Tamayo v. Peru*, 17 September 1997, Series C No. 33, para.66, the Inter-American Court of Human Rights noted the difference between the ACHR and the ICCPR. It noted that the term “the same cause” is a much broader term in favour of the accused.

⁴⁴³ European Court of Human Rights: *Sergey Zolotukhin v. Russia*, no. 14939/03, Judgement, paras.81-82; *Häkkä v. Finland*, no. 758/11, Judgement, para.41.

⁴⁴⁴ *Sergey Zolotukhin v. Russia*, no. 14939/03, Judgement, para.84.

⁴⁴⁵ European Court of Human Rights: *Marguš v. Croatia* No. 4455/10, Judgment of the Grand Chamber 27 May 2014, para.128.

⁴⁴⁶ *Marguš v. Croatia*, No. 4455/10, 27 May 2014, paras.124-138.

⁴⁴⁷ *Marguš v. Croatia*, No. 4455/10, 27 May 2014, para.141.

Although the American Convention on Human Rights contains no explicit exception to the *ne bis in idem* principle, the Inter-American Court of Human Rights has similarly held that the principle cannot be used to exclude responsibility for gross human rights violations. In a case involving an enforced disappearance, the Court held: “since this case involves serious human rights violations and considering the nature of the events, the State may not apply amnesty laws or argue statute of limitations, non-retroactivity of the criminal law, *res judicata*, or the *non bis in idem* principle, or any other similar mechanism that excludes responsibility, in order to exempt itself from this obligation”.⁴⁴⁸

The *ne bis in idem* principle set out at article 132bis of the Tunisian Criminal Code is broad in scope. It not only prevents prosecution of acquitted persons for the same offence but also for the same acts. Article 132bis also greatly limits the basis on which a case can be re-opened and only permits the re-opening if it would benefit the accused, not the victim of the crime. No exception is explicitly provided for in case of defects of the original proceedings or in light of the obligation to prosecute for gross human rights violations.

Given the numerous failings of the Tunisian criminal justice system to successfully prosecute cases of gross human rights violations before, during and after the 2011 Uprising and the absence of any explicit exceptions to the *ne bis in idem* principle for such violations in article 132bis, there is clear potential for numerous individuals who have been acquitted through flawed proceedings to escape justice.

Exceptions to the *ne bis in idem* principle enshrined in the 2014 Constitution (article 148(9)) and the Transitional Justice Law (article 42) aim at overcoming this obstacle by refusing to recognise the admissibility of arguments such as *res judicata* where a case falls within the “transitional justice system” or has been referred by the Truth and Dignity Commission to the public prosecutor. Since the Truth and Dignity Commission is mandated to transfer to the prosecutor cases of gross human rights violations, an exception to the *ne bis in idem* principle in such circumstances is supported by the jurisprudence of the European and Inter-American Courts of Human Rights, which recognise the priority afforded to the obligation to prosecute gross human rights violations.

Restrictions in Tunisian law or practice on re-opening criminal proceedings that have been dropped before trial could similarly undermine the obligation to prosecute persons responsible for such violations. It is imperative that restrictions on re-opening proceedings are not interpreted in such a way as to prevent the prosecution of gross human rights violations. As affirmed by the HRC, where proceedings are not final or have not resulted in an acquittal or conviction, the *ne bis in idem* principle, as provided for in the ICCPR, does not prevent proceedings from being reopened.

The Tunisian authorities should:

- i) Amend articles 132bis and 121 of the Tunisian Criminal Code to expressly provide for exceptions to the principle of *ne bis in idem* in cases of human rights violations that constitute crimes under international or national law, in line with Principle 26(b) of the Updated UN Set of principles for the protection and promotion of human rights through action to combat impunity.**

E. Principle of legality

i. Tunisian legal framework and practice

Article 28 of the 2014 Constitution provides that penalties are individual and are to be imposed only by virtue of a legal provision applicable at the time the criminal offence was committed. A similar provision was also enshrined in the 1959 Constitution (article 13).

Article 1 of the Criminal Code also states: “[n]o one may be punished except by virtue of a provision

⁴⁴⁸ Inter-American Court of Human Rights: *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Judgment of 1 September 2010, para.237(b). See also *Gelman v. Uruguay*, Judgment of 24 February 2011, para.254; and *Barrios Altos v. Peru* (Merits), Judgment of March 14, 2001. Series C No. 75, para.41.

of a previously existing law. If, after the fact but before the final judgment, provision is made by law for the imposition of a more lenient penalty, this law only shall apply.”

The principle set out at article 1 of the Criminal Code has been applied broadly in cases of gross human rights violations, including where international treaties requiring criminal prosecution of such conduct have been ratified by Tunisia but not implemented in domestic legislation. This is particularly the case in relation to acts of torture, which, despite ratification of the CAT in 1988, were not separately criminalized under the Criminal Code until 1999.⁴⁴⁹ As outlined above, judges are reluctant to refer to or apply international law in domestic cases. Consequently, judges have held that for acts of torture committed prior to 1999, they must be prosecuted under the lesser offences in force at the time, such as article 101 or 103 of the Criminal Code, which are punishable with a maximum prison sentence of 5 years.⁴⁵⁰ Requests by lawyers to consider the acts under the offence of “torture” have been held to breach the principle of non-retroactivity.

The use of the principle of non-retroactivity by domestic courts: Case No. 74937 (First Instance Tribunal) and No. 20416 (Court of Appeal) - Barraket Essahel

This case involved the arrest and torture of 244 army officers in 1991. The facts and legal procedure are set out in more detail above at section A.ii.1.

When considering the question of whether it had the competence to hear the case, the Military First Instance Tribunal examined the charge in question and the procedure followed.⁴⁵¹ The Court noted that when the investigating judge opened the investigation he began by examining whether a crime pursuant to article 101bis and article 32 of the Criminal Code had been committed. However, the investigating judge later examined the facts only in relation to article 101 of the Criminal Code on the basis that article 101bis only became part of Tunisian law in 1999 and the facts of the case occurred in 1991. The Court affirmed the approach taken by the investigating judge, referring to the principle of *nullum crimen* as set out at article 1 of the Criminal Code.⁴⁵² No reference was made by the Court to article 15 of the ICCPR or to the fact that Tunisia had ratified the CAT prior to 1991.

Appeal

On appeal, lawyers for the civil parties once again requested that the court recuse itself because the crimes in question were felonies, as they amount to torture, as well as other crimes under the Criminal Code. Although the Court dismissed the request on the basis that the civil parties had no right to make submissions on the criminal qualification of the facts, it stated that it would demonstrate that the legal reasoning was wrong in any event.⁴⁵³

In relation to the claim that the facts amounted to torture, the Court noted that the CAT was ratified by the Tunisian state on 11 July 1988 and, as a Convention, represents an engagement

by States to criminalize torture within their national legislation. However, the Court stated that the CAT does not contain provisions spelling out specific penalties that courts can apply in such cases. Since article 101bis was introduced into national legislation on 2 August 1999, after the facts of the case had occurred, it could not be relied on due to the principle of non-retroactivity, as set out in article 1 of the Criminal Code.

On 23 October 2012, the military chamber at the Cassation Court upheld the decision of the Military Court of Appeal.

⁴⁴⁹ Law No. 99-89 of 2 August 1999.

⁴⁵⁰ These offences are discussed in more detail above at section A.ii.1

⁴⁵¹ Permanent First Instance Military Court of Tunis, Case No. 74937, p.41.

⁴⁵² Permanent First Instance Military Court of Tunis, Case No. 74937, p.41.

⁴⁵³ Military Appeals Court, Case No. 334, p.45-46.

The use of the principle of non-retroactivity by domestic courts: Rached Jaidane case

Rached Jaidane was arrested in 1993 for his suspected involvement in organizing, together with others, an attack against a congress of the RCD. Mr Jaidane and two others were arrested on 29 July 1993 and held for 38 days on premises of the Ministry of the Interior during which they were tortured by officers of the State Security under the direct supervision of Ezzedine Jenayah, the then Director of State Security. The methods of torture reportedly included electrocution, the “roast chicken” (where an individual is suspended from his knees with his wrists tied over his legs), cigarette burns, waterboarding, sexual abuse, being punched, kicked and beaten with sticks, pulling out of nails and crushing of their fingers.

Mr Jaidane and the other detainees were forced to sign blank sheets of paper or confessions they were not permitted to read, or to write confessions that were dictated to them. They were presented before the investigating judge for the first time on 4 September 1993, after 48 days of incommunicado detention. Mr Jaidane was subsequently held in pre trial detention until his trial in 1996, when he was convicted and sentenced to 26 years imprisonment. He was subjected to further torture both in pre-trial detention and while serving his prison sentence. He was granted parole after serving 13 years. Following his release, Mr Jaidane tried to have his case reopened but his request was refused.

On 3 June 2011, Mr Jaidane filed a complaint of torture with the public prosecutor of the First Instance Tribunal of Tunis against eight officers of the prison administration and senior officials of the Ministry of the Interior, including Abdallah Kallel (Minister of the Interior 1991-1994) Ezzeddin Jenaieh (Director of State Security in 1991) and Ali Seriati (former Director of Presidential Security).

The public prosecutor opened an investigation on 16 July 2011 on charges of violence against the person, under article 101 of the Criminal Code. According to meetings the ICJ had with the lawyers in the case, the reason for not prosecuting under article 101bis (torture) was the principle of non-retroactivity, since the events took place in 1993.

The first hearing before the First Instance Tribunal of Tunis was held in April 2012. For three years the trial has been adjourned repeatedly at the request of defence lawyers. On 10 April 2015, the tribunal issued the verdict and acquitted all the defendants except for former President Ben Ali who was sentenced *in absentia* to 5 years.

The use of the principle of non-retroactivity by domestic courts: Abderazzek Ounifi

Abderazzek Ounifi was arrested and tortured twice during the Ben Ali regime, first in 1987 and again in 1991. In 1987, Mr Ounifi was arrested by the National Security Police and kept at the Gorjani police station in Tunis for three days. He was then imprisoned within the Ministry of the Interior’s premises for four months during which he was subject to torture and forced to sign confessions. Mr Ounifi was brought before a military investigating judge and convicted for conspiracy for organising an attack under article 72 of the Criminal Code. Mr Ounifi was detained for 15 months and was pardoned in July 1989. The second arrest took place in 1991 when Mr Ounifi was kept in the Bouchoucha detention facility where he was again subject to torture and forced to sign confessions.

In June 2011, Mr Ounifi filed a complaint with the public prosecutor of the First Instance Tribunal of Tunis. The complaint was filed against former President Ben Ali, Habib Ammar (former Minister of Interior) and Abderrahmen Guesmi and Zouhair Rdissi (officers of State Security). The prosecutor charged these three accused, as well as former President Ben Ali, with violence against the person under article 101 of the Criminal Code.

On 8 April 2015, the First Instance Tribunal of Tunis convicted Ben Ali *in absentia* sentencing him to 5 years imprisonment and to a 100,000 dinars fine. All the other accused were acquitted.

The application of the principle of non-retroactivity could have implications for the crime of enforced disappearance. Currently, no separately-defined offence of enforced disappearance is provided for in ordinary Tunisian law despite the ratification of the ICPEP in 2011.

As referred to in section D.i above, article 148(9) of the 2014 Constitution prohibits reliance on legal principles such as “claims of retroactivity of laws” to prevent the prosecution of individuals for violations in the context of the “transitional justice system”. The scope of cases that fall within this exception is not made clear in the 2014 Constitution, nor is any specific provision on non-retroactivity included in the Transitional Justice Law. However, the provision could be designed to apply to those cases of “deliberate killings, torture, rape and all forms of sexual violence, enforced disappearance, and executions without fair trial guarantees” transferred by the Truth and Dignity Commission to the public prosecutor.⁴⁵⁴

ii. Assessment in light of international law and standards

The principle of legality provides that a person may only be convicted for a criminal offence where the conduct in question was prohibited in law at the time when it occurred. It encompasses two dimensions: the prohibition of retroactive offences (*nullum crimen sine lege*) and the prohibition of retroactive penalties (*nulla poena sine lege*). A corollary of the legality principle is that the offence must be clearly defined in law.

The *nullum crimen, nulla poena sine lege* principle is enshrined in article 15 of the ICCPR, as well as other international human rights treaties.⁴⁵⁵ Given its importance, the principle is expressly characterised as non-derogable.⁴⁵⁶

Article 15 of the ICCPR provides as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 15(1) therefore clearly allows a person to be held accountable for an act that did not necessarily constitute a criminal offence under national time at the time it was committed, if it constituted a crime under international law at the time.⁴⁵⁷

International and regional bodies have addressed the application of the *nullum crimen sine lege* principle in the context of the prosecution and punishment of those responsible for gross human rights violations. For example, the Committee against Torture, in its concluding observations on Indonesia, expressed concern about the “inadequacy of measures to ensure that the second amendment to the 1945 Constitution, relating to the right not to be prosecuted based on retroactive law, will not apply to offences such as torture and crimes against humanity which under international law are already

⁴⁵⁴ Law No. 53-2013 of 24 December 2013, articles 8 and 42.

⁴⁵⁵ ECHR, article 7; ACHR, article 9; Arab Charter on Human Rights, article 15; ACHPR, article 7(2); Rome Statute of the ICC, article 22.

⁴⁵⁶ Article 4(2) of the ICCPR includes article 15 among the dispositions that cannot be subject to derogation. See also, HRC, General Comment 29, para.7. And see, article 15(2) of the ECHR; article 27(2) of the ACHR; and article 4(2) of the Arab Charter on Human Rights.

⁴⁵⁷ M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 1993, Strasbourg, Engel Publisher, pp. 276 and 281. See also HRC, *Baumgarten v. Germany* (960/2000), A/58/40 vol. II (31 July 2003) 261 (CCPR/C/78/D/960/2000), paras.9.2 to 9.5.

criminalized".⁴⁵⁸ The Committee went on to recommend that such crimes committed in the past be "investigated and, where appropriate, prosecuted in Indonesian courts".⁴⁵⁹

Article 7(1) and (2) of the ECHR is essentially identical to article 15(1) and (2) of the ICCPR as regards *nullum crimen sine lege*. In the case of *Kononov v. Latvia* the European Court of Human Rights found that there had been no breach of article 7 of the ECHR, since the war crimes of which the applicant had been found guilty in the domestic courts of Latvia were considered crimes under international law at the time the offence took place.⁴⁶⁰

In Estonia, the Tallin Court of Appeal upheld the conviction of two individuals for crimes against humanity committed in 1949 on the basis that the Estonian Criminal Code and Penal Code, although enacted after the acts in question, provided that crimes against humanity were punishable regardless of when the offences took place. The Estonian Court of Appeal also relied on the Estonian Constitution, pursuant to which generally recognised principles and rules of international law were an inseparable part of the Estonian legal system and noted that article 7(2) of the ECHR did not prevent punishment of a person for acts that were considered, at the time of their commission, criminal according to the general principles of law recognised by civilised nations.⁴⁶¹ In response to an application by the defendants to the European Court of Human Rights, the Court ruled the case to be inadmissible and manifestly unfounded. In so doing it referred to article 7(2) of the ECHR and further stated: "[t]he Court notes that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court sees no reason to come to a different conclusion."⁴⁶²

The Inter-American Court of Human Rights has reasoned that in cases of gross human rights violations the principle of non-retroactivity of criminal law cannot act as an avenue for impunity. In the *Barrios Altos Case*, the Court stated that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law".⁴⁶³ In its subsequent case law, the Court explicitly included "non-retroactivity of the criminal law" in this list of measures that cannot be used to eliminate criminal responsibility.⁴⁶⁴

In addition to the principle of the non-retroactive application of law, the principle of *nulla poena sine lege* requires that the punishment for a crime also be set out in advance. However, the lack of specific punishments for gross human rights violations has not generally been considered an obstacle to prosecution.

In particular, the statutes of the various international criminal courts and tribunals do not specify precise criminal sentences but rather set out the type of penalties, a maximum sanction and the basis

⁴⁵⁸ Committee against Torture, Concluding Observations: Indonesia, UN Doc. CAT, A/57/44 (2002) 22 at para.44(c).

⁴⁵⁹ Committee against Torture, Concluding Observations: Indonesia, UN Doc. CAT, A/57/44 (2002) 22 at para.45(f).

⁴⁶⁰ *Kononov v. Latvia*, No. 36376/04, Judgment of the Grand Chamber, 17 May 2010, paras.198-199 and 213. See also *Papon v France (No 2)*, No. 54210/00 (admissibility decision, 15 November 2001) "The Law" para 5; *Streletz, Kessler and Krenz v. Germany*, Nos 34044/96, 35532/97 and 44801/98, Judgment of the Grand Chamber, 22 March 2001.

⁴⁶¹ European Court of Human Rights, Decision as to the Admissibility of Application no. 23052/04 by August Kolk and Application No.24018/04 by Petr Kislyiy against Estonia, 17 January 2006.

⁴⁶² European Court of Human Rights, Decision as to the Admissibility of Application no. 23052/04 by August Kolk and Application No.24018/04 by Petr Kislyiy against Estonia, 17 January 2006.

⁴⁶³ Inter-American Court of Human Rights, *Barrios Altos v. Peru*, Judgment of March 14, 2001, para.41.

⁴⁶⁴ Inter-American Court of Human Rights, *González Medina and family v. Dominican Republic*, Judgment of 27 February 2012, para.285(e). See also Case of *Contreras et al. v. El Salvador*, Judgment of 31 August 2011, para.185.d. For a case involving extra-judicial killings and enforced disappearances, see Inter-American Court of Human Rights, *Case of La Cantuta v. Peru*, Judgment of November 29, 2006, para.226. See also Inter-American Commission on Human Rights, *Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human rights Committed during the Regime of Jean-Claude Duvalier*, 17 May 2011, available at <http://www.oas.org/en/iachr/docs/other/Haiti2011.asp>, last accessed: 24 January 2016.

on which the penalty is decided. For example, penalties under the Rome Statute of the International Criminal Court can include “imprisonment for a specified number of years, which may not exceed a maximum of 30 years”, or “a term of life imprisonment”.⁴⁶⁵ In determining the sentence the Court must take into account, among other things, “the gravity of the crime and the individual circumstances of the convicted person”.⁴⁶⁶ The statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) limit penalties to “imprisonment” and require the respective tribunals to “have recourse to the general practice regarding prison sentences” in the courts of the former Yugoslavia and Rwanda, respectively, when determining the length of the sentence.⁴⁶⁷ Furthermore, factors such as the “gravity of the offence and individual circumstances of the convicted person” should also be taken into account.⁴⁶⁸

In the trial after World War II of a General accused of war crimes and crimes against humanity, the Netherlands Special Court of Cassation examined the principle of *nulla poena sine lege* and found: “[t]his principle, however, bears no absolute character, in the sense that its operation may be affected by that of other principles with the recognition of which equally important interests of justice are concerned. These latter interests do not tolerate that extremely serious violations of the generally accepted principles of international law, the criminal character of which was already established beyond doubt at the time they were committed, should not be considered punishable on the sole ground that a previous threat of punishment was lacking.”⁴⁶⁹

In the case of *Kononov v. Latvia*, referred to above, the European Court of Human Rights held that “where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law”.⁴⁷⁰

Article 28 of the 2014 Constitution and article 1 of the Tunisian Code of Criminal Procedure together prohibit the punishment of persons without previously existing law. They therefore set out a principle of non-retroactivity of punishment as opposed to non-retroactivity of offences. However, article 1 has been interpreted broadly by the Courts and by prosecutors.

Under Tunisian law, acts or omissions recognised as criminal under international law are not prosecutable unless they are also enshrined as such under domestic law. No exception to the non-retroactivity principle is set out in law or accepted by Tunisian Courts where an act or omission is “criminal according to the general principles of law recognized by the community of nations”, in accordance with article 15(2) of the ICCPR. The non-retroactivity principle has even been applied where Tunisia has signed and ratified an international convention but has not adequately incorporated it into domestic law.

Article 148(9) of the 2014 Constitution prohibits reliance on non-retroactivity in relation to all cases falling within the “transitional justice system”. To the extent that this applies to cases referred by the Truth and Dignity Commission to the public prosecutor under the Transitional Justice Law, the crimes that can be referred (deliberate killings, torture, rape and all forms of sexual violence, enforced disappearance, and executions without fair trial guarantees) are recognised as such by international law or according to the general principles of law recognized by the community of nations.

If the article 148(9) exception is limited to those cases referred by the Truth and Dignity Commission

⁴⁶⁵ Rome Statute of the ICC, article 77.

⁴⁶⁶ Rome Statute of the ICC, article 78. See also Rule 145 of the ICC Rules of Procedure and Evidence.

⁴⁶⁷ Article 24 of the Statute of the ICTY; article 23 of the Statute of the ICTR.

⁴⁶⁸ Id. See also the International Law Commission, *Draft Code of Crimes against Peace and Security of Mankind*, 1996, article 3, which states that what is important is that the punishment shall be commensurate with the “character and gravity of the crime.”

⁴⁶⁹ Netherlands Special Court in 's-Gravenhage (The Hague) and Netherlands Special Court of Cassation, *Trial of Hans Albin Rauter*, Judgment delivered on 4th May 1948 and 12th January 1949, in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Volume XIV, 1949, p.120, available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-14.pdf, last accessed: 24 January 2016.

⁴⁷⁰ *Kononov v. Latvia*, No. 36376/04, Judgment of the Grand Chamber, 17 May 2010, para.212.

to the prosecutor, numerous other cases of gross human rights violations, and in particular cases of torture and enforced disappearance, may be prevented from being prosecuted by the application of article 1 of the Criminal Code of Procedure.

The Tunisian authorities should:

- i) **Amend article 1 of the Criminal Code of Procedure in line with article 15(1) and (2) of the ICCPR, such that acts and omissions that, at the time of their commission, constituted a criminal offence under national or international law or are criminal according to the general principles of law recognized by the community of nations can be prosecuted and punished in domestic criminal proceedings; and**
- ii) **Enact amendments to the Criminal Code or Criminal Code of Procedure in respect of specific offences such as torture to specify that they apply retroactively to at least the date on which Tunisia ratified the relevant treaty (without prejudice to the possibility of a longer period of retroactivity pursuant to the amendments to article 1 of the Criminal Code of Procedure as contemplated above).**

F. Statute of limitations

i. Tunisian legal framework and practice

A limitation period of 10 years applies to all serious offences defined as “crimes” and 3 years for all lesser offences defined as “délits”.⁴⁷¹ Some offences that have been used in the prosecution of gross human rights violations fall within the category of “délits” and would therefore be subject to the 3 year limitation period.⁴⁷²

The limitation period for civil lawsuits runs parallel to the corresponding criminal lawsuit.⁴⁷³ Consequently, victims wishing to claim reparation in civil proceedings must file their claim within the 10 or 3-year period.

Following the 2011 Uprising, the limitation period for torture was increased from 10 to 15 years.⁴⁷⁴ The 2014 Constitution amended this once again by recognising the non-applicability of statutory limitations for the crime of torture.⁴⁷⁵

The limitation period is suspended “by any legal or material obstacle, which prevents the criminal action being pursued, except where this results only from the lack of will of the accused”.⁴⁷⁶ What amounts to a “legal or material obstacle” is not defined in the Code of Criminal Procedure or elsewhere.

In some of the cases brought since the Uprising, this provision has been given a broad interpretation so as to prevent cases of torture that took place during the Ben Ali regime from being time-barred.

The use of statutes of limitations by domestic courts: Barraket Essahel – Case No. 74937

At first instance, the Military Tribunal found that the imbalance of power between the victims and the accused resulted in immunity in law and practice for the accused, which amounted to a “material obstacle for the purposes of article 5 of the Code of Criminal Procedure”.⁴⁷⁷

⁴⁷¹ Code of Criminal Procedure, article 5.

⁴⁷² Examples include violence against the person (article 101 of the Criminal Code), prejudicing freedom or violence or ill-treatment by a public official (article 103 of the Criminal Code), acts of violence (articles 218 and 219 (unless it causes disability of more than 20%).

⁴⁷³ Code of Criminal Procedure, article 8.

⁴⁷⁴ Decree 106-2011 of 22 October 2011.

⁴⁷⁵ 2014 Constitution, article 23.

⁴⁷⁶ Code of Criminal Procedure, article 5(2).

⁴⁷⁷ Permanent First Instance Military Court of Tunis, Case No. 74937, p.38-40.

Consequently, the Court concluded that the statute of limitations did not apply until the 14 of January 2011, the date Ben Ali left Tunisia.⁴⁷⁸

Military Court of Appeal

On appeal, the Military Court of Appeal took note of the three year period for misdemeanours but also referenced the exception provided by article 5(2) of the Code of Criminal Procedure if there is a "legal or material obstacle".⁴⁷⁹ Looking at the original French text, the Military Court concluded that "material obstacle" is any obstacle that exists in effect or in reality. The Court noted that the law did not define what amounts to a material obstacle and did not provide any further detail.⁴⁸⁰

Although the Military Court accepted that, in general, civil law could act as a reference point in order to understand certain concepts of criminal law, in this case it stated that there was no need to do so. The Court also noted that the notion of *force majeure* in civil law is more restrictive than the notion of "material or legal obstacles" for the purpose of the statute of limitations. According to the Court, the legislator had left it to the Courts to interpret the notion of "material and legal obstacles".⁴⁸¹

The Military Court found that it was "indisputable" that the situation in Tunisia under Ben Ali was characterized by injustice and authoritarian rule. This situation was said to be "public knowledge" that everyone shares, without the need for proof.

The Military Court noted that the regime that was in place prevented individuals from seeking remedies to the violations they were subjected to by the security agencies. The Court also found that the regime had control over the prosecution service. It was, therefore, "impossible" for the individuals in the present case to complain about the "gross violations" that were inflicted on their bodies and on their physical and psychological integrity.⁴⁸²

In addition, the Military Court noted that had the victims wanted to act in that case they would have had to appear before military tribunals. Military trials, at that time, could not take place without the Minister of Defence's authorization.⁴⁸³ In addition, the Court noted that the Minister of Defence was under the direct authority of the President of the Republic. This "procedural situation" itself was said to amount to a legal obstacle.⁴⁸⁴

The Military Court found that given the situation at that time in Tunisia it was "useless" to bring a claim against the accused within the three year limitation period.⁴⁸⁵ The Court pointed to claims brought during Ben Ali's rule that did not lead to any result. Therefore, the Court ruled that the statute of limitations did not apply until 14 January, the date of Ben Ali's "escape" from Tunisia.⁴⁸⁶

Article 148(9) of the 2014 Constitution precludes the application of limitation periods in the context of violations prosecuted under the "transitional justice system".⁴⁸⁷ In addition, the Transitional Justice Law states that legal actions falling within article 8 of the law are imprescriptible. Article 8 of the Transitional Justice Law establishes the specialized criminal chambers for cases involving "deliberate

⁴⁷⁸ Permanent First Instance Military Court of Tunis, Case No. 74937, p.40.

⁴⁷⁹ Military Appeals Court, Case No. 334, p.48.

⁴⁸⁰ Military Appeals Court, Case No. 334, p.49.

⁴⁸¹ Military Appeals Court, Case No. 334, p.49.

⁴⁸² Military Appeals Court, Case No. 334, p.50.

⁴⁸³ Id.

⁴⁸⁴ Id.

⁴⁸⁵ Military Appeals Court, Case No. 334, p.51.

⁴⁸⁶ Id.

⁴⁸⁷ Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organisation, article 9.

killings, torture, rape and all forms of sexual violence, enforced disappearance and executions without fair trial guarantees”.

ii. Assessment in light of international law and standards

Statutes of limitation may constitute an obstacle for accountability as well as for the realization of victims’ right to remedy and reparation. Consequently, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, to which Tunisia is a party, proscribes statutory limitations in respect of crimes against humanity and war crimes.⁴⁸⁸ Article 29 of the Rome Statute of the ICC, to which Tunisia is also a party, provides that none of the crimes within the jurisdiction of the ICC are subject to any statute of limitations.⁴⁸⁹

The use of limitation periods should not be permitted to allow for impunity in relation to other gross human rights violations. The ICPED, to which Tunisia is party, requires that where a statute of limitations is applied in respect of enforced disappearances the term of limitation for criminal proceedings “is of long duration and is proportionate to the extreme seriousness of this offence” and only commences when the enforced disappearance ceases, taking into account its continuous nature.⁴⁹⁰ The ICPED also provides that “Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.”⁴⁹¹ This should be interpreted as reflecting the provision of the UN Declaration on the Protection of all Persons from Enforced Disappearance, by which any limitation period should also be suspended during any time at which effective remedies, as contemplated under article 2 of the ICCPR, are not available.⁴⁹²

The HRC has affirmed that unreasonably short periods of statutory limitation can act as an impediment to the establishment of legal responsibility and should be removed.⁴⁹³ In its Concluding Observations in relation to Ecuador the HRC welcomed provisions in the Constitution which, among other things, provided that torture, enforced disappearances and extrajudicial executions are not subject to a statute of limitations.⁴⁹⁴ It has also expressed concern in relation to El Salvador that investigations into extrajudicial killings were considered under the statute of limitations even though the supposed perpetrators had been identified.⁴⁹⁵ In relation to Argentina the HRC noted that “Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice”.⁴⁹⁶

The Committee against Torture has gone further and has stated on numerous occasions that there should be no limitation period in relation to torture.⁴⁹⁷ The ICTY and the European Court of Human

⁴⁸⁸ See UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, 26 November 1968. Tunisia acceded to this Convention on 15 June 1972.

⁴⁸⁹ Rome Statute of the International Criminal Court, 17 July 1998, article 29.

⁴⁹⁰ CED, article 8(1).

⁴⁹¹ CED, article 8(2).

⁴⁹² Declaration on the Protection of all Persons from Enforced Disappearance, article 17(2). See also 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 (2005), Principle 23. And see ICJ, Practitioners Guide no 9, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, 2015, pp. 214 to 218.

⁴⁹³ HRC, General Comment No. 31, para.18.

⁴⁹⁴ Concluding Observations of the HRC: Ecuador, ICCPR, UN Doc. A/53/40 vol. I (1998) 43 at para.280.

⁴⁹⁵ Concluding Observations of the HRC: El Salvador, ICCPR, UN Doc. A/58/40 vol. I (2003) 61 at para.84(7).

⁴⁹⁶ Concluding Observations of the HRC: Argentina, ICCPR, UN Doc. CCPR/CO/70/ARG, 15 November 2000, section C. See also Concluding Observations in relation to Croatia, UN Doc. CCPR/C/HRC/CO/2, 4 November 2009, para.10, where the HRC recommended Croatia to “[e]nsure the suspension of the operation of the statute of limitation for the period of the conflict to allow the prosecution of serious cases of torture and killings”.

⁴⁹⁷ Committee against Torture, General Comment No. 3, para. 40. See also Concluding Observations of the Committee against Torture: Morocco, Committee against Torture, UN Doc. A/59/44 (2003) 58 at paras.126(f) and 127(d); Turkey, Committee against Torture, UN Doc. A/58/44 (2003) 46 at para.123(c); and Chile, Committee against Torture, UN Doc. A/59/44 (2004) 28 at para.57(f). In relation to Slovenia, the Committee expressed concern over a limitation period for torture and further noted that “the period of limitation pertaining to acts of ill-treatment other than torture is too short”. Concluding Observations of the Committee against Torture: Slovenia, Committee against Torture, UN Doc. A/58/44 (2003) 44 at paras.115(b) and 116(b). In relation to Venezuela, the Committee against Torture welcomed provisions in

Rights have also said that no limitation period should apply in cases of torture.⁴⁹⁸

The Basic Principles on the Right to a Remedy and Reparation and the Updated Impunity Principles affirm that statutes of limitation do not apply to gross human rights violations that amount to crimes under international law.⁴⁹⁹ For those violations that do not amount to crimes under international law, the Updated Impunity Principles state that prescription periods shall not run where there is no effective remedy available and “shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.”⁵⁰⁰ The Basic Principles on the Right to a Remedy and Reparation state that in such cases the time limits should not be “unduly restrictive”.⁵⁰¹

The jurisprudence of the Inter-American Court of Human Rights is clear that statutes of limitation cannot be invoked by a State to undermine its duty to investigate and punish those responsible for gross human rights violations.⁵⁰² In the *Barrios Altos* case the Court affirmed that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”⁵⁰³

The ICJ welcomes the abolition of the limitation period in the Tunisian Constitution in relation to the crime of torture as being consistent with international standards.

Many gross human rights violations should properly be characterised as serious offences under Tunisian law and therefore be subject to a 10 year limitation period. However, many of the provisions actually used to prosecute human rights violations have been considered minor offences and subject to a 3 year limitation period only, including crimes involving torture and other ill-treatment, which have been prosecuted under articles 101, 103, 218 and 219 of the Criminal Code.

Since the 2011 Uprising, some jurisprudence of the Military First Instance Tribunals and Appeal Courts demonstrates a willingness to apply an expansive interpretation of the exception to the statute of limitations in some cases involving gross human rights violations. The reasoning for suspending the limitation period differed in the two instances, with the Military Court of Appeal adopting a broad exception given the inability for the accused to bring a case under the Ben Ali regime. It relied on both the inability to bring cases against the security services, as well as the Minister of Defence and President’s control over the military court system. It remains to be seen whether Courts will apply this reasoning to other cases involving gross human rights violations, including those that would not have been subject to the military court system and involve lower-level public officials.

The abolition of the limitation period for cases falling within article 8 of the Transitional Justice Law is to be welcomed, since these crimes concern gross human rights violations. However, the extent to which article 148(9) extends this to other crimes that do not amount to gross violations or to other cases involving gross human rights violations that are not transferred to the specialized chambers

the Constitution which declared that action to punish human rights violations is not subject to a statute of limitations, Committee against Torture, UN Doc. A/58/44 (2002) 32 at para.76(c).

⁴⁹⁸ ICTY, Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, 10 December 1998, para.157. European Court of Human Rights, *Abdülşamet Yaman v. Turkey*, no. 32446/96, Judgment of 2 November 2004, para.55. See also case of *İzci v. Turkey*, No. 42606/05, Judgment of 23 July 2013, para.73.

⁴⁹⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 6. Updated Impunity Principles, Principle 23.

⁵⁰⁰ Updated Impunity Principles, Principle 23.

⁵⁰¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 7.

⁵⁰² Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Judgment, 26 September 2006, para.151. See also, Inter-American Court of Human Rights: *Gómez Paquiyauri Brothers v. Peru*, Judgment of July 8, 2004, paras.149-151; *The 19 Tradesmen v. Colombia*, Judgment of July 5, 2004, para.263; *Bulacio v. Argentina*, Judgment of 18 September 2003, para.116; and *Gomes Lund et al (“Guerrilha do Araguaia”) v. Brazil*, Judgment of 24 November 2010, para.171.

⁵⁰³ Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment, 14 March 2001, para.41.

under article 8 of the Transitional Justice Law, is not clear.

The Tunisian authorities should:

- i) **Ensure that impunity for gross human rights violations is not permitted due to the application of limitation periods and to this end:**
 - a. **Legislate to ensure that no limitation period applies to any human rights violation that constitutes a crime under national or international law, including acts of torture and other ill-treatment, enforced disappearance, extrajudicial killings, prolonged arbitrary detention, war crimes, crimes against humanity and genocide, both in relation to criminal proceedings and to civil or administrative claims on behalf of victims;**
 - b. **If a limitation period is nevertheless retained in relation to cases of enforced disappearances it must at minimum be of a long duration, must not start until the fate and whereabouts of the victim are known and the facts surrounding the disappearance are clarified, and must be suspended during any period in which effective remedies were not available; and**
 - c. **Ensure that cases falling within the “transitional justice system” as provided for by article 148(9) of the 2014 Constitution are adequately defined in law and extend to the prosecution of all previous cases involving gross human rights violations.**

G. Responsibility of superiors and superior orders

i. Tunisian legal framework and practice

1. Superior responsibility

Articles 32 and 33 of the Criminal Code delimit the criminal responsibility for accomplices of an offence. According to article 32, complicity is defined as:

- provoking, by gifts, promises, threats, abuse of power or conspiracy, the act or giving instructions to commit it;
- facilitating the commission of the crime by providing weapons or other useful tools knowing their purpose; or
- facilitating by aiding, abetting or assisting others to fulfill the criminal purpose or to grant impunity to the authors.

Pursuant to article 33, accomplices face the same sentence as the principal perpetrator.

In addition, Law No. 48 of 1966 on criminal omissions criminalizes “whoever deliberately fails to stop a felony or misdemeanour from being committed on the body of a person without fearing a danger on him or others”.⁵⁰⁴ The crime is punishable with 5 years imprisonment and a fine of 10000 dinars.

Prior to the 2011 Uprising, superior law enforcement and security officials were rarely prosecuted for the acts of their subordinates. However, since the Uprising the above provisions have been relied upon to convict a small number of high-ranking officials for the killing and injuring of persons during the Uprising.

The responsibility of superiors in Tunisian jurisprudence: Case No. 71191 (First Instance Tribunal of the Permanent Military Court of Tunis)

Case No. 71191 was a case involving several separate incidents that took place on 12 and 13 January 2011 in Tunis and in surrounding towns and cities. In total, 8 individuals were killed and an unspecified number were injured.

⁵⁰⁴ Law No.48 of 1966 on criminal omissions, article 1.

In addition to the conviction of the principal perpetrators (see above) the Court also considered the accomplice liability of seven government and senior security officials, including the President, Zine El Abidine Ben Ali, and the Minister of Interior, Rafik Qassimi. One senior security official, a Director in the National Guard, was acquitted.

The Court found that the notion of “accomplice” liability in Tunisian law rests on two principles: first, the differentiation between the principal and the accomplice; second, how the responsibility of the accomplice is linked to that of the principal by “borrowing criminality”.⁵⁰⁵

Ben Ali (President)

In determining the criminal responsibility of Ben Ali the Court found that he provided means designed to kill security officials, although no evidence was cited in support of this finding.⁵⁰⁶ The Court found that his acts fell under article 32(1) and (2) and referred to Ben Ali’s “abuse of power”.

The Court stated that in “comparative and international law” inaction over crimes would suffice to engage the responsibility of “High Commanders of the country, including the President”.⁵⁰⁷ No further detail was given and no international or comparative law or jurisprudence was cited to support this finding.

The Court referred to the hierarchical structure of the ISF, pointing out that Ben Ali was the superior member of the ISF and its officers obeyed his orders. He was found guilty as an accomplice to intentional and attempted murder pursuant to articles 32, 59 and 205 of the Criminal Code.⁵⁰⁸

In the last paragraph of the judgment, the Court referred to the Basic Principles on the Use of Force.⁵⁰⁹ However, the Court did not rely directly on this instrument to reach a finding in relation to the liability of Ben Ali.⁵¹⁰

Rafik Qassimi (Minister of Interior)

The Court first noted that, pursuant to article 2 of law No. 82-70 on the ISF, the security forces receive orders directly from the Minister of the Interior.⁵¹¹ In addition, the Court observed that Qassimi was a member and supervisor of the Crisis and Monitoring Cell and was therefore aware of the reality on the ground. The Court also found that Qassimi had provided ammunition and weapons to the security forces without providing them with other less lethal means.⁵¹²

In response to Qassimi’s argument that he did not give clear instructions to open fire on demonstrators, the Court found that there was a “strong presumption” that he incited and contributed to the killing of demonstrators.⁵¹³

On the basis of the above, the court found Qassimi guilty as an accomplice, pursuant to article 32(2) and (3), to the crimes of intentional and attempted murder.

⁵⁰⁵ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.896.

⁵⁰⁶ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.899.

⁵⁰⁷ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.900.

⁵⁰⁸ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.900.

⁵⁰⁹ The Court referred to the Basic Principles as “La Havana Convention”, apparently assuming that the Basic Principles are a binding treaty as opposed to a soft law instrument.

⁵¹⁰ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.901.

⁵¹¹ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.901.

⁵¹² The Court did not elaborate on whether weapons and ammunition had been specifically provided to tackle the demonstrations or whether these were weapons and ammunition provided in the past. The evidence used to support this finding was not disclosed by the Court. Permanent First Instance Military Court of Tunisia, Case No. 71191, p.902.

⁵¹³ Permanent First Instance Military Court of Tunisia, Case No. 71191, p.903.

Mohamed Al-Zaytouni Charafeddine (Director in the National Guard)

The accused was charged as an accomplice although the principal crime was not specified by the Court. The accused was found not to be supervising operations on the ground and “facing the demonstrations” since the ‘Back-Up and Follow-Up Cell’ in the National Guard Directorate

and the Central Operations Unit is subordinated to the Commander of the National Guard. The Court also found that the carrying out of investigations into the killing of demonstrators did not come within the purview of his position since article 20 of Order 246 of 2007 places this authority within the powers of the Commander of the National Guard. The Court stated that it failed to see how he could be responsible under article 32 and therefore acquitted the accused.⁵¹⁴

The responsibility of superiors in Tunisian jurisprudence: Case No.95646 (First Instance Tribunal of the Permanent Military Court of El Kef)

Case No. 95646 comprised several separate incidents of killings and causing injury that took place from 8 to 10 January 2011 in Kasserine, from 8 to 12 January in Talah and on 14 January in Kairouan and Tajerouine. According to the Court, these incidents resulted in the death of 22 persons and injuries to 615 persons. The 22 accused included former president, Ben Ali, former Interior Minister, Rafiq Qassimi, as well as law enforcement officials and employees in the Interior Ministry.⁵¹⁵ The following considers the reasoning of the Court in relation to Ben Ali and Rafiq Qassimi, who were found guilty as accessories and the reasoning in relation to the 5 superiors who were acquitted.

Ben Ali (President)

The Court began by examining the liability of the accomplices, beginning with Ben Ali. In so doing, the Court found that the killings in Talah and Kasserine were premeditated.

The Court went on to consider the criminal responsibility of Ben Ali as an accomplice, pursuant to article 32 of the Criminal Code.

The Court found that Ben Ali set up a monitoring cell on 7 January 2011 that was entrusted with putting an end to the protest movement. According to the Court, this cell took decisions that worsened the situation on the ground, including by sending in security forces that opened fire. In addition, the Court found that Ben Ali’s position as the Supreme Commander of the ISF enabled him to supervise the “engineering of the repression of popular protests”.⁵¹⁶ Finally the Court relied on a circular issued on 15 January 2011 by Qassimi, following the departure of Ben Ali, prohibiting the use of live ammunition against demonstrators as the basis for a presumption that Ben Ali allowed such practices and did not act to stop them.

The Court thus convicted Ben Ali as an accomplice to premeditated intentional murder and as an accomplice to attempted premeditated murder pursuant to articles 32, 59, 201, and 202 of the Criminal Code.⁵¹⁷

Rafik Qassimi (Minister of Interior)

The Court also examined the criminal liability of Rafik Qassimi based on his role as a supervisor of the ISF and as an executor of Ben Ali’s orders. The Court first examined Qassimi’s knowledge

⁵¹⁴ Case No. 71191, Judgment 924-925.

⁵¹⁵ In total, seven individuals were convicted as accomplices to premeditated and intentional murder and as accomplices to attempted premeditated murder, pursuant to article 32, 201, 202, 59 and 54 of the Criminal Code; one individual was convicted of premeditated murder and attempted premeditated murder, pursuant to articles 59, 201, 202 and 205 of the Criminal Code; two individuals were convicted of intentional murder pursuant to article 205 of the Criminal Code, one of whom was also convicted of inflicting physical harm on a demonstrator pursuant to article 225 of the Criminal Code; one accused was convicted of unintentional murder pursuant to article 217 of the Criminal Code; two individuals were convicted of violent assault pursuant to article 101; and nine of the accused were acquitted.

⁵¹⁶ First Instance Permanent Military Tribunal of El Kef, Case No.95646, p.702.

⁵¹⁷ First Instance Permanent Military Court of El Kef, Case No.95646, p.703.

of the criminal intent of the principal perpetrators and found that such knowledge could be presumed since he was the person that was “most in control of the security forces”.⁵¹⁸

In relation to the material element of the crime, the Court found that as Interior Minister and a member of the Monitoring Cell, Qassimi gave orders regarding the organization of the ISF, supervised their work, entrusted them with countering the threat posed by demonstrators and sent them the means and equipment to do so.⁵¹⁹ The Court also argued that Qassimi did not act to stop the killing of the demonstrators.

Consequently, based on his abuse of power and his assistance to the principal perpetrators he was convicted as an accomplice to premeditated murder and to attempted premeditated murder, pursuant to article 32(1) and (3) and articles 59, 201 and 202 of the Criminal Code.

Ali Seriati (General Director of State Security)

The accused was charged with being an accessory to intentional and premeditated murder pursuant to articles 32, 201 and 202, as a result of various allegations, including bringing tear gas bombs from Libya, his permanent presence in the “Crises Cell” in the Ministry of the Interior, being implicated in security plans to repress demonstrations using live ammunition and ordering the Director of Prisons to “kill a prisoner or two” to stop the protest movement in Nadour Prison.⁵²⁰ Regarding those allegations the Court found that it is not enough to convict the accused for being an accomplice in premeditated intentional murder.

The Court acquitted the accused on the basis that he had no ties to the Minister of Interior and was not considered one of its security commanders since he was the General Director of the President’s and High Officials’ Security. The Court reasoned that his presence in two meetings was ordered by the President and was not a personal initiative.⁵²¹

The Court went on to find that, even assuming that the accused was aware of the killing and even if he did not take any actions to stop them, he could not be held responsible since he was not part of the security structure, which could have enabled him to influence the decision-making process.⁵²²

Ahmad Furay’a (Minister of Interior)

The charges against the former Minister of the Interior were limited to failing to take measures to prevent the wounding and killing of the demonstrator, Mohamed Kassrawi, pursuant to law No.48-66.

The Court considered a series of facts to establish that the accused expressed his disapproval of the killing of protestors. The Court stated that the prosecutor had not proven an intention to inflict harm through omission. On the contrary, the Court found that there was an intention not to inflict harm on demonstrators.⁵²³

Colonel Al Mounsif Al-Ujaymi (Colonel in the ISF)

Al Mounsif Al-Ujaymi, a Colonel in the Intervention Forces (a unit of the ISF) was charged with aiding and abetting the intentional and premeditated killing of a demonstrator on 12 January 2011 (pursuant to articles 32, 201 and 202 of the Criminal Code) by resuming the policy of repression adopted by his predecessor, following his appointment on 10 January 2011 in Talah.

The Court relied, among other evidence, on testimony from eight security officials, a witness and three of his co-accused in finding that the accused favoured not using weapons but instead using

⁵¹⁸ First Instance Permanent Military Court of El Kef, Case No.95646, p.704.

⁵¹⁹ First Instance Permanent Military Court of El Kef, Case No.95646, p.704.

⁵²⁰ Case No. 95646, Judgment, p.707.

⁵²¹ Case No. 95646, Judgment, p.707.

⁵²² Case No. 95646, Judgment, p.709.

⁵²³ Case No. 95646, Judgment, p.711.

traditional law enforcement means, including shields and tear gas.⁵²⁴

Al-Hussein Zaytoun (Head of National Security for Kasserine)

The accused was charged with being an accomplice to attempted premeditated murder and an accomplice to premeditated murder under articles 32(1) and (3), 59, 201 and 202 of the Criminal Code on the basis that he was aware of the security plan in Kasserine, was present at the shootings and had entrusted his co-accused, Wissam Al-Wartatani, to go to the Security Centre in Nour's Quarter where Al Wartatani intentionally opened fire on demonstrators. The Court found that his mere presence was not sufficient to convict him. It was not proven that the accused was in contact with the principals, even indirectly.⁵²⁵

Mouncif Kurayfa (General Director of Presidential Security)

The accused was charged with being an accomplice to attempted premeditated murder and as an accomplice to premeditated murder (articles 32, 59, 201 and 202 of the Criminal Code) due to his presence at the scene of killings in Kasserine and his awareness of activities in the field that related to the repression of demonstrators.

The Court held that the accused only reached the place where the crimes were committed the day after the killings took place and did not have any role in the field but was restricted to providing logistical support and back-up, without specifying what sort of back-up. The accused was found to be hierarchically subordinated to the Police Governors, pursuant to article 52 of order 1160 of 2006 on the special status of members of National Security and the National Police Sector. Contradictory witness statements were submitted to the Court on the issue of whether the accused or another individual was in charge in the field.

The Court stated that it failed to see how any of the acts specified in article 32 were committed by the accused.⁵²⁶

2. *Superior orders*

Article 42 of the Criminal Code grants a person immunity from criminal prosecution in relation to any offence if the act constituting an offence was committed pursuant to a legal provision or an order given by the competent authority.

Article 46 of Law No. 82-70 on the ISF limits this in relation to orders given to officers of the ISF by requiring that the order must be given "by their superior in the framework of legality".

The interpretation of the defence of superior order: Case No. 71191

In Case No. 71191, article 42 of the Criminal Code and article 46 of the ISF law were considered by the First Instance Tribunal of the Permanent Military Court.⁵²⁷ In particular, the Court examined whether law enforcement officials found to have shot at protestors could invoke article 42 by arguing that the acts were carried out pursuant to a law or an order by a competent authority. The Court found that neither Law No. 69-04 (on the policing of demonstrations) nor Law No. 82-70 (on the ISF) had been respected. In addition, the Court stated that the accused could only benefit from an order from a competent authority if the order itself was lawful. According to the Court, obedience does not mean blind subordination. Quoting from article 46 of Law No. 82-70 the Court stated that security officers must respect orders "within the bounds of legality".⁵²⁸

⁵²⁴ Case No. 95646, Judgment, p. 714-715.

⁵²⁵ Case No. 95646, Judgment, p. 727.

⁵²⁶ Case No. 95646, Judgment, p. 731-732.

⁵²⁷ Further details regarding Case No. 71191 and the Court's reasoning regarding the criminal liability of the law enforcement officials is considered at section G. above.

⁵²⁸ First Instance Tribunal of the Permanent Military Court in of Tunisia, Case No. 71191, p. 868.

ii. Assessment in light of international law and standards

1. Superior responsibility

Under international law individual criminal liability for gross human rights violations is not limited to the direct perpetrator of the crimes but can extend to superiors where they either order or induce the commission of an offence or fail to take sufficient measures to prevent or report the violations.

Under the ICPED, criminal liability for enforced disappearances extends to any person who “commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”.⁵²⁹ In addition, criminal liability of superiors extends to those who:

- (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
- (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
- (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.⁵³⁰

These provisions of the ICPED broadly mirror those of article 28(b) of the Rome Statute of the ICC in relation to non-military superiors.⁵³¹ Similar provisions concerning the responsibility of superiors can also be found in the statutes of the ICTR and the ICTY.⁵³²

The Committee against Torture has confirmed that “those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures”.⁵³³ The Committee against Torture has stated that it is essential that “the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities”.⁵³⁴ As was mentioned earlier, officials that issue an order to carry out torture must, for instance, be considered by national law to have committed a crime through complicity or participation within the meaning of article 4(1) of the Convention.⁵³⁵

Similarly, the HRC has stated in relation to article 7 of the ICCPR that “Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible”.⁵³⁶ In numerous instances the Committee against Torture has emphasized the importance of holding to account individuals in senior positions.⁵³⁷

The Updated Impunity Principles state that “[t]he fact that violations have been committed by a subordinate does not exempt that subordinate’s superiors from responsibility, in particular criminal,

⁵²⁹ ICPED, article 6(1)(a).

⁵³⁰ ICPED,, article 6(1)(b).

⁵³¹ A slightly broader test applies to military commanders, which omits the need to demonstrate that the commander exercised effective responsibility for and control over the activities concerned with the crimes. See article 28(a) of the Rome Statute of the ICC.

⁵³² Statute of the International Criminal Tribunal for Rwanda (article 6) as well as the Statute of the International Criminal Tribunal for the Former Yugoslavia (article 7).

⁵³³ Committee against Torture, General Comment No.2, para.26.

⁵³⁴ Committee against Torture, General Comment No.2, para.26.

⁵³⁵ See e.g. UN Doc A/HRC/25/60 (10 April 2014), paras.48 and 50.

⁵³⁶ HRC, General Comment No.20: Article 7, A/44/40 (1992), para.13.

⁵³⁷ Committee against Torture, Concluding Observations: Indonesia, Committee against Torture, UN Doc. A/57/44 (2002) 22 at para.43(a); see also Concluding Observations of the HRC: Serbia and Montenegro, ICCPR, A/59/40 vol. I (2004) 68 at para.75(12).

if they knew or had at the time reason to know that the subordinate was committing or about to commit such a crime and they did not take all the necessary measures within their power to prevent or punish the crime.”⁵³⁸ The UN Basic Principles on the Use of Force state that “[g]overnments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.”⁵³⁹

Under article 32 of the Tunisian Criminal Code, accomplice liability is broadly defined and could include superior law enforcement officials who order, solicit, induce or instigate the commission of a crime. It also extends to superiors who aid, abet or assist the principal perpetrators in enjoying impunity. However, it is not clear if failing to report a subordinate for a criminal offence would be sufficient to fall within article 32.

There is no specific provision in the Criminal Code setting out the liability of superior law enforcement officials over their subordinates. Furthermore, the law on criminal omissions (Law No. 48-66) applies to all persons and imposes no specific obligations on law enforcement officials to prevent crimes committed by those under their control.

The judgments of the military courts in cases 71191 and 95646 brought since the 2011 Uprising present a confused picture. On the one hand the Courts convicted Ben Ali and Qassimi by relying on an expanded interpretation of article 32 of the Criminal Code, referring to their inaction, silence over the killings of demonstrators and “abuse of power”. On the other hand, a stricter interpretation of article 32 appears to have been applied to other senior law enforcement officials who were acquitted even though in some instances they were alleged to have taken material acts (Seriaty’s order to kill prisoners) or were present at the killing of demonstrators (Al-Hussein Zaytoun).

In neither case did the Court set out and apply clear elements of command responsibility. In Case No. 71191, although the Basic Principles on the Use of Force was cited, the Court stated that inaction on its own would suffice to engage the responsibility of “High Commanders of the country, including the President”, without referring to the mental requirements of the superior (that they knew or had reason to know the subordinate was committing or about to commit a crime) and the action that is required of them to avoid responsibility (that they did not take all the necessary measures within their power to prevent or punish the crime).

In order to provide clarity and to ensure that superior law enforcement and security officials are held responsible for the actions of their subordinates in line with international standards, the Tunisian authorities should:

- i) Amend the Criminal Code to establish criminal accountability for superior law enforcement officials who knew or had at the time reason to know that the subordinate was committing or about to commit such a crime and they did not take all the necessary measures within their power to prevent or punish the crime.**

2. Superior orders

In addition to the responsibility of superiors for the acts of those under their effective control, international law is also clear that subordinates are not absolved of criminal responsibility for gross human rights violations simply because they acted pursuant to orders from a superior.

Both the CAT and the ICPED make clear that an order of a superior or public authority can never be

⁵³⁸ Updated Impunity Principles, Principle 27(b).

⁵³⁹ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para.24. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ECOSOC res 1989/65 (24 May 1989), .19, states in part, “Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts.”

invoked as justification in the criminal proceedings contemplated by those treaties.⁵⁴⁰ The HRC and the Committee against Torture have endorsed and recommended the incorporation of this principle in domestic law.⁵⁴¹

The Statutes of the ICTY and the ICTR state that "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment".⁵⁴² This is similarly stated in the Updated Impunity Principles.⁵⁴³

Article 33(1) of the Rome Statute of the International Criminal Court states:

The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

The Basic Principles on the Use of Force recognise that the defence of superior orders cannot be relied upon by a subordinate "if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it."⁵⁴⁴

Both the Rome Statute and the Basic Principles on the Use of Force raise the question of what amounts to a "manifestly unlawful" order. In article 33(2), the Rome Statute explicitly recognises that orders to commit genocide or crimes against humanity are manifestly unlawful. Since crimes against humanity include, among others, torture, murder and enforced disappearance, when committed as part of a widespread or systematic attack, it may be inferred that orders to commit such crimes, even where not part of a widespread or systematic attack, must also be considered manifestly unlawful.

Both article 42 of the Tunisian Criminal Code and article 46 of Law No. 82-70 could be construed as granting broad exemption for liability for persons who commit crimes based on an order given by a superior. The only limitations are that the order is from a "competent authority" or in the case of the ISF is "in the framework of legality". These provisions have the potential to grant subordinates impunity for gross human rights violations where they claim to be acting on the orders of their superiors.

Although the Military Court, in Case No. 71191, imposed important limitations on these provisions by stating that the order from the competent authority must be "lawful" and orders from ISF commanders "within the bounds of legality", the Tunisian authorities should clarify the position through legislation that prevents "superior orders" defences from resulting in impunity of perpetrators of gross human rights violations.

⁵⁴⁰ CAT, article 2(3); ICPED, article 6(2). See also Committee against Torture, General Comment No.2, para.26; Concluding Observations of the Committee against Torture: Egypt, CAT, A/49/44 (1994) 14 at para.89; Concluding Observations of Committee against Torture: Panama, CAT, A/48/44 (1993) 52 at para.339; Senegal, CAT, A/51/44 (1996) 19 at para.114; Uruguay, CAT, A/52/44 (1997) 16 at paras.91 and 93; Mauritius, CAT, A/54/44 (1999) 15 at para.123; and Poland, CAT, A/55/44 (2000) 21 at paras.88 and 93.

⁵⁴¹ HRC, General Comment No.31, para.18. See also HRC, General Comment No.20, article 7, A/44/40 (1992), para.3; Concluding Observations of Committee against Torture: Armenia, Committee against Torture, UN Doc. A/51/44 (1996) 17 at para.97; Concluding Observations of the HRC: Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para.280; and Concluding Observations of Committee against Torture: El Salvador, Committee against Torture, UN Doc. A/55/44 (2000) 28 at para.158.

⁵⁴² Statute of the International Criminal Tribunal for Rwanda, article 6; and Statute of the International Criminal Tribunal for the Former Yugoslavia, article 7.

⁵⁴³ Updated Impunity Principles, E/CV.4/2005/102/Add.1, 8 February 2005, Principle 27(a).

⁵⁴⁴ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para.26.

To this end, the Tunisian authorities should:

- i) Amend the Criminal Code and Law No.82-70 to ensure that any individual who is responsible for a gross human rights violation is not able to rely on an order received from a superior officer or public authority to escape criminal responsibility.**

H. The use of military courts

The 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 committed by military personnel. This section examines the use of military courts in Tunisia to hear cases involving gross human rights violations and the rights of victims in such proceedings.⁵⁴⁵

i. Tunisian legal framework

1. Jurisdiction of military courts over gross human rights violations

The jurisdiction of the Tunisian military justice system is broad and extends to cases of gross human rights violations committed by members of the military as well as by law enforcement officials.

The jurisdiction of military tribunals is set out in the Code of Military Justice (CMJ). Following the uprising, the NCA amended the CMJ by adopting Law-Decree No.2011-69 and Law-Decree No.2011-70 of July 2011. The amendments set out some additional guarantees aimed at enhancing procedural fairness but also expanded the jurisdiction of military courts.

Article 1 of the CMJ, as amended by Law-Decree No.2011-69, extended the subject-matter jurisdiction of military courts, which had previously been restricted to "military offences", to the potentially broader scope of "cases of a military character" (*des affaires d'ordre militaire*).⁵⁴⁶ Article 5 of the CMJ was also amended to clarify that military courts have jurisdiction over both ordinary crimes committed by military personnel and ordinary crimes committed against military personnel.⁵⁴⁷ As a result of these amendments the subject matter jurisdiction of military courts is broad and potentially extends to cases involving gross human rights violations, since it includes:

- 1) offences committed inside the barracks, camps, schools and places occupied by the military for the needs of the army or armed forces;
- 2) offences under the jurisdiction of military tribunals as provided for by special laws and regulations; and
- 3) offences under ordinary law committed by military personnel.⁵⁴⁸

In the aftermath of the 2011 Uprising the vast majority of cases concerning the killing and injuring of

⁵⁴⁵ For further information relating to the jurisdiction of Tunisian military courts, the composition, selection and appointment of military court judges, proceedings in trials before military courts, the composition and role of the Military Judicial Council and the competences and independence of military prosecutors and investigating judges see ICJ report, The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, 13 May 2014, Chapter IV, available at, <http://icj.wpengengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 25 January 2016.

⁵⁴⁶ Prior to its amendment, article 1 of the CMJ granted jurisdiction over "military offences". Following its amendment, the jurisdiction of military tribunals is not restricted to military offences but instead includes cases of a military "nature". Article 1 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*".

⁵⁴⁷ Although these grants of jurisdiction were previously contained in article 5(6), they are now separated into article 5(6) and 5(7).

⁵⁴⁸ 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. 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".

civilians were transferred by ordinary courts to the military judicial system on the basis of article 22 of Law No.82-70 of 6 August 1982 on the ISF. Pursuant to article 22 of this law, military tribunals have competence over cases involving “agents of the ISF for acts that took place in, or on the occasion of, the exercise of their functions when the alleged facts are related to their responsibility in the areas of internal and external security of the State, or to the maintenance of order on the public roads and in public places and in public or private businesses, and, during or following public meetings, processions, parades, demonstrations and gatherings”.

**The restrictions on the right to a judicial remedy through the use of military courts:
Case No.74937 - Barraket Essahel**

This case involved the arrest and torture of 244 army officers in 1991.

In this case, some of the victims filed a complaint on 11 April 2011 before the investigating judge No.15 at the First Instance Tribunal of Tunis. The investigating judge at the First Instance Tribunal in Tunis opened the investigation on 2 May 2011. After summoning the generals accused of being responsible for the acts of torture, the judge was reportedly called to a meeting by the Minister of Defence, who requested him to decline jurisdiction and to transfer the case to the military courts. Although initially the investigating judge reportedly refused to make such a ruling, on 25 June 2011, the investigating judge ultimately declined to investigate the case and on 27 October 2011, the file was transferred to the military investigating judge on the basis of article 22 of Law 82-70.

Given the extensive coordination between the Directorate of State Security, the Central Military Administration and Ministry of Defence in the arrest, detention and torture of the victims, the complaint of the victims included, among others, the former Minister of Defence, officials from the Ministry of Defence and members of the military.⁵⁴⁹ However, no charges were brought by the military investigating judge against these individuals.⁵⁵⁰

The 2014 Constitution narrows the jurisdiction of military courts to military offences (“*infractions militaires*”)⁵⁵¹ which, under the current CMJ 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. Legislative amendments to the CMJ have not yet been adopted.

2. Proceedings before military courts

As set out in more detail in the ICJ’s report on the independence of the judiciary in Tunisia,⁵⁵² the military court system is under the authority of the executive. In particular, military courts are composed of a majority of military judges in the First Instance Tribunals and Courts of Appeal.⁵⁵³ The appointment

⁵⁴⁹ The complaint listed the following individuals: Former President Ben Ali, Abdallah Kallel (Minister of Interior in 1991); Habib Boulaaress (Minister of Defence in 1991); Mohamed Ali Ganzoui (Director of Intelligence Services in 1991); Ezzeddine Jenayah (Director of National Security in 1991); five officers from National Security (Abderrahmane Ben Salem Guesmi, Mohamed Naceur Alibi, Zouhayer Ben Chedli Redissi, Hassan Ben Salah Jallali and Bechir Essaidi); Director-General of Military Security, Mohamed Hefayadh Ferz; senior military officials (General Mohamed Hedi Ben Hassine, General Ridha Attar and General Mohamed Chedli Cherif); the Prosecutor-General Director of Military Justice, Mohamed Guezguez; and police officers Fawzi Aloui, Mustapha Ben Moussa, and Moussa Khalfi.

⁵⁵⁰ The accused before the First Instance Military Tribunal were Ben Ali, Abdallah Kallel, Mohamed Ali Ganzoui, Ezzeddin Jenaieh, Abderrahmane Ben Salem Gasmi, Mohamed Ennacer Alibi, Zouhir Ben Chedli Rdissi, Houssine Ben Salah Jallali, Bechir Essaidi.

⁵⁵¹ 2014 Constitution, article 110.

⁵⁵² ICJ report, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 13 May 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 25 January 2016.

⁵⁵³ Law-Decree No.2011-70, article 1A and B; and see article 10(2) and (3) of the CMJ, as amended by Law-Decree No.2011-69.

of both military and civilian judges is controlled by the executive.⁵⁵⁴ Prosecutors and their deputies, investigating judges and advisors to the Military Court of Appeal or to the military indictment division, are drawn exclusively from the military.⁵⁵⁵

Although military judges are said to be independent from the military hierarchy they are subject to “general disciplinary rules”⁵⁵⁶ and their career and recruitment is tightly controlled by the executive and, in particular, the Minister of Defence, who also sits as President of the Military Judicial Council (MJC).⁵⁵⁷ The MJC, charged with overseeing the career of military judges, is composed of a majority of military judges and only military members are allowed to sit when it meets as a disciplinary body.⁵⁵⁸

Prosecution functions are performed by the public prosecutor of the First Instance Tribunal of the Permanent Military Court or by one of his deputies.⁵⁵⁹ The military prosecution service is under the authority of the Attorney-General Director of Military Justice.⁵⁶⁰

Military prosecutors are charged with conducting the public prosecution (“*action publique*”) in military courts by 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.⁵⁶¹ Consequently, as in the civilian court system, 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 the new facts revealed by the investigation would constitute aggravating circumstances in relation to the offences that have been referred.⁵⁶²

Article 38 of the CMJ provides that the procedure before military courts is the one provided for in the civilian Code of Criminal Procedure, taking into account the special provisions provided for by the CMJ. Hearings are public unless the court decides that publicity will undermine the interests of the armed forces.⁵⁶³ Judgments of the military courts must be pronounced publicly.

Law-Decree No.2011-69, introduced an appellate jurisdiction for cases decided by military tribunals. Articles 28, 28bis, and 29 of Law-Decree No.2011-69 provide for appeal to a military Court of Appeal and then review by the military chamber at the Cassation Court.⁵⁶⁴ The Military Chamber of the Court of Cassation does not re-examine the factual findings in a case but only decides whether the law has been correctly applied by the lower courts based on the findings of fact.

⁵⁵⁴ Civilian judges sitting on military tribunals are appointed by decree based on recommendations by both the Minister of Justice and Minister of Defence (Law-Decree No.2011-70, article 2); Military judges are appointed by decree following a proposition by the Minister of Defence and a decision by the Military Judicial Council (MJC) (Law-Decree No.2011-70, article 12).

⁵⁵⁵ Law-Decree No.2011-70, article 1(a).

⁵⁵⁶ The Code of Military Justice provides that military judges are subject to general disciplinary rules. See also Law-Decree No.2011-70 of 29 July 2011, on the organization of military justice and the statute of military magistrates, article 19.

⁵⁵⁷ 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 (Law No.2011-70, article 10). The modalities and programme of the examination are also fixed by an order of the Minister of Defence (Law-Decree No.2011-70, article 11). The composition of the MJC is set out at article 14 of Law No.2011-70.

⁵⁵⁸ Law No.2011-70, articles 14, 15 and 17.

⁵⁵⁹ Articles 10 and 14 of the CMJ, as amended by Law No.2011-69.

⁵⁶⁰ Article 14 of the CMJ.

⁵⁶¹ CMJ, article 24, as amended by Law No.2011-69.

⁵⁶² Code of Criminal Procedure, articles 47-51.

⁵⁶³ CMJ, article 40.

⁵⁶⁴ 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 civil Court of Appeal.

3. *The role of victims in military courts*

Law-Decree No.2011-69 introduced the possibility for victims to file civil claims for compensation in the context of criminal cases before military tribunals.⁵⁶⁵ Consequently, from 16 September 2011, the date on which Law-Decree No. 2011-69 came into force, victims of gross human rights violations could join proceedings as a civil party. For all cases brought prior to this date victims could only join proceedings as a civil party after 16 September 2011. Consequently, many cases involving those killed and injured during the 2011 Uprising reached the military indictment chamber at a time when the victims were still excluded from the process.

Civil proceedings before military courts are to be conducted in accordance with the same procedure set out in the Code of Criminal Procedure.⁵⁶⁶ Therefore, victims are subject to the same rights and limitations in proceedings before the military tribunals as they are before proceedings in civilian courts, as set out above.

4. *Investigations by the military investigating judge*

In practice, proceedings involving gross human rights violations before military courts have been beset with problems, including lengthy delays, inadequate investigations, a lack of transparency and impunity or sentences that are not commensurate with the crime for those responsible.

The ICJ held interviews with victims of gross human rights violations committed during the 2011 Uprising, their legal representatives and representatives of victims' associations.⁵⁶⁷ During these interviews, the ICJ was told that, upon transfer to the military court system, the military investigating judge would repeat much of the work that had already taken place, despite this work having been conducted in the ordinary court system prior to their transfer. This caused extensive delays, as well as re-questioning and consequent re-traumatisation of victims.

According to certain legal representatives for civil parties and certain legal representatives for the accused, the work of the military investigating judge was often superficial and focused almost exclusively on interviewing victims and witnesses. Little, if any, forensic work was done and few, if any, site visits were conducted. The ICJ was informed that investigating judges rarely left their offices to conduct investigations. Consequently, investigations carried out by the military investigating judges were often incomplete and essential evidence was frequently missing, including ballistic reports and autopsies. Given that investigations frequently began months after the events, the bodies of those killed were often buried without an autopsy. Not all families agreed to the exhumation of the bodies for the purposes of an autopsy.

Moreover, a lack of cooperation from the Ministries of Interior and Defence deprived the investigating judge and the civil party from accessing essential information. In particular, the Ministry of the Interior reportedly refused to provide the investigating judge with the list of ISF officers deployed during the uprising. As a consequence of these failings, only a limited number of individuals have been identified and prosecuted for the gross human rights violations committed during the Uprising.

In addition, despite allegations of gross human rights violations being committed by the armed forces during the Uprising, and in particular after 14 January 2011, only a few members of the armed forces have been charged with offences. Senior officers from the Ministry of Defence and the armed forces were not suspended from their post while being investigated by military investigating judges.

⁵⁶⁵ CMJ, article 7 as amended by Law-Decree No.2011-69.

⁵⁶⁶ CMJ, article 7 as amended by Law-Decree No.2011-69.

⁵⁶⁷ ICJ meetings took place: on 22 February and 2 April 2013 with the President of the "Association des Familles des martyrs et des blessés de la révolution Tunisienne (Awfia)" and civil party lawyer in the Grand Tunis case; on 28 February 2013 with the President of the "Association for the protection of the Rights of the Martyrs and the Injured of the Tunisian Revolution Lan Nansakoum (We will not forget you)", two young men who were injured during the 2011 Uprising and family members of four individuals who were killed during the Uprising; on 22 and 25 March 2013 and 15 March 2014 with civil party lawyers representing a number of relatives of those killed during the uprising; and on 5 April 2013 with a defence lawyer representing a number of individuals accused of killings during the Uprising; on 18 November 2014 with the Secretary General of the Organization against Torture in Tunisia; and on 18 November 2014 with the President of the National Independent Coordination on Transitional Justice.

In interviews with the ICJ, victims have stated that the “military justice system treats us as if we are the problem, as if we are the enemy”.⁵⁶⁸ Due to their mistrust of the military justice system, some victims have decided not to apply for compensation before the military court and instead have stated that they intend to file a civil compensation claim before the ordinary courts once the criminal case has been adjudicated.

The weaknesses and failings of the military investigation system: the “case of martyrs and wounded of Thala and Kasserine”

In the “case of the martyrs and wounded of the revolution of Thala and Kasserine” a complaint was filed on 22 February 2011 by the lawyers of victims in relation to violent events that took place in the cities of Thala and Kasserine, between 17 December 2010 and 14 January 2011. On 1 March 2011, the public prosecutor of the First Instance Tribunal of Kasserine opened an investigation. In May 2011, the investigating judge declared he lacked jurisdiction and transferred the case to the military investigating judge pursuant to article 22 of Law No. 82-70.

From the date of the transfer until 16 September 2011, when Law-Decree No.2011-69 came into force, the victims were excluded from proceedings, by which time the case was at the trial stage. Consequently, the victims were excluded from participating in the investigations conducted by the military investigating judge.

In meetings with the victims and their representatives, the ICJ was told that the investigation carried out by the military investigating judge was superficial and incomplete. The investigation only identified the agents responsible for 3 out of 23 killings that took place in Thala and Kasserine during the Uprising. The military investigating judge based his findings almost exclusively on declarations of witnesses and did not conduct an effective on-site visit. No ballistic report was provided and no autopsies were carried out. There was also no detailed reconstruction of the facts and no seizure of the weapons used, and no list of officers that were present in the area where the violence took place was produced. On 6 September 2011, the indictment chamber examined the case and, without ordering further investigations, transferred the case to the First Instance Military Tribunal.

If the case had continued, the lawyer for the victims could have requested the intervention of experts as well as more on-site investigations. Instead, the victims found themselves confronted with the decision to close the investigation taken by the indictment chamber on the basis of an incomplete investigation, which compromised all of the following steps of the trial.

Further failings of the military investigation system were highlighted by the case of Sophiane Ben KhmissJammala.⁵⁶⁹

Case No. 2325/3 - Sophiane Ben Khmiss Jammala

This case involved the killing of naval officer, Ben Jammala, on 6 January 2011. The military prosecutor declared himself competent to initiate the prosecution. However, no enquiry was opened until 25 January 2011, when the victim’s widow, accompanied by her lawyer, visited the military prosecutor. The questioning of witnesses did not commence until the end of April 2011, almost four months after the crime. The investigating judge never visited the site of the shooting and only agreed to hear additional witnesses after the victim’s widow met with the judge and insisted he do so.

Despite the existence of witnesses to the killing of Ben Jammala, the investigating judge did not charge anyone with his murder.

⁵⁶⁸ ICJ interview conducted on 28 February 2013 with members of the ‘Association for the protection of the Rights of the Martyrs and the Injured of the Tunisian Revolution Lan Nansakoum (We will not forget you)’ including victims who were injured and families of those killed during the 2011 Uprising in the Touzeur governorate, Sfax region.

⁵⁶⁹ Case No. 2325/3, Military Tribunal, Tunis.

ii. Assessment in light of international law and standards

Military tribunals fundamentally lack the independence from the executive to act as an impartial and independent tribunal, as contemplated by article 14 of the ICCPR, and have frequently acted in countries around the world to shield those responsible for human rights violations from criminal responsibility for their acts. National laws should therefore require that cases of serious human rights violations are within the exclusive jurisdiction of civilian courts and that the jurisdiction of military tribunals should be limited to military personnel for breaches of military discipline only.⁵⁷⁰

The HRC and the Committee against Torture have repeatedly expressed concern when the jurisdiction of military tribunals encompasses human rights offences committed by members of the military or security forces.⁵⁷¹ In relation to Mexico in 2010, for instance, the HRC has firmly stated that “[t]he State party should amend its Code of Military Justice so as to ensure that the jurisdiction of military courts does not extend to cases of human rights violations. In no event may military courts judge cases where the victims are civilians.”⁵⁷²

The Decaux Principles, citing, among other sources, the jurisprudence of the HRC and the Committee against Torture,⁵⁷³ 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 gross human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”⁵⁷⁴

Specific exclusions of the use of military courts for cases against individuals charged with acts of enforced disappearance are included in the Inter-American Convention on Forced Disappearance of Persons and the UN Declaration on the Protection of All Persons from Enforced Disappearance.⁵⁷⁵

Further information on international law and standards relating to the exclusion of military courts’ jurisdiction over civilians and relating to fair trial rights in military courts are set out in the ICJ’s report on the independence of the judiciary in Tunisia.⁵⁷⁶

The provisions of the Tunisian CMJ and Law No.82-70 that grant military courts jurisdiction over

⁵⁷⁰ See e.g. Draft Principles Governing the Administration of Justice through Military Tribunals (the Decaux Principles), UN Doc. E/CN.4/2006/58 (2006); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle L(a); Updated Principles on Impunity, Principle 29. See also ICJ, *Military jurisdiction and international law: military courts and gross human rights violations*, Vol. I, Geneva, 2004.

⁵⁷¹ See e.g. Human Rights Committee, Concluding Observations on Venezuela, UN Doc. CCPR/C/79/Add.14, para. 10; Concluding Observations of the HRC on Brazil, UN Doc. CCPR/C/79/Add.66, para.315; Concluding Observations of the HRC on Brazil, UN Doc. CCPR/C/BRA/CO/2, para.9; Concluding Observations of the HRC on Colombia, UN Doc. CCPR/C/79/Add.2, 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 HRC on the Democratic Republic of Congo, UN document CCPR/C/COD/CO/3, para.21; Conclusions and Recommendations of the Committee 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.

⁵⁷² Human Rights Committee Concluding Observations on Mexico, UN Doc CCPR/C/MEX/CO/5 (17 May 2010), para.18.

⁵⁷³ 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.

⁵⁷⁴ The Decaux Principles, Principle 9.

⁵⁷⁵ 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 benefit from a fair trial before a competent, independent and impartial court or tribunal established by law”, see article 11(3).

⁵⁷⁶ ICJ report, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 13 May 2014, Chapter IV.C, available at, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 25 January 2016.

non-military offences, including gross human rights violations, run counter to international law and standards. In his report on Tunisia, the Special Rapporteur on the promotion of truth, justice, reparation and 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”.⁵⁷⁷

Military courts in Tunisia cannot be considered independent and impartial. Not only does the Minister of Defence control the recruitment and appointment process, the disciplinary process is entrusted to the MJC, which is also dominated by members of the Ministry of Defence. In addition, military judges remain within the chain of command. Consequently, a military judge’s failure to comply with an order from his superior might, under Tunisian law, be considered to constitute an infringement to the “general disciplinary rules” and lead to disciplinary proceedings.

Furthermore, prosecutors and investigating judges in Tunisian military courts are also members of the military and are subsumed within the military structure. They therefore lack the necessary independence and impartiality to conduct investigations of gross human rights violations, as required by international standards.⁵⁷⁸

This is particularly the case where those alleged to be responsible for the human rights violations being investigated are from the military. The National Fact-Finding Commission, also known as the Bouderbala Commission, reported that “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”.⁵⁷⁹ In a case before the European Court of Human Rights, the Court took note of the fact that “military prosecutors were, as well as the accused, active military personnel and they were members of the military structure based on the principle of hierarchical subordination”. The Court found 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”.⁵⁸⁰ To ensure the independence and impartiality of investigations, the HRC has recommended that in cases of violations of human rights committed by the military or armed forces, investigations should be conducted by civil authorities.⁵⁸¹

The independence of military prosecutors and judges in Tunisia is of particular concern given that high-ranking officials in the Ministry of Defence and in the armed forces, who were in power during the 2011 Uprising when numerous individuals were killed and injured by the armed and security forces, remained in their post during the investigation and prosecution of such offences by the military justice system. The prosecutors and judges mandated to investigate, prosecute and adjudicate the offences were, at the time of the proceedings, under the control of the individuals allegedly responsible for the violations.

Trials before military courts also undermine the rights of victims of human rights violations to a

⁵⁷⁷ 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).

⁵⁷⁸ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, 7 June 2012, para.57.

⁵⁷⁹ 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.

⁵⁸⁰ European Court of Human Rights, *Voiculescu v. Roumanie*, Application No. 5325/03, Judgement of 3 February 2009.

⁵⁸¹ See for example: Concluding Observations on Colombia, UN Doc. CCPR/C/79/Add.76, 5 May 1997, paras.19, 23, 32,34; Concluding Observations on Venezuela, 26 April 2001, UN Doc. CCPR/CO/71/VEN, para.8; Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para.7; Concluding Observations on Chile, 30 March 1999, UN Doc. CCPR/C/79/Add.104, para.10; Concluding Observations on Belarus, 19 November 1997, UN Doc. CCPR/C/79/Add.86, para.9; Concluding Observations on Macedonia, 18 August 1998, UN Doc. CCPR/C/79/Add.96, para.10; Concluding Observations on France, 4 August 1997, UN Doc. CCPR/C/79/Add.80, para.16 et seq; and Report of the HRC to the General Assembly, 35th period of session, UN Doc. A/35/40 (1980), para.249 et seq.

remedy.⁵⁸² The Special Rapporteur on the independence of judges and lawyers has “noted with concern that the extent of the jurisdiction of military tribunals continues to be a serious obstacle for many victims of human rights violations in their quest for justice”.⁵⁸³

In Tunisia, victims were initially not able to participate in military court proceedings. Even after September 2011, victims have faced numerous obstacles including a lack of transparency, lengthy delays, inadequate investigations, re-traumatization through repeated questioning and, ultimately, the impunity of those responsible.

In addition, although an additional level of appeal before a military appeal court was introduced into the military court system and limited appeals can be made to the military chamber of the Court of Cassation, these do not meet international standards, which requires that judgments and sentences for criminal offences imposed by a military tribunal must be subject to appeal before a higher court.⁵⁸⁴ This right has two aspects. First, the right to an appeal requires that the level of appellate scrutiny is sufficient. In this regard, the HRC has stated that the right to an appeal “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”.⁵⁸⁵ Second, the reviewing court should be civilian in nature. Decaux Principle No.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”.

In addition to ensuring the urgent reform of the CMJ in light of the 2014 Constitution and in line with international standards (see recommendations E(i)-(vii) in the ICJ’s report on the independence of the judiciary in Tunisia⁵⁸⁶), the Tunisian authorities must specifically ensure that:

- i) The jurisdiction of military courts is restricted to cases involving members of the military for alleged breaches of military discipline only and, to this end:**
 - a. Limit the offences set out in article 5 of the CMJ accordingly;**
 - b. Explicitly exclude from the military justice system all cases involving gross human rights violations and crimes under international law, including genocide, enforced disappearance, torture, extrajudicial executions, war crimes and crimes against humanity;**
 - c. Ensure that allegations of human rights violations committed by the military, the ISF and other security officials are investigated by civilian authorities; and**
 - d. Amend article 22 of Law No. 82-70 on the ISF such that all crimes committed by the ISF are heard before ordinary courts.**

⁵⁸² Inter-American Court of Human Rights, *Radilla-Pacheco v. Mexico*, Judgment of 23 November 2009, para.275

⁵⁸³ Report of the Special Rapporteur on the independence of judges and lawyers, 12 September 2006, UN Doc. A/61/384, para.18.

⁵⁸⁴ 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.

⁵⁸⁵ HRC, General Comment No. 32, para.48. See also, Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, which states: “[f]or 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”, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para.239; and see European Court of Human Rights, *Incal v. Turkey*, Application No. 41/1997/825/1031, Judgment of 9 June 1998, para.72, where appellate review was held to be lacking where the Court of Cassation did not have full jurisdiction.

⁵⁸⁶ ICJ report, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 13 May 2014, Chapter IV.C, available at, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 25 January 2016.

3. THE RIGHT TO AN EFFECTIVE REMEDY IN OTHER PROCEDURES AND THE RIGHT TO REPARATION

A. Overview

As stated by the Permanent Court of International Justice, (the predecessor to the current International Court of Justice), "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form"⁵⁸⁷ whose purpose is to, "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".⁵⁸⁸ The Permanent Court made this statement in a 1928 case concerning a dispute between States, but current international law recognises that States can also have obligations to make reparation to *individual* victims of violations of international human rights law.

The right of victims to reparation for human rights violations is now an integral part of international human rights law. The state must provide effective reparation for any violation that has been established, including through judicial proceedings.

Numerous international human rights instruments, including article 2(3) of the ICCPR, contain reference to the right to an "effective remedy".⁵⁸⁹ The HRC has highlighted that the obligation on the State to provide an effective remedy cannot be discharged without reparation.⁵⁹⁰ The UN Basic Principles on the Right to a Remedy and Reparation reaffirm that "[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to adequate, effective and prompt reparation for harm suffered" and that "[r]eparation should be proportional to the gravity of the violations and the harm suffered".⁵⁹¹ Consequently, under international law, for this right to be realized, it requires that reparation meets certain characteristics.

In addition to this general right to reparation as an aspect of effective remedy, some treaties contain additional specific references. For example, article 14 of the CAT provides that "[e]ach State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".⁵⁹² ICCPR article 9(5) requires that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." The CERD refers to the right to "adequate reparation or satisfaction for any damage suffered".⁵⁹³

Article 24(4) of the ICPED provides that "[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation" and article 24(5) specifies that reparation includes "material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; and (d) Guarantees of non-repetition."⁵⁹⁴ This list mirrors those set out in the Basic Principles on the Right to a Remedy and Reparation.⁵⁹⁵ Similarly, the HRC, in interpreting article 2 of the ICCPR, has stated that "where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as

⁵⁸⁷ Permanent Court of International Justice, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, 29.

⁵⁸⁸ *Id.*, 47.

⁵⁸⁹ UDHR, article 8; ICCPR, articles 2(3), 9(5) and 14(6); CERD, article 6; ICPED, article 8; CAT, article 14.

⁵⁹⁰ HRC, General Comment No.31, para.16.

⁵⁹¹ Basic Principles on the Right to a Remedy and Reparation, respectively Principle 11 and 15.

⁵⁹² CAT, article 14(1).

⁵⁹³ CERD, article 6. See also the CRC, which refers to the obligation on States to take "appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts" (article 39).

⁵⁹⁴ ICPED, article 24(4) and (5).

⁵⁹⁵ Basic Principles on the Right to a Remedy and Reparation, Principle 18.

bringing to justice the perpetrators of human rights violations".⁵⁹⁶

International and regional courts also recognise the need for reparation to victims. For example, the Rome Statute of the ICC provides for the Court to order reparations to victims, including restitution, compensation and rehabilitation.⁵⁹⁷ The Inter-American Court of Human Rights and the European Court of Human Rights have both highlighted that a range of measures beyond mere compensation may be required to make full reparation in a given case, with the Inter-American Court in particular routinely ordering States directly to implement such measures.⁵⁹⁸

The Basic Principles on the Right to a Remedy and Reparation further elaborate on each of these aspects of the right to reparation. Restitution attempts to restore the victims to the situation before the human rights violation took place.⁵⁹⁹ Compensation involves financial remuneration for any economically assessable loss resulting from the human rights violation.⁶⁰⁰ Rehabilitation measures are aimed at ensuring physical and psychological care, as well as social rehabilitation.⁶⁰¹ Satisfaction includes non-financial reparation for moral damage or damage to the dignity of the victim, including measures aimed at cessation of the violation, disclosure of the truth, official declarations or judicial decisions, sanctions against those liable, public apologies, acceptance of responsibility and public commemoration.⁶⁰² Guarantees of non-repetition include a wide array of legal, policy and other measures designed to prevent similar violations occurring in the future.⁶⁰³

As such, reparation is not necessarily linked or limited to a particular proceeding or mechanism. Victims often seek recourse through a judicial process, in criminal or civil proceedings, especially when human rights violations are attributed to an act or omission of authorities of the State, and international standards recognise the primary importance of remedies of a specifically judicial character; for example the Basic Principles on the Right to a Remedy and Reparation affirm that "[a] victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law".⁶⁰⁴ Additionally, collective and administrative reparation programmes, often in the context of transitional justice processes, can also be established by the State in case of large-scale human rights abuses, including "in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations".⁶⁰⁵ However, such programmes cannot undermine or replace the individual right to reparation of victims through judicial processes and must respect the fundamental characteristics of reparation under international law.

In light of the above and taking into account the transitional justice initiatives in Tunisia, it is essential to address both the right to reparation within court proceedings and the question of other reparation programmes and transitional justice initiatives. This section will examine reparations that can be awarded to victims as a result of criminal, civil or administrative court proceedings in Tunisia as well as the case of reparation programmes and other initiatives to address the gross human rights violations that took place during the 2011 Uprising, as well as the legacy of gross human rights violations from previous regimes.

⁵⁹⁶ HRC, General Comment No.31, para.16.

⁵⁹⁷ Rome Statute of the ICC, article 75.

⁵⁹⁸ Inter-American Court of Human Rights, Case of *Velásquez-Rodríguez v. Honduras*, Judgment of 21 July 1989, (Reparations and Costs), para.26. European Court of Human Rights, *Savridin Dzhrayev v. Russia*, No.71386/10, Judgment of 25 April 2013, paras.242-264. In addition, the Committee against Torture has argued that reparation requires a range of measures, including compensation, restitution and rehabilitation. See, for example: Concluding Observations on Georgia, A/52/44 (1997) 20 at para.120; and see *Guridi v. Spain* (212/2002), Committee against Torture, UN Doc. A/60/44 (17 May 2005) 147 at para.6.8.

⁵⁹⁹ Basic Principles on the Right to a Remedy and Reparation, Principle 19.

⁶⁰⁰ Basic Principles on the Right to a Remedy and Reparation, Principle 20.

⁶⁰¹ Basic Principles on the Right to a Remedy and Reparation, Principle 21.

⁶⁰² Basic Principles on the Right to a Remedy and Reparation, Principle 22.

⁶⁰³ Basic Principles on the Right to a Remedy and Reparation, Principle 23.

⁶⁰⁴ See e.g. Basic Principles on the Right to a Remedy and Reparation, Principle 15; ICCPR article 2(3)(b).

⁶⁰⁵ Basic Principles on the Right to a Remedy and Reparation, Principle 16.

B. Court ordered reparations

i. Reparations flowing from criminal proceedings

1. *Tunisian legal framework*

After a trial, the trial judge can pronounce an accused guilty or not guilty. Where an accused is found guilty, the Court will determine his or her sentence. Maximum sentences for each offence are set out in the Criminal Code. However, the Court has broad discretion to impose lighter sentences.⁶⁰⁶

Article 1 of the Code of Criminal Procedure provides that any offence gives rise to a civil action if harm was caused.⁶⁰⁷ In order to avail themselves of this right, victims must join the proceedings as a civil party.⁶⁰⁸ According to article 167 of the Code of Criminal Procedure, in an order convicting the accused, the criminal tribunal can also order the accused to pay civil compensation to a victim who joined the proceedings as a civil party and filed a request to obtain civil compensation.

In adjudicating the civil action referred to under article 1 of the Code of Criminal Procedure, judges have full discretion to determine the amount of compensation for any physical and moral damage.

Recent judgments of the Military Courts in cases of gross human rights violations brought since the 2011 Uprising demonstrate the varying approaches towards the assessment of compensation.

Lack of consistency in the assessment of compensation

Cases No.95646, 71191 and 74937

Cases No.95646 and 71191 involved a number of joined cases of killing and injuring of individuals during the 2011 Uprising heard in the First Instance Tribunals in the Permanent Military Courts of Tunis and El Kef, respectively. Case No.74937 involved acts of torture that took place in 1991 but that were not prosecuted until after the 2011 Uprising. The cases resulted in the conviction of various law enforcement officials, as well as senior government and security officials. The reasoning and convictions in these cases are set out in detail at section 2.G above but are examined here in relation to the compensation awarded to victims.⁶⁰⁹

Case No. 95646 (First Instance Tribunal of the Permanent Military Court of Kef)

The Court began by quoting article 83 of the Code of Obligations and Contracts, which states that those who have suffered moral or material harm through unintentional acts or omissions deserve compensation for that harm.⁶¹⁰

In relation to moral harm, the Court found that it was “undisputed” that moral harm is the type of harm that is inflicted on the victims’ emotions and feelings and the pain the victims endure.⁶¹¹ On this basis, the families of the 22 deceased were awarded amounts of either 40,000 or 30,000 Dinars for each spouse;⁶¹² 30,000 Dinars for each of the parents; 10,000 Dinars for each sibling and each child; and 5,000 Dinars for each aunt, uncle, grandfather and grandmother. In reaching these amounts, the Court stated that the jurisprudence relating to compensation is settled. However, no case law was cited in support of this statement and no reasoning for the Court’s

⁶⁰⁶ Criminal Code, article 53.

⁶⁰⁷ Code of Criminal Procedure, article 1.

⁶⁰⁸ Code of Criminal Procedure, article 7.

⁶⁰⁹ Article 7 of Decree 69/2011 of the 29 July 2011 amended the Code of Military Justice to enable civil party claims to be brought in military courts.

⁶¹⁰ First Instance Permanent Military Court of Kef, Case No.95646, Judgment p.735.

⁶¹¹ Case No.95646, Judgment p.736.

⁶¹² In the cases of BelKassem Ben Ali Ben Mohamed Ghabani and Ahmed Be Altaher Al Jabari, the Court awarded 30,000 Dinars to their respective spouses. However, in the case of Ahmad Boulaabi, his spouse was awarded 40,000 Dinars. No reasoning was given for the award of different amounts. Case No.95646, Judgment respectively p.738 and 736.

calculations, based on this jurisprudence, was given.⁶¹³

As regards material harm for the families of the deceased, the Court only considered and awarded compensation for material harm in relation to the family of one of the deceased, taking into account his age and the average life expectancy.⁶¹⁴ Although material and moral compensation was awarded to the deceased's family, the moral compensation was lower than that awarded for other families with no rationale given.

As regards the 615 persons who were injured, the Court awarded compensation for both moral harm and "physical harm", referring to its "absolute jurisprudence" without citing it, or its methodology.⁶¹⁵ Based on the awards granted, it appears that the level of moral compensation was based on the material harm suffered.⁶¹⁶ To compensate for physical harm the Court also awarded varying amounts⁶¹⁷ without explanation. The Court also awarded some of the victims and their families a contribution towards litigation and/or counsel's fees⁶¹⁸ without justifying why others were not awarded a contribution towards fees.

Case No. 71191 (First Instance Tribunal of the Permanent Military Court of Tunis)

In this case, the Court did not refer to any specific provision of the Code of Obligations and Contracts as the basis for ordering the State to pay compensation. The Court granted family members of the deceased compensation for moral harm and granted compensation for material harm to wives and children of the deceased only.

In determining the amount of moral compensation the Court did not refer to or state that it was relying on any jurisprudence. Instead the Court stated that the compensation granted is "commensurate with the reality of the suffering they endured and within the framework of achieving justice and equity".⁶¹⁹

Compensation for material harm was awarded to the spouse and children of the deceased and not to other family members. Where the deceased had no spouse or children no material compensation was awarded. In this regard, the Court stated that other family members had not proved that they suffered material and economic harm. The Court did not refer to what, if any, evidence was presented and why it was insufficient to substantiate the claim for material compensation.

In relation to those injured, the Court awarded compensation for moral harm to compensate "the physical pain, sorrow and impairment arising from the injuries". Those with more severe injuries received higher awards.⁶²⁰

The Court also granted compensation for "physical harm" of either 1,000, 1,500, 2,000 or 2,500 Dinars for every percentage of incapacity. Before deciding on the compensation award, the Court did not clarify why the amounts differed from one victim to another nor did it cite any supporting jurisprudence. However, before deciding on the amount to be awarded, the Court stated that it would take into account "the age of the victim, the nature of the injury that was inflicted and the gravity of the harm". In some cases, the Court used a lower rate/percentage of incapacity for

⁶¹³ Case No.95646, Judgment p.736.

⁶¹⁴ To calculate the minimum wage the Court referred to Order No. 679 of 9 June 2011.

⁶¹⁵ Case No.95646, Judgment p.741.

⁶¹⁶ Case No.95646, Judgment p.741.

⁶¹⁷ For example, Bilal Ben Taher Najlawi's incapacity was evaluated at 20 per cent and he received 1,000 Dinars for every percent of incapacity (Judgment p.909); Abia Bent Mubarak Nasri's incapacity was evaluated at 20 percent and she received 1,200 Dinars for every percent (Judgment p.925); and Mourad Ben Abdel Majid's incapacity was evaluated at 20 percent and he received 1,500 Dinars for each percent (Judgment p.897).

⁶¹⁸ Case No.95646, Judgment pp.738-940.

⁶¹⁹ Permanent First Instance Military Court of Tunis, Case No. 71191, p.943.

⁶²⁰ Permanent First Instance Military Court of Tunis, Case No. 71191, pp.986 and 990.

victims with more severe injuries as compared to those with less severe injuries.⁶²¹ Finally, the Court ordered 500 Dinars to be paid to each of the victims as a contribution towards counsel's fees. No explanation for the basis on which this sum was calculated was given.

Case No. 74937 - Barraket Essahel (First Instance Tribunal of the Permanent Military Court of Tunis)

In this case, 3 of the 30 civil parties to the case requested 1 million Dinars for material and moral compensation during the criminal proceedings.

In relation to moral compensation, the Court acknowledged that the victims had "suffered physical pain, psychological suffering and feelings of oppression and sorrow" because of the physical and psychological harm that was inflicted on them.⁶²² On this basis, the Court awarded 50,000 Dinars to the 3 victims who submitted evidence.⁶²³ No further explanation or jurisprudence was cited to support its calculation.

The Court refused requests from the 3 victims for material harm suffered because, according to the Court, the claims were not corroborated "with arguments and the medical reports" necessary for such claims. This was despite the fact that the Court had previously relied on medical certificates annexed to the case file in finding that the physical harm actually "occurred and is proven".⁶²⁴

With regard to legal costs, the Court ordered 500 Dinars to be paid to the 3 victims to meet "litigation fees" without explanation.

Despite the findings of the Court, the victims in the case did not have their employment with the military reinstated. It was not until June 2014 that an extension to article 2 of the amnesty law was enacted in order to force the military to reinstate them.⁶²⁵

Any compensation award is separate from the fine that the judge can order to be paid as part of the sentence for the crime, the amount of which is fixed by the relevant provisions of the Criminal Code in relation to the offence.

Where the victim agrees, the judge can, in some instances, order that the accused pays punitive damages to those who were personally and directly harmed by the offence as an alternative to a prison sentence.⁶²⁶ A claim for compensation must take into consideration any punitive damages already paid when determining the amount payable.⁶²⁷

Although the Code of Criminal Procedure clearly recognizes a victim's right to pursue a civil claim against the accused, it does not specify whether a civil claim can also be considered against the State for the criminal acts of public officials. Some laws explicitly recognise State liability for the acts of public officials. For example, article 49 of Law No. 82-70 on the ISF recognises State liability for civil compensation for "a misconduct that is not gross committed while carrying out his duties". In practice, in criminal cases against public officials the Criminal Courts have in some cases considered the liability of the State at the same time as addressing the civil liability of the perpetrator.

⁶²¹ Permanent First Instance Military Court of Tunis, Case No. 71191, pp.1006 and 1012.

⁶²² Permanent First Instance Military Court of Tunis, Case No. 74937, p.47.

⁶²³ Permanent First Instance Military Court of Tunis, Case No. 74937, p.47.

⁶²⁴ Permanent First Instance Military Court of Tunis, Case No. 74937, p.46.

⁶²⁵ ICJ meetings with the Association INSAF for former members of the Army held in March 2013. Law No. 2014-28 of 16 June 2014.

⁶²⁶ Criminal Code, article 5. Punitive damages can only be awarded where the term of imprisonment is six months or less and the accused has not either paid punitive damages or been sentenced to imprisonment for an offence in the past (article 15quarter). Punitive damages cannot be ordered for certain specified offences, notably corruption, violence and public indecency (article 15quarter, para.3).

⁶²⁷ Criminal Code, article 15.

Concurrent liability of the State

Cases No. 71191 and 95646

In both judgments, the Military Court found that they had jurisdiction to look at the responsibility of the State on the basis that the “judge looking at the principal also looks at the accessory”.⁶²⁸

The Military Court of El Kef added other reasons for examining State liability, including: that the responsibility of the State is “closely linked” to the criminal case and therefore it had jurisdiction to look into compensation due from the State; and that it was necessary for the proper administration of justice and the enforcement of the principle of transitional justice, which requires accountability and compensation for victims.⁶²⁹

Both military courts found that the acts for which the Tunisian officials were convicted engaged not only the civil liability of the official concerned but also engaged the liability of the State.⁶³⁰ They stated that the misconduct committed by the security forces is linked to and “is not detached” from their official function or public service.⁶³¹

The Military Court of Tunis referred to the State’s liability pursuant to article 49(2) of the law on the ISF.⁶³² Both military courts cited jurisprudence from the Administrative Court as support for the fact that the gravity of the mistake by the employee is irrelevant as regards the State’s liability.⁶³³ Consequently, the State was required to pay compensation whether the mistake was “serious” or not.⁶³⁴ The rationale for this finding was the need to avoid the public official being insolvent (and so unable to fully compensate the victim). In addition, the Military Court of Tunis cited the need to grant greater protection to the victim. Both Courts found that the State retains the right to reclaim the sum from the employee later.⁶³⁵

Case No. 74937 - Barraket Essahel

In this case, involving the torture of 244 army officers in 1991, the First Instance Tribunal of the Permanent Military Court of Tunis convicted nine state officials and employees pursuant to article 101 of the Criminal Code.⁶³⁶ Unlike in Cases No.71191 and 95646, the Tunisian State was not listed as a respondent. Only the convicted individuals were ordered to pay compensation and the liability of the State was not discussed.

Since the 2011 Uprising, when making an award for compensation to victims of gross human rights violations, judges may be required to take into consideration compensation already paid to the victim under administrative compensation schemes that have been established.⁶³⁷

2. Assessment in light of international law and standards

In addition to the investigation of the violation and the prosecution and punishment of those responsible, under international standards the victim of the violation is also entitled to “adequate,

⁶²⁸ Court of First Instance of the Permanent Military Court of El Kef, Case No.95646, Judgment p.734; Court of First Instance of the Permanent Military Court of Tunis, Case No. 71191, Judgment p.941.

⁶²⁹ Case No.95646, Judgment p.734-5.

⁶³⁰ Case No.95646, Judgment p.733; Case No. 71191, Judgment p.941.

⁶³¹ Case No.95646, Judgment p.734; Case No. 71191, Judgment p.941.

⁶³² The Military Court of Tunis unlike the Military Court of El Kef referred to article 49 at p.940.

⁶³³ Case No. 71191, Judgment p.941 the Military Court referred to Case No. 32873 on 8 February 2002 and Case No. 33742 on 11 March 2002. Case No.95646, Judgment, p.734 referred to a case that was delivered on 22 October 1984 without giving a reference number.

⁶³⁴ Case No.95646, Judgment p.734; Case No. 71191, Judgment p.941.

⁶³⁵ Case No.95646, Judgment p.734; Case No. 71191, Judgment p.941.

⁶³⁶ Case No. 74937, Judgment of 29 November 2011.

⁶³⁷ Law-Decree No.2011-97, article 11; and Transitional Justice Law No.53-2013, article 45.

effective and prompt reparation for harm suffered".⁶³⁸ The right to reparation, including the right to fair and adequate compensation is explicitly recognised at article 14(1) of the CAT and article 24(4) of the ICPED, both of which Tunisia is a party to. Furthermore, the HRC has affirmed that States parties to the ICCPR, which Tunisia is also a party to, are required to provide reparation to victims as part of their right to an effective remedy under article 2(3).⁶³⁹

The notion of reparation includes material and moral damages and encompasses a variety of different forms.⁶⁴⁰ For example, the Basic Principles on the Right to a Remedy and Reparation states that reparation includes: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁴¹ More than one form of reparation may be appropriate. The different forms of reparation are therefore to be considered as complementary in nature and not alternative.⁶⁴²

The obligation to ensure adequate and effective reparation for gross human rights violations is an obligation imposed on the State. Where criminal proceedings verify the facts and ensure full public disclosure of the truth surrounding the violations this can provide some measure of satisfaction for the victim. The same is true if judicial and administrative sanctions are imposed against persons responsible for the violations.⁶⁴³ However, other forms of reparation may also be required by the State.

Persons responsible for gross human rights violations may also be required to provide some form of reparation. For example, the Basic Principles on the Right to a Remedy and Reparation recognise that, where a person or entity is found liable, the individual or entity must provide reparation or compensate the State if the State has already provided reparation to the victim.⁶⁴⁴ More specifically, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that "[o]ffenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights."⁶⁴⁵ The Declaration goes on to recommend that "[g]overnments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions".⁶⁴⁶

Where an individual has been found criminally liable and has been ordered to provide reparation, this does not absolve the State of its responsibility. Further information in this regard is detailed in the following section.

Tunisian law permits victims of gross human rights violations to claim reparation from the accused where they have joined criminal proceedings as a civil party and the suspect is convicted. The Court is however restricted to ordering compensation and sanctioning the accused only and does not have any explicit authority to order other forms of reparation. Although in some instances the State has been joined as a respondent to criminal proceedings and has been required to pay civil compensation to the victims, the approach of the courts in this regard is not consistent. In cases where the State has not been joined, separate civil or administrative claims would have to be brought against the State, as detailed in the following section. A presumption should be established by law that the State be joined as a respondent to assess its civil liability in all criminal proceedings relating to gross human rights violations where the acts or omissions are attributable to the State, so as to ensure a consistent

⁶³⁸ Basic Principles on the Right to a Remedy and Reparation, Principle 11(b). See also the Updated Impunity Principles, Principle 31.

⁶³⁹ HRC, General Comment No.31, para.16.

⁶⁴⁰ ICPED, article 24(5); and see the Updated Impunity Principles, Principle 34

⁶⁴¹ Basic Principles on the Right to a Remedy and Reparation, Principle 18. See also HRC, General Comment No.31, para.16; and Updated Impunity Principles, Principle 34.

⁶⁴² Draft Articles on the Responsibility of States for Internationally Wrongful Acts, article 34.

⁶⁴³ Basic Principles on the Right to a Remedy and Reparation, Principle 22(b) and (f).

⁶⁴⁴ Basic Principles on the Right to a Remedy and Reparation, Principle 15.

⁶⁴⁵ Basic Principles of Justice for Victims of Crime, Principle 8.

⁶⁴⁶ Basic Principles of Justice for Victims of Crime, Principle 9.

approach and to facilitate the ability for victims to claim compensation from the State without having to bring separate civil and administrative proceedings.

The Basic Principles on the Right to a Remedy and Reparation state that compensation is payable for “any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”.⁶⁴⁷ Examples of the types of economically assessable damage include:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁶⁴⁸

The judgments of the First Instance Military Tribunals of Tunis and El Kef in cases brought since the 2011 Uprising reflect some but not all elements of this framework, and, overall, demonstrate an inconsistent approach, which does not meet international standards.

Compensation for “moral harm” in relation to the families of the deceased was said in Case No.95646 to cover “emotions and feelings and the pain the victims endure” and in Case No.71191 to be “commensurate with the reality of the suffering they endured and within the framework of achieving justice and equity”. In relation to victims of injuries, the Court in Case No.71191 found that such compensation was for “the physical pain, sorrow and impairment arising from the injuries”, while in Case No.74937 it was awarded for “physical pain, psychological suffering and feelings of oppression and sorrow”. Furthermore, different amounts were awarded for persons who were the same relation to the deceased and for persons suffering the same percentage of injury, without any explanation as to why this was the case.

Inconsistent approaches were also seen in relation to material harm. In Case No.95646, material harm was only awarded to one family, whereas in Case No.71191 it was awarded to those victims who were either the wife or child of the deceased. In relation to injured persons, compensation for “physical harm” was awarded in both Cases No.95646 and 71191. However, such claims were referred to as “material harm” and dismissed entirely in relation to victims of torture in Case No.74937, on the basis that they were not corroborated, despite the Court accepting that physical harm was proven. Similarly, legal expenses were granted to some victims but not all and the amounts varied without explanation. These inconsistencies, coupled with the lack of explanation regarding how different forms of compensation is assessed and awarded, undermine the ability of victims to claim adequate and effective compensation.

Also of concern is the use of the minimum wage as a basis for calculating material harm caused to family members of the deceased. Neither the Military Court of Tunis nor El Kef explained why this figure was appropriate as opposed to considering the actual and potential earnings of the deceased. In addition, the basis on which compensation was awarded is not clearly defined and does not allow for the full range of harm to be compensated for. For example, lost opportunities and the costs of medical or other services were not considered while mental harm was not assessed in any meaningful way.

In order to ensure that victims of gross human rights violations obtain adequate and effective reparation, the Tunisian authorities should:

- i) Ensure that the State is presumptively joined as a respondent to assess its civil liability in all cases of gross human rights violations where the acts or omissions are attributable to the State;**

⁶⁴⁷ Basic Principles on the Right to a Remedy and Reparation, Principle 20; see also, Committee against Torture, General Comment No. 3, para.10.

⁶⁴⁸ Basic Principles on the Right to a Remedy and Reparation, Principle 20. See also Committee against Torture, General Comment No. 3, para.10.

- ii) Establish in the law the basis on which civil compensation and legal expenses claimed during criminal proceedings are to be assessed, and ensure that these provide adequate and effective reparation to victims and are consistent with the approach taken in civil proceedings (recommendations below).**

ii. Tunisian civil and administrative proceedings

1. Tunisian legal framework

Under the Tunisian legal system, victims of gross human rights violations, as with other victims of crime, can decide whether to join criminal proceedings and claim compensation before the criminal courts or to pursue a separate civil claim against the alleged perpetrator in the civil courts. In addition, the victim of a gross human rights violation can also bring a claim for compensation before the Administrative Court, which adjudicates cases between individuals and the public administration.

According to article 7 of the Code of Criminal Procedure, all persons who have directly suffered personal injuries as a result of the offence may bring a civil claim. It can be exercised at the same time as the criminal case or separately before the civil courts. If a separate civil claim is brought, the civil court must wait for the decision in the criminal case before it adjudicates the case.

Civil liability in such circumstances is encompassed within article 82 of the Code of Obligations and Contracts, according to which “any act of a man [sic] which, without the authority of law, knowingly and wilfully causes material or moral damage to someone, requires its author to repair the damage resulting from the act, when it is established that this fact is the direct cause.” Article 83 of the Code establishes that civil liability extends to damage caused by acts or omissions without intention to cause harm.⁶⁴⁹

According to the Code of Obligations and Contracts, the State is also civilly liable for acts or omissions committed by public officials in the exercise of their duty, without prejudice to the direct responsibility of the latter to the injured parties.⁶⁵⁰ A public official who causes material or moral damage in the performance of his or her duties by fraud or gross negligence is required to repair the damage caused by his fraud or gross negligence.⁶⁵¹

Pursuant to article 107 of the Code of Obligations and Contracts, damages may include:

- the actual loss experienced by the applicant;
- the necessary expenses that he had or should have to pay in order to repair the consequences of the act committed against his rights; and
- the gains he has been deprived of as a consequence of the act.

Law No. 82-70 on the ISF also explicitly recognises State liability for the acts of employees of the ISF. Article 49 states: “... [i]f one of the employees of the Interior Security Services is prosecuted by a third party for a misconduct that is not serious, committed while carrying out his duties, the administration must cover any civil compensation he would be ordered to pay. In all circumstances, a careful administrative investigation is carried out concerning the events that prompted the civil conviction against him.” However, jurisprudence of the Administrative Court and affirmed by the Military Courts in Cases No.71191 and 95646 (see above) has extended the scope of State liability to include all cases of serious misconduct by ISF officials.

Citizens can also apply to the Administrative Court for: the annulment of an administrative decision if the decision constitutes an abuse of power;⁶⁵² and to adjudicate on disputes aimed at establishing

⁶⁴⁹ Article 83 of the Code of Obligations and Contracts states, “[e]veryone is responsible for the moral or material damage he causes not only by his act, but by his own omission, when it is established that the omission is the direct cause.”

⁶⁵⁰ Code of Obligations and Contracts, article 84.

⁶⁵¹ Code of Obligations and Contracts, article 85.

⁶⁵² Law No. 72-40 of 1 June 1972 on the Administrative Court, article 3, as amended by Law No. 2002-11 of 4 February

the administrative responsibility of the State.⁶⁵³

An application for annulment can be brought by anyone who has a moral or material interest in the annulment of an administrative decision. A decision can constitute an abuse of power on the basis of: incompetence, infringement of procedural requirements, violation of the rule of law, or misuse of power or procedure.⁶⁵⁴

An application relating to the State's administrative responsibilities can be brought on the basis of unlawful administrative actions or activities ordered by the State, or on the basis of abnormal loss caused by dangerous activities of the State.⁶⁵⁵

The Administrative Court can order the annulment of the decision and can order the party or parties, including the State, to pay costs.⁶⁵⁶

2. *Assessment in light of international law and standards*

As set out above, under international standards, the right to a remedy for gross human rights violations includes the right to adequate, effective and prompt reparation for harm suffered, including, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁵⁷

Both the CAT and the ICPED require each State party to "ensure in its legal system" the right to obtain reparation, including compensation, although they are silent on precisely how this right should be secured. The Committee against Torture has explained that the procedural aspects of the obligation set out at article 14(1) of the CAT require States to "ensure the existence of institutions competent to render enforceable final decisions through a procedure established by law to enable victims of torture or ill-treatment to secure redress, including adequate compensation and rehabilitation".⁶⁵⁸

In order to meet the requirement of adequacy and effectiveness, the reparation should take into account: the harm caused to the victims, the violations and the broader social context of each individual case.⁶⁵⁹ According to the Committee against Torture, "in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate in relation to gravity of the violations committed against them."⁶⁶⁰

While criminal prosecution is an important form of reparation for victims of gross human rights violations, the right to other forms of reparation should not be dependent on whether or not the perpetrator has been prosecuted through criminal proceedings. This has been affirmed by the Committee against Torture and the Committee on Enforced Disappearances.⁶⁶¹ The Committee against Torture has also recognised that "Civil liability should be available independently of criminal proceedings and the

2002. The Tunisian Administrative Court was established by Law 72-40 of 1 June 1972.

⁶⁵³ Law No. 72-40 of 1 June 1972 on the Administrative Court, article 17, as amended by Law No. 96-39 of 3 June 1996.

⁶⁵⁴ Law No. 72-40 of 1 June 1972 related to the Administrative Tribunal, articles 6 and 7.

⁶⁵⁵ Law No. 72-40 of 1 June 1972 on the Administrative Court, article 17, as amended by Law No. 96-39 of 3 June 1996.

⁶⁵⁶ Law No. 72-40 of 1 June 1972, article 34.

⁶⁵⁷ ICPED, article 24(4) and (5); CAT, article 14(1); Article 2(3) of the ICCPR; HRC, General Comment No.31, para.16; Committee against Torture, General Comment No. 3, para.2; UN Basic Principles on the Right to a Remedy and Reparation, Principles 11(b) and 18; Updated Impunity Principles, E/CN.4/2005/102/Add.1, Principles 31 and 34.; and Inter-American Court of Human Rights, Velásquez Rodríguez v. Honduras (Compensatory Damages), Judgment of 21 July 1989, para.26.

⁶⁵⁸ Committee against Torture, General Comment No. 3, para.24 and see para.5.

⁶⁵⁹ Basic Principles on the Right to a Remedy and Reparation, Principles 15 and 18.

⁶⁶⁰ Committee against Torture, General Comment No. 3, para.6.

⁶⁶¹ Committee against Torture, General Comment No. 3, para.26; and Committee on Enforced Disappearances, Concluding Observations: Spain, UN Doc. CED/C/ESP/CO/1, 12 December 2013, para.30.

necessary legislation and institutions for such purpose should be in place”.⁶⁶²

In addition, the Committee against Torture has stated that “compensation should not be unduly delayed until criminal liability has been established ... [i]f criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence of or undue delay in those criminal proceedings constitutes a failure on the part of the State party to fulfil its obligations under the Convention.”⁶⁶³

It is also important that the possibility of civil redress from the perpetrator does not extinguish the obligations on the State to ensure full reparation for human rights violations. As the Updated Impunity Principles make clear, “[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”⁶⁶⁴ The Basic Principles on the Right to a Remedy and Reparation affirm the duty on the State to “provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.”⁶⁶⁵ They also provide that “[i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim”.⁶⁶⁶ It further recognises that “[s]tates should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations”.⁶⁶⁷

Tunisian law establishes a framework whereby civil liability can be imposed on both the perpetrator of gross human rights violations and on the State, where the acts were committed by public officials in the exercise of their duty. In addition, administrative claims can be brought in order to annul a decision or to establish the State’s liability regarding an administrative decision.

Although civil claims can be brought by victims regardless of whether or not criminal proceedings have been sought, the requirement to wait until criminal liability has been determined can result in extensive delays for victims, contrary to international standards.

Furthermore, the liability of the State is limited to acts committed by public officials in the exercise of their duty.

Compensation for civil liability under Tunisian law covers both material and moral damages but is restricted to loss suffered, expenses paid or expected in order to repair the harm caused and future gains the person has been deprived of. This could potentially be interpreted to exclude other types of “economically assessable damage”.⁶⁶⁸ In particular, Tunisian law does not ensure clearly enough that the assessment takes into account mental harm as well as physical harm; lost opportunities, including in relation to employment, education and social benefits; and costs required for legal or expert assistance, medicine and medical services; and psychological and social services.⁶⁶⁹

In terms of the ability to obtain other forms of reparation, the Committee against Torture, in relation

⁶⁶² Committee against Torture, General Comment No. 3, para.26.

⁶⁶³ Committee against Torture, General Comment No. 3, para.26. See also, Committee on Enforced Disappearances, Concluding observations on Spain, 13 November 2013, UN Doc. CED/C/ESP/CO/1 (para. 9) which recommended that Spain “should ensure that any natural person who has suffered harm as the direct result of an enforced disappearance is entitled to all the reparatory and compensatory measures provided for under the law, even if no criminal proceedings have been brought”.

⁶⁶⁴ Updated Impunity Principles, UN Doc. E/CN.4/2005/102/Add.1, principle 31.

⁶⁶⁵ Basic Principles on the Right to a Remedy and Reparation, Principle 15.

⁶⁶⁶ Basic Principles on the Right to a Remedy and Reparation, Principle 15.

⁶⁶⁷ Basic Principles on the Right to a Remedy and Reparation, Principle 16.

⁶⁶⁸ Basic Principles on the Right to a Remedy and Reparation, Principle 20. See also Committee against Torture, General comment No. 3, para.10.

⁶⁶⁹ Basic Principles on the Right to a Remedy and Reparation, Principle 20. See also Committee against Torture, General comment No. 3, para.10.

to Tunisia, has affirmed: “article 14 of the Convention⁶⁷⁰ not only recognizes the right to fair and adequate compensation but also requires States parties to ensure that the victim of an act of torture obtains redress. The Committee considers that redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case”.⁶⁷¹ While administrative proceedings can bring an end to a violation through annulment proceedings, other forms of reparation are not explicitly provided for through civil and administrative proceedings.

The Tunisian authorities should ensure legal and policy reforms are enacted to guarantee victims of human rights violations adequate, effective and prompt reparation and to this end ensure that:

- i) The right to reparation is not unduly delayed by having to wait for criminal proceedings to end before a civil claim can be determined;**
- ii) The State is obliged to provide reparation to victims of human rights violations for all acts and omissions attributable to it and, to this end, article 49 of Law No. 82-70 is amended to ensure that all acts or omissions constituting human rights violations by persons employed by or acting on behalf of the ISF give rise to State liability;**
- iii) When determining what amounts to effective and adequate reparation, judicial decisions take into account the harm caused to the victim, the gravity of the violations and the circumstances of each case;**
- iv) Full restitution is available to victims of human rights violations where possible;**
- v) Compensation for human rights violations is awarded proportional to the gravity of the violation and the circumstances of each case and extends to cover any economically assessable damage, including:**
 - a) physical or mental harm;**
 - b) lost opportunities, including employment, education and social benefits;**
 - c) material damages and loss of earnings, including loss of earning potential;**
 - d) moral damage; and**
 - e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services;**
- vi) Rehabilitation is included as a form of reparation for victims, including medical and psychological care as well as legal and social services;**
- vii) In addition to verifying facts and imposing sanctions against persons who are liable, Tunisian law should explicitly provide courts and other decision-makers with the authority to order other forms of satisfaction to victims in appropriate cases, including: the cessation of continuing violations; search for and identification of disappeared persons; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; public apologies, including acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to victims; and inclusion of an accurate account of violations that occurred in educational materials; and**
- viii) Courts and other decision-makers should be explicitly authorized to order measures necessary to guarantee non-repetition of human rights violations.**

⁶⁷⁰ Paragraph 1 of article 14 of the CAT states that: “[e]ach State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation”.

⁶⁷¹ *Saadia Ali v. Tunisia*, decision of the Committee against Torture, Communication No. 291/2006 of 2 March 2006, UN Doc. CAT/C/41/D/291/2006 of 26 November 2008, paragraph 15.8. For example, Principle 9 of the Basic Principles of Justice for Victims of Crime recommend that governments “review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions”. See also Committee on Enforced Disappearances, Concluding Observations: France, UN Doc. CED/C/FRA/CO/1, 8 May 2013; see also Committee on Enforced Disappearances, Concluding Observations: Spain, UN Doc. CED/C/ESP/CO/1, 12 December 2013, paras.29 and 30.

Commission Members

May 2016 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Sir Nigel Rodley, United Kingdom

Vice-Presidents:

Prof. Robert Goldman, United States

Justice Michèle Rivet, Canada

Executive Committee:

Prof. Carlos Ayala, Venezuela

Justice Azhar Cachalia, South Africa

Prof. Jenny E. Goldschmidt, Netherlands

Ms Imrana Jalal, Fiji

Ms Hina Jilani, Pakistan

Justice Radmila Dicic, Serbia

Mr Belisario dos Santos Junior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Adolfo Azcuna, Philippines

Mr Muhannad Al-Hasani, Syria

Dr. Catarina de Albuquerque, Portugal

Mr Abdelaziz Benzakour, Morocco

Justice Ian Binnie, Canada

Sir Nicolas Bratza, UK

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Andrew Clapham, UK

Justice Elisabeth Evatt, Australia

Mr Roberto Garretón, Chile

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Mr. Shawan Jabarin, Palestine

Justice Kalthoum Kennou, Tunisia

Prof. David Kretzmer, Israel

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Justice Charles Mkandawire, Malawi

Mr Kathurima M’Inoti, Kenya

Justice Yvonne Mokgoro, South Africa

Justice Sanji Monageng, Botswana

Justice Tamara Morschakova, Russia

Prof. Vitit Muntarbhorn, Thailand

Justice Egbert Myjer, Netherlands

Justice John Lawrence O’Meally, Australia

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Victor Rodriguez Rescia, Costa Rica

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Mr Raji Sourani, Palestine

Justice Philippe Texier, France

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia

ISBN 978-92-9037-223-3



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org