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Obstacles to Access to Justice for Women in Tunisia in Light of International Law and Standards

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The right of access to justice is both a fundamental component of the rule of law and a key element in ensuring the realisation of all human rights.¹ While commonly associated with the right to a remedy and reparation to redress human rights violations, the right of access to justice has a broader meaning under international human rights law. It also comprises the prohibition of discrimination and the principle of equality before the law and equal protection of the law. Furthermore, the right of access to justice must be understood in the context of States’ obligations under international human rights law to respect, protect and fulfil human rights.²

This set of interrelated obligations is critical to understand the scope and content of the right of access to justice for women. The Committee on the Elimination of Discrimination against Women (the CEDAW Committee) stressed that the right of access to justice is “multidimensional” and “essential to the realisation of all the rights protected under the Convention [on the Elimination of all Forms of Discrimination against Women]”. The CEDAW Committee further noted that “[i]t is a fundamental element of the rule of law and good governance, together with the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and corruption, and the equal participation of women in the judiciary and other law implementation mechanisms.”³

¹ See, e.g., Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation on women’s access to justice, CEDAW/C/GC/33, 23 July 2015 (hereinafter CEDAW General Recommendation No. 33), para. 1.

² Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 7 (hereinafter HRC General Comment No. 31).

³ CEDAW General Recommendation No. 33, para. 1.

Where States fail to comply with their obligations to respect, protect and fulfil human rights, obstacles to the realisation of the right of access to justice will arise and affect both men and women. However, women will often face additional and specific obstacles to their enjoyment of the right of access to justice on the basis of equality. The CEDAW Committee has explained that “[a]ll of these obstacles constitute persistent violations of women’s human rights”.⁴ Moreover, certain common barriers, be they legal, structural, economic, practical, or social factors, may affect women and men differently or be predominantly experienced by women. States are therefore required to take specific steps to address women’s experiences and the wide range of particular obstacles they face when seeking to exercise their right of access to justice.

In this regard, Tunisia has a long history of progressive legislation protecting women’s rights, such as the 1956 Personal Status Code. Following the 2011 uprising, the political transition led to far-reaching legal and institutional reforms culminating with the adoption of a new constitution in 2014 that, in turn, envisages comprehensive legislative reforms relating to the judiciary and to the protection of human rights, including women’s rights. Tunisia is also party to key human rights treaties, including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), to which it withdrew its reservations in 2014. Under those instruments Tunisia must ensure women’s right of access to justice effectively.

Despite the above-mentioned progressive history and positive developments, various, significant obstacles continue to exist regarding women’s right of access to justice in Tunisia. Legal obstacles include laws that, due to inadequate definitions of the relevant crimes, fail to fully criminalize certain violations of women’s human rights, such as rape, sexual assault, and sexual harassment. Women in Tunisia also continue to face obstacles due to expressly discriminatory legislation, including in the Personal Status Code itself, such as some of the current legal provisions on child custody. Furthermore, even where domestic laws provide a basis for women’s effective exercise of their right of access to justice, obstacles related to the administration of justice, such as lack of adequate competences and resources, as well as discriminatory practices on the part of justice sector actors, undermine women’s effective access to justice. Women also encounter practical barriers due to a lack of knowledge about their rights, social stigma associated with bringing legal claims, as well as a lack of free legal aid.

For women’s right of access to justice to be fully realized, Tunisia must implement a wide range of measures to eliminate these obstacles. In this respect, while legal reforms in line with international human rights obligations are key, they are insufficient to address comprehensively the array of obstacles, notably policies and practices in the administration of justice, gender stereotypes and practical barriers based on social and economic realities faced by women.⁵ In this context, the International Commission of Jurists (ICJ) welcomes the broad approach of the Draft Law on Violence against Women, which the government is currently drafting, since it includes prevention and protection measures.

In this memorandum, the ICJ analyses some of the main obstacles affecting women’s access to justice in Tunisia in light of international law and standards, including inadequate laws failing to fully protect women’s rights and laws perpetuating gender discrimination; structural and practical obstacles related to the administration of justice; gender stereotypes and norms undermining women’s ability and/or willingness to seek justice; as well as economic and social barriers to the effective realisation of women’s right of access to justice. This analysis takes into account information gathered through Focus Group Discussions (FGDs) carried out in Kef, Kasserine and Tunis by the ICJ in partnership with Tunisian NGOs working on women’s

⁴ *Ibid*, para. 3.

⁵ See with regard to women’s access to justice for gender-based violence, UN Secretary-General, “In-depth study on all forms of violence against women”, A/61/122/Add.1 (2006), para. 292.

rights in March and April 2016. During these meetings, women recounted their experiences in seeking justice, including by identifying the obstacles they faced in doing so, and shared their views on what should be done to improve their access to justice. In addition, this memorandum relies on discussions that took place in the context of a seminar organized by the ICJ on "Mapping and addressing obstacles to access to justice for women in Tunisia" on 9-10 May 2016 in Tunis, which lawyers, judges, prosecutors, government representatives and human rights defenders attended.

In this memorandum, the ICJ also formulates recommendations for reform in order to address those obstacles, highlighting the need for a comprehensive approach, so as to ensure that women in Tunisia are empowered and able to fully enjoy their right of access to justice as prescribed under international law and standards.

Meaning and scope of the right of access to justice for women under international law and standards

While international human rights treaties do not explicitly refer to 'access to justice', they recognise a set of obligations and rights that clearly require States to ensure access to justice. As noted by the UN Special Rapporteur on the independence of judges and lawyers, the right of access to justice is both a right in itself, and also includes "the right to effective judicial protection (fair trial or due process), the right to an effective remedy and the right to equality."⁶ International human rights instruments impose further obligations to address the specific obstacles women face when seeking justice.

1. Tunisia's obligations to respect, protect and fulfil human rights

The international and regional human rights treaties to which Tunisia is a party⁷ require the adoption of legislative, judicial, administrative, educative and other appropriate measures⁸ to respect, protect and fulfil the human rights of all. The obligation to respect means that all State officials, including government agents and those who act under its instructions, direction or control or through delegation of governmental authority, must not commit human rights violations. It also requires the State to ensure equal treatment in law and in practice and to refrain from any unlawful interference with the enjoyment of human rights. The additional obligation to protect requires state authorities to take all necessary measures to protect individuals from the impairment or nullification of their human rights by third parties, including non-State actors such as business enterprises and private individuals.⁹ In particular, as explained by the CEDAW Committee, the obligation to protect requires that States parties "protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practice that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women".¹⁰ The CEDAW Committee has also emphasised that States could be held responsible for private acts if they "fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and for providing compensation".¹¹ Finally, the

⁶ Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/17/30 (2011) para. 37.

⁷ The International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the International Convention for the Protection of All Persons from Enforced Disappearances (ICPED); CEDAW; and the African Charter on Human and Peoples' Rights (ACHPR).

⁸ HRC General Comment No. 31, para. 78.

⁹ HRC General Comment No 31, para. 8.

¹⁰ CEDAW General Recommendation No 28, para. 9.

¹¹ CEDAW General Recommendation No 19, paragraph 9; and CEDAW General Recommendation No 28, paragraph 13. See also HRC, General Comment No 31, para. 8.

obligation to fulfil human rights means that the State must not only ensure a legal framework is in place that gives effect to the human rights obligations by which it is bound,¹² but it must also enable the realisation of rights in practice, including by taking effective legislative, judicial, administrative, educative and other appropriate implementation measures to ensure the ability of individuals to enjoy their rights.¹³

This entails, in part, that where violations are alleged or otherwise suspected to have occurred, the State must ensure that they are effectively investigated; and that where established violations constitute crimes under international or national law, those responsible must be brought to justice.¹⁴

The obligations to respect, protect and fulfil human rights therefore require that Tunisia enable access to justice in various complementary ways. First, human rights obligations binding on Tunisia must be recognised and incorporated into the domestic legal order and relevant human rights provisions should be codified in domestic law.¹⁵ This is a pre-condition for individuals to claim and seek to enforce their human rights as entitlements under the law.

In addition, Tunisia's legal system must provide effective legal protection against harmful conduct of public and private actors to prevent abuses and ensure accountability when they do occur.¹⁶ This means that certain conduct must be prohibited in law, and systems and mechanisms put in place to ensure consistent enforcement, accountability and sanctions. For example, Tunisia is required to protect the rights to life, personal integrity and freedom from torture and other forms of ill-treatment through the enactment of criminal laws prohibiting certain forms of violence and by establishing effective procedures and mechanisms for law enforcement, investigation, prosecution, and punishment commensurate with the gravity of the relevant offence.¹⁷

Furthermore, individuals must be guaranteed the right to an effective remedy and reparation to redress violations. This right has first been recognised in article 8 of the Universal Declaration of Human Rights. Numerous international and regional treaties to which Tunisia is a party further acknowledge this right.¹⁸ The right to a remedy applies to all violations of civil, cultural, economic, political and social rights, though the specific modalities for remedy may vary depending on the right in question and the character of the violation. The right to an effective remedy and reparation guarantees, first of all, the right to bring allegations of human rights violations in order for them to be considered in the context of a fair hearing, before an independent and impartial body, capable of formally confirming whether human

¹² See for example Article 2(2) ICCPR; Articles 2 (a)-(g) CEDAW.

¹³ HRC, General Comment 3, Implementation at the National Level, HRI/GEN/1/Rev.1, 1981 (hereinafter HRC General Comment 3); HRC General Comment No. 31, para. 7; Committee Against Torture, General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008 (hereinafter CAT General Comment No. 2.); CEDAW, General Recommendation 28, The Core Obligations of States Parties under Article 2 of CEDAW, U.N. Doc. CEDAW/C/GC/28, 2010 (hereinafter CEDAW General Recommendation 28); Committee on the Rights of the Child, General Comment No. 5, General Measures of Implementation of CRC, CRC/GC/2003/5, 27 November 2003.

¹⁴ Basic Principles on the Right to a Remedy and Reparation, 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); and HRC, General Comment No 31, paras. 15 and 18.

¹⁵ See for example: HRC, General Comment No. 31, para. 13; See also Article 2 (a)-(g) CEDAW and CEDAW General Recommendation 28.

¹⁶ Article 2(b)-(f) CEDAW and CEDAW General Recommendation 28, paras. 17,31,36; HRC, General Comment No.31, para. 8.

¹⁷ See for example Articles 2,4,12 and 16 CAT and in general CAT General Comment No. 2. See also ICCPR Articles 2, 6 & 7 and HRC, General Comment No.31, para. 8. And see CEDAW, General Recommendation 19, Violence Against Women, CEDAW/C/1992/L.1/Add.15, paras. 19, 24(b) and 24(t) (hereinafter CEDAW General Recommendation 19); CEDAW, General Recommendation 28, para. 34.

¹⁸ ICCPR, article 2(3); CAT, articles 13 and 14; and ACHPR, article 7(1)(a).

rights violations took place, empowered to order that the said violations come to an end if they are continuing, and capable of ensuring that victims receive adequate reparation in all its forms.

The procedural nature of the right to a remedy does not preclude that in some cases the relevant human rights violations are considered and established by non-judicial mechanisms,¹⁹ 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 available.²⁰ A judicial remedy must be prompt and effective²¹ and secured through fair and impartial proceedings.²² This requires that the judicial authority reviewing the violation is independent and is not subject to interference by the authorities.²³ Proceedings must also be accessible in practical terms and access to legal representation and legal aid, if needed, must be ensured.²⁴

Finally, it is also critical to address practical barriers to access to justice. Tunisia must take proactive measures to ensure that in practice individuals can fully enjoy their rights.²⁵ In the view of the Human Rights Committee, article 2 of the International Covenant on Civil and Political (ICCPR) requires States to “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”²⁶, including increased awareness-raising about rights and available legal avenues to ensure their respect.

2. Women’s access to justice

Failure by the authorities to implement their obligations to respect, protect and fulfil human rights will result in obstacles affecting both men and women. However, women will often face additional and specific obstacles in exercising the right of access to justice because of systemic, pervasive discrimination directed against them on the basis of their sex and gender, as well as discrimination “compounded by intersecting factors that affect some women to a different degree or in different ways than men and other women”, such as ethnicity/race, colour, socio-economic status, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, and being lesbian, bisexual, transgender women or intersex persons.²⁷ Moreover, certain common barriers may affect women and men differently or be predominantly experienced by women. Tunisia is therefore required to take further measures to address the various additional legal, structural and practical obstacles that may undermine women’s access to justice, including with regard to specific violations women may suffer.

¹⁹ ICCPR article 2(3)(b); HRC, General Comment no 31, para. 15; Basic Principles on the Right to a Remedy and Reparation, Principle 12.

²⁰ See e.g. Basic Principles on the Right to a Remedy, Principle 12; HRC, *Bautista v. Colombia*, Communication No. 563/1993 (27 October 1995), para. 8.2; HRC, *Vicente v. Colombia*, Communication No. 612/1995 (29 July 1997), para. 8.2. CAT, General Comment No. 3: Implementation of article 14 by States parties, CAT/C/GC/3, 13 December 2012, para. 30.

²¹ HRC, General Comment No.31, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004) para.15.

²² Basic Principles on the Right to a Remedy and Reparation, Principle 12.

²³ Article 14(1) of the ICCPR.

²⁴ HRC, General Comment No.31, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004) paras.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.

²⁵ CAT, General Comment No. 3: Implementation of article 14 by States parties, CAT/C/GC/3, 13 December 2012, 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.

²⁶ HRC, General Comment No.31, CCPR/C/21/Rev.1/Add. 13 (2004), para. 7.

²⁷ See CEDAW, General Recommendation No. 33, para. 8.

The right to a remedy for violations of women’s rights itself imposes far-reaching obligations on Tunisia. While non-judicial remedies may be at times appropriate, the CEDAW Committee has explained that access to justice for women includes “justiciability”, “requir[ing] the unhindered access by women to justice as well as their ability and empowerment to claim their rights under the Convention as legal entitlements”.²⁸ The Committee further recommends that the provision of remedies by States encompasses providing and enforcing “appropriate, timely remedies for discrimination against women and ensure that women have access to all available judicial and non-judicial remedies”, including ensuring that non-judicial remedies “are not used as substitutes for investigations into and prosecutions of perpetrators”.²⁹ In turn, this means that access to justice entails the right for women to bring judicial proceedings to ascertain whether in certain circumstances they are in fact actually entitled to judicial (as well as non-judicial) remedies.

Furthermore, access to justice refers to a much wider range of measures to be taken by the authorities than criminal justice responses to perpetrators of violence against women. Women’s right of access to justice also includes their entitlement and ability to seek safety through effective protection orders; physical and mental recovery through good quality and accessible health services; and the opportunity to seek and obtain a divorce and a new life free from the violence of a spouse.³⁰ As explained by the CEDAW Committee, access to justice also means the capacity to use the law in a transformative way that empowers the individuals as rights holders.³¹ The Committee has added that the obligation to fulfil rights requires that States parties “take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures in line with Article 4, paragraph 1, of the Convention and General Recommendation 25 on Article 4, paragraph 1, of the Convention. This entails obligations of means or conduct and obligations of results.”³²

Substantive equality

The CEDAW Committee has explained the meaning and scope of substantive equality in the following terms:

“In the Committee’s view, a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.”³³

²⁸ Ibid., para. 14(a).

²⁹ Ibid., para. 15.

³⁰ ICJ, “Women’s Access to Justice for Gender-Based Violence - A Practitioners’ Guide”, 2016, p. 3, available at: <http://www.icj.org/womens-access-to-justice-for-gender-based-violence-icj-practitioners-guide-n-12-launched>.

³¹ CEDAW General Recommendation No. 33, para.2.

³² CEDAW, General Recommendation 28, para. 9.

³³ CEDAW, General Recommendation 25, on article 4, para. 1, on temporary special measures, HRI/GEN/1/Rev.7 at 282 (2004) (hereinafter CEDAW General Recommendation 25), paras. 8-10.

Access to justice, including the right to remedy, the prohibition of discrimination and the principle of equality,³⁴ combined with the general obligations to respect, protect and fulfil the human rights of women,³⁵ require the Tunisian authorities to consider the specific needs and problems faced by women in the country when taking measures to address obstacles to access to justice.

According to international Treaty Bodies, in particular the CEDAW Committee and the Human Rights Committee, such measures, addressing legal, practical and other obstacles, include:³⁶

- Recognising women as equal rights bearers and granting women equal legal capacity and protection of the law in all spheres and circumstances;³⁷
- Revising and removing all discriminatory laws;³⁸
- Establishing adequate and accessible legal protection from discrimination and unequal treatment in law and practice;³⁹
- Ensuring that the definition and content given to legal rights takes account of the particular needs of women as women, arising for example from biological differences as well as social and culturally constructed differences;⁴⁰
- Ensuring that laws and law-enforcement procedures effectively prohibit and safeguard against human rights abuses which women face as women in public and private spheres or which affect women in distinct or disproportionate ways;⁴¹
- Establishing gender-sensitive legal procedures and processes and ensuring the forms of redress available are designed to respond to the particular needs of women;⁴²
- Taking steps to address the wide range of social and practical factors that can often impede women's ability to claim their rights, including the status of women, their lack of independent access to resources, and pejorative gender-based stereotypes, prejudices and norms in operation in a society.⁴³

Under international law, further detailed measures have also been considered and recommended to address a wider range of issues and obstacles that arise as a result of and in connection with gender inequality and discrimination, including additional grounds of discrimination against women such as race, ethnicity, religion, marital status, social and economic status and sexual orientation, the existence of discriminatory customary law, the need for adequate resources and institutional capacity to address violations of women's rights, child maintenance, and gender-based violence. For example, in the case of *Yildirim v. Austria*,⁴⁴ in which the applicant was murdered by her husband after suffering several years

³⁴ See Universal Declaration of Human Rights, Art. 7 and ICCPR Art. 26; HRC, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/8/4 (2008) para. 17.

³⁵ Article 2, CEDAW; Articles 2, 3 & 26 ICCPR; CEDAW, General Recommendation 28; HRC, General Comment 28.

³⁶ For an overview of States' obligations and measures required see, ICJ series on women's access to justice and "Identifying the Obstacles & Need for Change" on Thailand and Botswana, available at: <http://www.icj.org/womens-access-to-justice-in-thailand-identifying-the-obstacles-and-need-for-change> and <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/11/ICJ-Women%E2%80%99s-Access-to-Botswana-AW.1.pdf>

³⁷ See in HRC General Comment No. 32; HRC, General Comment 28, Article 3: The Equality of Rights between Women and Men, 2000, HRI/GEN/1/Rev.9, para. 19 (hereinafter HRC General Comment 28); CEDAW General Recommendation 28; CEDAW, General Recommendation 29, Economic consequences of marriage, family relations and their dissolution, General Recommendation on Article 16, CEDAW/C/GC/29, 26 February 2013, (hereinafter CEDAW, General Recommendation 29).

³⁸ CEDAW General Recommendation 28. para. 35

³⁹ CEDAW General Recommendation 28. para.31

⁴⁰ CEDAW General Recommendation 25.

⁴¹ CEDAW General Recommendation 28, in general and specifically paras. 10, 17.

⁴² See in general Article 2 CEDAW; CEDAW General Recommendation 28; CEDAW, *VK v. Bulgaria*, Communication No. 20/2008, 25 July 2011, para. 9.9 and 9.11-9.16; CEDAW, *Vertido v. Philippines*, Communication No. 18/2008, 16 July 2010, paras. 8.5-8.9; See also CAT General Comment No. 2.

⁴³ Article 5 CEDAW, CEDAW General Recommendation 28.

⁴⁴ *Yildirim v Austria*, CEDAW Communication No 6/2005, UN Doc CEDAW/C/39/D/6/2005 (2007), para.

of domestic violence, the CEDAW Committee expanded on the content of the standard of positive action required on the part of the State, as a result of the State's duty of due diligence for the actions of non-State actors. The Committee affirmed that the State had an obligation to prevent, investigate, prosecute, punish and offer adequate redress with respect to acts that had the effect of impairing or nullifying the complainant's right to life and to be free from torture or other ill-treatment.⁴⁵ The CEDAW Committee noted that Austria had "established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators". These formal measures, while necessary, were nonetheless found to be insufficient by themselves when the political will they expressed, was not supported by State actors in adherence to Austria's due diligence obligations.⁴⁶

When it comes to understanding access to justice for women specifically, the CEDAW Committee has explained that the persistence of obstacles to women's access to justice constitutes a violation of women's human rights under CEDAW.⁴⁷ In order to ensure that women genuinely have access to justice, the CEDAW Committee outlined six interrelated components that are essential to establish functional justice systems that enforce women's human rights: justiciability, availability, accessibility, good quality, accountability and the provision of remedies for victims.⁴⁸

Tunisia has an obligation to ensure that those critical elements of women's right of access to justice be realised, including by protecting women against all forms of discrimination.⁴⁹ The CEDAW Committee has found that this obligation extends to exposing and removing obstacles that prevent women from exercising and seeking to enforce their rights and that impair or otherwise restrict their ability to access effective remedies for violations of their human rights.⁵⁰

Legal obstacles

Legal obstacles to women's access to justice in Tunisia are manifold and hamper women's ability to seek justice in various ways. Substantive legal obstacles such as legal frameworks that explicitly discriminate on grounds of sex or gender or that do not adequately define or address women's rights are often combined with legal procedural barriers, such as inadequate procedures providing legal remedies in relation to discrimination, inequality, and violence against women, and limited access to legal aid.

Tunisia developed a relatively robust legal framework for equality between men and women. Article 21 of the 2014 Constitution expressly provides that all citizens, male and female, are equal before the law without any discrimination. Article 46 further stresses that the State commits to protecting the advances and rights achieved by women's ("*les droits acquis de la femme*"); that the State "guarantees equality of women and men to have access to all levels of responsibility in all domains"; and that it "takes the necessary measures to end violence against women". Tunisia also adopted several domestic pieces of legislation that reflect the principle of equality and prohibit discrimination. For example, Law No. 93-74 of 12 July 1993 amended the Personal Status Code further recognising women as persons enjoying all rights.

12.1.2. See also *Goecke v Austria*, CEDAW Communication No 5/2005, UN Doc CEDAW/C/39/D/5/2005 (2007).

⁴⁵ *Ibid.*, *Yildirim v Austria*, para. 12.1.2.

⁴⁶ *Id.*

⁴⁷ CEDAW, General Recommendation No. 33, para.3.

⁴⁸ *Ibid.*, para.14.

⁴⁹ *Ibid.*, para.2.

⁵⁰ *Ibid.*, para.7.

However, numerous specific legal obstacles remain for the realisation of women's full right of access to justice in breach of Tunisia's international human rights obligations.

1. Laws failing to criminalise certain violations of women's rights adequately and related legal barriers

The Tunisian domestic legal framework contains various provisions that address violence against women. Among them, however, there are some that undermine women's access to justice for violations of their rights.

The ICJ is particularly concerned by certain problematic provisions, both substantive and procedural, in the Tunisian Criminal Code, including definitions of rape, sexual assault and sexual harassment that are inconsistent with relevant international standards.

As the CEDAW Committee has repeatedly stressed, pursuant to the Convention, States must address, prevent and redress sexual violence against women, including, in particular, through effective criminal justice responses. These require that criminal laws, procedures and practice appropriately and adequately define and prohibit all forms of sexual violence and provide for dissuasive sanctions and punishments commensurate with the gravity of the offence, in turn fulfilling a deterrent function.⁵¹ A key component of this is ensuring that legal definitions of rape, sexual assault and of consent to sexual intimacy do not embody wrongful stereotypes.⁵²

- Rape and sexual assault

The ICJ is concerned at the fact that rape and sexual assault continue, despite a series of amendments, to be addressed in the Tunisian Penal Code under the title/chapter of "crimes against decency" – as opposed to serious crimes against the person, physical integrity and sexual autonomy.

Article 227 of the Tunisian Criminal Code criminalises rape when: a) it is "committed with violence, the use or threat of use of a weapon" against a person who is 10 years or age or above; or b) when committed "without the above-mentioned means [against a] person [who] is under 10 years old"; and c) when committed in any other way. It also specifies that consent is considered absent if the victim is under the age of 13. The first two offences are punished by death,⁵³ while the latter carries a sentence of life imprisonment.

Article 227bis further criminalises: a) anyone who subjects, without violence, any girl aged under 15 years of age to sexual intercourse; and b) anyone who subjects, without violence, any female victim who is aged between 15 years and less than 20 years of age to sexual intercourse.

These provisions fall short of international standards on various grounds. First not only rape itself is not properly defined in the Criminal Code, but in Tunisia it is generally understood as the non-consensual penetration of the vagina by the penis.⁵⁴ It follows that the definition of rape does not encompass anal or oral penetration or through the use of objects. Nor does it

⁵¹ CEDAW General Recommendation 19, para. 24; HRC General Comment No. 28, Article 3 (The equality of rights between men and women), HRI/GEN/1/Rev.9 (Vol. I), 29 March 2000, (hereinafter HRC General Comment No. 28), para.11.

⁵² See *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008; Article 5 CEDAW.

⁵³ The ICJ is unconditionally opposed to the death penalty in all circumstances; the organization considers that the use of the death penalty constitutes a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment.

⁵⁴ Amnesty International report, p. 53.

acknowledge that men and boys may be victims of rape.⁵⁵ Furthermore, insofar as requiring the use or threat of violence for the crime to have occurred, and by providing that only a victim below the age of 13 is incapable of lawfully consenting, these provisions fail to recognise and adequately criminalise acts of rape committed in circumstances where the victims' prior, free and informed consent was absent as they had been coerced through "fear of violence, duress, detention, psychological oppression or abuse of power", or "by taking advantage of a coercive environment".⁵⁶

The Criminal Code also fails to define other forms of sexual violence such as sexual assault, although such acts could be prosecuted as "indecent assaults" under Articles 228, 228bis and 229.

The ICJ is also concerned at additional legal barriers related to the way evidentiary rules are applied undermining effective criminal investigations and prosecutions of acts of rape. As reported by Amnesty International, "overall the state places the responsibility on the plaintiff to prove that they were a victim of a crime and the survivor and their lawyers are forced to gather evidence by themselves".⁵⁷ Evidentiary challenges include, for example, judges often requiring victims to provide a medical certificate known as "*certificat médical initial*" (CMI) as proof of sexual or gender-based violence.⁵⁸ In addition to the challenges in obtaining a CMI, judges do not necessarily consider the forensic report as highly authoritative in establishing some critical facts in connection with the alleged offences.⁵⁹ More fundamentally, very often, in practice, judges and police officers tend to unreasonably favour the alleged male perpetrator's version over that of the victim, especially in the absence of a medical certificate. For example, a large majority of women in all FGDs conducted by the ICJ reported that this was by and large the attitude of police officers they had encountered when trying to file a complaint of gender-based, including sexual violence with the police.⁶⁰

Furthermore, with regard to the crime of subjecting someone to sexual intercourse without violence, the marriage of the victim to the perpetrator automatically puts an end to any criminal prosecution for the offence or erases any criminal conviction for the same, unless the husband divorces the victim within the expiry of a two-year period after the marriage.⁶¹ Similarly, Article 218 of the Criminal Code, which criminalizes certain forms of physical violence, provides for the discontinuation of the prosecution, including once a trial on criminal charges has begun, and/or suspends the enforcement of the sentence in cases of domestic violence where the victim and the alleged perpetrator are related to one another and the victim withdraws his or her complaint.

The flaws in the definition of rape, particularly when combined with other legal provisions, undermine justice for victims, in particular in cases of marital rape. For example, article 13 of the Personal Status Code, which makes marital sexual intercourse conditional upon the prior payment of the dowry by the husband, implicitly suggests that once the dowry has been paid,

⁵⁵ See International Criminal Court, Elements of Crimes, 2011, available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>; and Prosecutor v Akayesu, Case No ICTR-96-4, Trial Judgment 2 September 1998, paras. 596-598

⁵⁶ International Criminal Court, Elements of Crimes, 2011.

⁵⁷ Amnesty International Report, p. 57.

⁵⁸ Id. With respect to the CMI, Amnesty International further explains that the CMI "is a forensic medical report [which] can only be obtained from a public institution, and must be requested by a police officer, judge or local authority representative such as a mayor or governor. In addition to recording the physical harm suffered by the survivor and including his or her account of the violence, for cases of physical assault, the examining doctor must establish whether the violence has resulted in any long-lasting medical consequences or any incapacity for work."

⁵⁹ Amnesty International Report, p. 25-26.

⁶⁰ FGD, Kef, Kasserine, and Tunis, March-April 2016.

⁶¹ Article 227bis(4) of the Criminal Code.

then the husband is permitted to “compel” his wife to have sexual intercourse with him, thereby effectively condoning marital rape. In addition, article 23 of the Personal Status Code states that both spouses “must fulfil their marital duties according to custom”. According to interviews conducted by Amnesty International, this provision is generally understood to mean that sexual relations constitute a marital obligation.⁶² The lack of explicit recognition of marital rape in law, coupled with those provisions in the Personal Status Code make it extremely difficult for the offence to be properly charged as marital rape. As a result, very few complaints for marital rape are lodged, and even when they are, the act is qualified as physical assault instead of rape.⁶³

While the Tunisian authorities have maintained before UN Treaty Bodies that “marital rape is, like all other forms of rape, a crime under Tunisian law,” covered by articles 227 and 227bis of the Criminal Code⁶⁴, when reviewing Tunisia’s compliance with the CEDAW, as a result of a very high number of complaints withdrawn, the Committee expressed concern at impunity prevailing for perpetrators and recommended among other measures the specific criminalisation of marital rape.⁶⁵

The inadequate definitions of rape and other forms of sexual violence constitute a significant impairment to the recognition of such acts as criminal offences in breach of international standards. In cases of rape and sexual assault, these standards require that State officials conduct a prompt and effective official investigation into all credible allegations, of their own volition and with a view to ensuring the vigilant and speedy identification and prosecution of alleged perpetrators.⁶⁶ In this regard, while the ICJ welcomes the fact that the current Draft Law on Violence against Women contains an amendment removing article 227bis from the Criminal Code, it remains concerned at the failure of the Draft Law to properly address the flawed definitions of rape and sexual assault in the Criminal Code, due in part to cultural factors.⁶⁷

- Sexual harassment

Article 226ter of the Criminal Code, which criminalises sexual harassment, fails to define it in a manner consistent with international standards. The definition is too restrictive; for the offence to be made out it requires proof that the perpetrator’s intent was to make the victim submit to his or her sexual desires. On the contrary, the CEDAW Committee has focused on the harmful nature of the behaviour itself, perceived by the victim as humiliating,⁶⁸ and recommended that Tunisia should amend this provision in line with its General Recommendation no 19, including by reversing the burden of proof.⁶⁹ The flawed definition is likely one of the main causes of the very low conviction rates for sexual harassment in Tunisia.⁷⁰

⁶² Amnesty International Report, pp. 23-24.

⁶³ CEDAW/C/TUN/Q/6/Add.1, para. 98.

⁶⁴ CEDAW/C/TUN/Q/6/Add.1, para. 97

⁶⁵ CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, paras. 26-27. See also HRC, CCPR/C/TUN/5, para. 6.

⁶⁶ CEDAW General Recommendation 19, para. 24; HRC, General Comment 28, para. 11.

⁶⁷ ICJ, Seminar on “Mapping and addressing obstacles to access to justice for women in Tunisia”, 9-10 May 2016, Tunis.

⁶⁸ CEDAW General Recommendation 19, para. 18. The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) defines sexual harassment as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment” (article 40).

⁶⁹ CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, para. 47.

⁷⁰ CEDAW Committee, Written replies from the Government of Tunisia to the list of issues and questions (CEDAW/C/TUN/Q/6) with regard to the consideration of the combined fifth and sixth periodic reports (CEDAW/C/TUN/5-6), CEDAW/C/TUN/Q/6/Add.1, para. 108 and Amnesty International Report, p. 56.

In addition, access to justice for women victims of sexual harassment is undermined by the prospect of defamation claims brought against them by the perpetrators. The CEDAW Committee raised concern over Article 226(4) of the Criminal Code under which the alleged victim of harassment is liable to be charged with defamation,⁷¹ an offence that can result in up to a two-year prison sentence and a fine, following either the dismissal of criminal charges against the defendant in criminal proceedings for sexual harassment arising from the victim's complaint or following the defendant's acquittal of the same charges. This provision also foresees the possibility for the plaintiff in a defamation suit to request reparation for damage incurred during the litigation. In respect of criminal defamation the Human Rights Committee has recommended that "States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."⁷²

Additionally, under international standards, sexual harassment should be criminalised both generally as well as specifically in the field of employment.⁷³ As noted by the CEDAW Committee, sexual harassment is "discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment".⁷⁴ While the Tunisian Labour Law Code prohibits discrimination based on sex (article 5bis), there is no provision that explicitly mentions gender based violence or sexual harassment. Ostensibly, this issue is covered under article 226(3) of the Criminal Code; however, there is no independent cause of action available to women when sexual harassment occurs in the work place.

The ICJ wishes to stress that for Tunisia to comply with its international human rights law obligations all forms of sexual violence, irrespective of the gender of the victim or of the perpetrator have to be adequately criminalised, ensuring prevention, investigation, prosecution, conviction, punishment and redress when warranted by the evidence. The obligation to respect human rights in particular comprises the need to ensure equal treatment in law and in practice. The CEDAW Committee stressed that "States parties [should] refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights".⁷⁵

Under international law, Tunisia is required to remove legal barriers that undermine access to justice for women and prevent prosecution of perpetrators. These barriers include those identified above with respect to the flawed definitions of relevant crimes, and flawed policing, investigative, forensic and prosecutorial practices that result in women not obtaining justice.

2. Laws discriminating against women

In addition to the failings identified above in respect to Tunisian criminal law frameworks, there is a number of other critical areas where domestic legal provisions either expressly discriminate against women and/or have a discriminatory impact on them, due for example to their selective enforcement or because they otherwise prevent women from seeking justice. Those issues are explored in this section.

⁷¹ CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, para. 46.

⁷² HRC General Comment No. 34, Article 9 (Freedoms of opinion and expressions), CCPR/C/GC/34, 11 September 2011, para. 47.

⁷³ CEDAW General Recommendation 19, para. 24(t). See also, see the International Labour Organization Convention No. 111 concerning Discrimination in Respect of Employment and Occupation on 25 June 1958; Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Equal Value, of 29 June 1951.

⁷⁴ CEDAW General Recommendation 19, para. 28.

⁷⁵ CEDAW General Recommendation 28, para. 9.

As noted above, the 2014 Constitution guarantees that all citizens, male and female, are equal before the law without any discrimination (article 21). However, while doing so, this provision refers to Tunisian citizens, excluding female foreigners from the constitutional protection against discrimination. This is in breach of Tunisia's obligations under international law that require it to respect and ensure the respect of the human rights of all people within its territory and jurisdiction without discrimination, including, in particular, on the basis of sex and/or gender and regardless of nationality.⁷⁶

Furthermore, Tunisia continues to enforce legislative provisions that expressly discriminate against women. For example, women who participated in the FGDs highlighted the discriminatory nature of laws on child custody and on women's role within the family under the Personal Status Code.⁷⁷ With regard to child custody disputes following divorce, article 154 of the Personal Status Code recognises the father as the sole legal guardian of the child, and only in the case of the father's death or incapacity does the mother become the legal guardian. This is particularly important because the Personal Status Code distinguishes between physical custody of the child and legal authority over the child, making the latter the father's prerogative.⁷⁸ Additionally, even when women are awarded physical custody of the child, their parental rights are curtailed. According to Article 58 of the Personal Status Code, in the event that the mother chooses to remarry after the divorce, she loses her guardianship rights over her child/ren, unless a judge directs otherwise. There are no clear provisions or standards for how long after the divorce this article is to affect women's right to guardianship over their children. In addition, there is no legal provision ensuring that women would maintain the right to the family house in the event of a divorce.⁷⁹

The ICJ is concerned that these discriminatory provisions can result in situations where women, being fearful of pursuing any legal claim against violations of their rights (e.g. domestic violence) because of the impact such claims may in turn have on their child custody rights, may choose not to use the available judicial remedies. This concern is heightened by the difficulty for women to reverse the strong presumption that the father maintains exclusive legal authority over the child, in particular under article 67 of the Personal Status Code related to conditions for a divorced woman with custody of the children to enjoy full guardianship.⁸⁰

Similarly, property rights are protected in a way that has a discriminatory impact on women. While article 14 of the 2014 Constitution guarantees the right to property, inheritance law in Tunisia continues to be based on patriarchal and patrilineal family law concepts. Likewise, upon marriage (and in the event of divorce) women can face various challenges in asserting and maintaining their property rights.⁸¹

In order to comply with its obligations under CEDAW, Tunisia's judicial institutions must apply the principle of substantive equality, not merely formal equality, in order to ensure that women receive equal treatment and do not face barriers to access to justice due to the impact of discriminatory legislation, regulations, procedures, customs or practices.⁸²

⁷⁶ ICCPR, article 2 and article 26; CEDAW article 1 and 15.

⁷⁷ FGD, Kef and Kasserine, March 2016.

⁷⁸ Article 154 of the Personal Status Code.

⁷⁹ A/HRC/23/50/Add.2 para. 33.

⁸⁰ Association Tunisienne des Femmes Démocrates (Tunisian Association of Democratic Women, ATFD) Report to the CEDAW Committee, 47th Session, October 2010, p. 6.

⁸¹ See for example Personal Status Code articles 24 and 11.

⁸² CEDAW, General Comment No. 33, para.22.

3. Use of international law by courts

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 itself.⁸³ Article 20 of the 2014 Constitution clearly states that international treaties approved by the Parliament, and subsequently ratified, shall have a status superior to that of domestic legislation but inferior to that of the Constitution.⁸⁴ International treaties enter into force once they have been ratified.⁸⁵

However the 2014 Constitution is silent on whether domestic courts can apply provisions of international human rights treaties ratified by Tunisia. The prevailing position of the Tunisian authorities that treaties that have been approved by Parliament and subsequently ratified create obligations only for the States parties, and, therefore, cannot be invoked directly before national courts, has gradually been abandoned, and courts "in a variety of cases have espoused the view that international instruments, including human rights instruments, may be directly invoked by litigants."⁸⁶ However, there is no consistent practice in this regard and, therefore, enforcement of women's human rights as enshrined in relevant international treaties ratified by Tunisia appears to be left to the discretion of the judiciary.

The ICJ is concerned that this lack of clarity further hampers women's right of access to justice by potentially limiting the possibility to use specific international human rights treaty provisions protecting access to justice, including the prohibition of discrimination and the principle of gender equality. For example, according to the CEDAW Committee, Tunisian judges seldom invoke the Convention.⁸⁷ The CEDAW Committee has recommended "that the Convention and related domestic legislation be made an integral part of the legal education and training of judges, magistrates, lawyers and prosecutors, particularly those working in the family courts, so that a legal culture supportive of the equality of women with men and non-discrimination on the basis of sex is firmly established in the country."⁸⁸

Obstacles linked to the administration of justice

While legal frameworks in line with international standards must be in place, the justice system and the administration of justice as a whole are key to ensuring effective access to justice for women and to giving effect to their rights under relevant international human rights law and standards. In that regard, and despite some reforms, significant structural obstacles, as well as barriers related to knowledge and attitude of justice sector actors, continue to undermine women's access to justice in Tunisia. As a result, it is reported that, even after the fall of Ben Ali's regime, only one out of five women trusts the Tunisian justice system.⁸⁹ Women taking part in the FGDs organised by the ICJ confirmed as much, with

⁸³ 1959 Constitution, article 32.

⁸⁴ This should not prevent the Constitution from being interpreted to the maximum extent possible in a manner consistent with international law. In addition, the ICJ underscores that from the point of view of international law, every State party to a treaty in force must apply its provisions and is bound by obligations in good faith (Vienna Convention on the Law of Treaties, 1969, article 26); in this context, a State is not permitted to invoke the provisions of its internal law as justification for its failure to perform such obligations (Vienna Convention on the Law of Treaties, 1969, article 27). Tunisia acceded to the Vienna Convention in 1971 and it came into force in 1980. See also, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 460, para. 113.

⁸⁵ 2014 Constitution, article 67.

⁸⁶ 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.

⁸⁷ CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, para 18.

⁸⁸ CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, para 19.

⁸⁹ See ASF, Réformer la justice en Tunisie: «C'est le moment ou jamais», 10 September 2015, available at : <http://www.asf.be/fr/bloq/2015/09/10/reforming-justice-in-tunisia-its-now-or-never>. A survey conducted in 2013, by Transparency International, showed that 56% of respondents in Tunisia felt that

some participants comparing their experience of having recourse to the justice system as a battle or a fight.⁹⁰ The following section describes some of the above-mentioned structural obstacles within the justice sector that continue to hamper women's effective access to justice in the country.

1. Lack of adequate capacity, resources and accountability

Despite positive steps taken by the Tunisian authorities to improve women's access to justice, significant obstacles to enhancing the justice system's capacity to address gender-based violence, including domestic violence against women, remain. As highlighted below, some of these obstacles arise because of the paucity of resources dedicated to addressing violence against women within the justice system.

In particular, various barriers undermine the ability of law-enforcement officials to effectively investigate violence against women incidents. With respect to this, for example, women taking part in FGDs repeatedly raised the paucity of female police officers tasked with registering criminal complaints involving allegations of violence against them. Once again this is due to the unequal position of women within Tunisian society as most female police officers are often relegated to secondary administrative tasks within police stations across the country.⁹¹ Moreover, female police officers do not work in the evenings or at night.⁹²

Another problem is the very limited number of forensic specialists across the country despite their key professional role in achieving successful investigation and prosecution outcomes in cases of sexual violence against women, in particular rape. There are only four medico-legal centres in hospitals in Tunis and only five other forensic specialists in hospitals across the rest of the country. Furthermore, it is reported that the judicial police do not have the wherewithal to use tools such as fingerprinting or DNA collection and, as a result, they rely primarily on confessions.⁹³ Police officers rarely conduct crime scene investigations, failing to collect material evidence or record witness statements; they also lack the necessary training to intervene in cases of domestic or gender-based violence.⁹⁴

In addition, the inadequacy of measures to protect women from violence deters them from lodging complaints with the authorities. For example, judges do not have the power to issue restraining orders against the alleged perpetrators of domestic violence to protect female complainants *ex ante*; they can only intervene *ex post facto*, that is, once the violence has taken its toll on women.⁹⁵

Furthermore, while Tunisian civil society organisations offer victims of violence a number of places in shelters and run other services, such as legal assistance and psychosocial support to victims, available or accessible emergency shelters for women victims of violence run by authorities are very limited and lack appropriate resources. Availability and accessibility of emergency shelters and related-services is particularly critical to empowering women to bring cases of domestic violence. Women who took part in the FGDs complained about the lack of

the judiciary was either corrupt or very corrupt, and 69% believed that the same was true about the police.

⁹⁰ FGD, Kef, Kasserine, and Tunis, March-April 2016.

⁹¹ FGD, Kef, Kasserine, and Tunis, March-April 2016.

⁹² Amnesty International meeting with officials at the Ministry of Interior, 24 October 2014.

⁹³ Querine Hanlon, United States Institute of Peace, Special Report: Security Sector Reform in Tunisia (2012) <http://www.usip.org/sites/default/files/SR304.pdf>, pg. 6.

⁹⁴ Amnesty International Report, p. 57 and 5.

⁹⁵ UNFPA, Etat du droit tunisien – violences faites aux femmes et aux filles, December 2013, available (in French) at :

http://www.unfpa-tunisie.org/images/stories/2014/publication/Publication%20Etude%20violence%202014_f.pdf, p. 23.

shelters and protection measures as a major reason for victims not seeking to press charges against the alleged perpetrators, and explained that the police would ordinarily send them back home without taking any action.⁹⁶ As a result of the difficulty in finding an adequate shelter, and the potential stigmatisation of living alone, many women choose to stay in abusive environments because they do not have other options.⁹⁷

A large majority of women participating in the FGDs explained that when filing a complaint, in particular in cases of domestic violence or sexual violence, police officers display a hostile attitude towards them, treating them like criminals, refusing to record their complaint and even threatening them. All women taking part in the FGDs insisted that, even when they took action and formally complained about this behaviour, none of their complaints against police officers for such a conduct ever succeeded, notwithstanding the fact that such behaviour on the part of law enforcement officials could amount to a disciplinary offence.⁹⁸ The FGDs participants denounced the complete impunity and lack of accountability of police officers for deterring them from seeking justice.⁹⁹ Furthermore, most women participating in FGDs organised by the ICJ stressed that complaints over verbal abuse, in particular domestic verbal violence, were never seriously considered by police officers, in part due to the absence of physical evidence. At worst, this argument was even used in cases involving physical violence.¹⁰⁰

Additionally, reports indicate that corruption and abuse of power are detrimentally affecting the capacity of the Tunisian justice system to ensure that women's access to justice is effective. All women participating in the FGDs stressed that corruption or connections within the police or the tribunal were key to achieving justice.¹⁰¹

Of the outmost seriousness were reports that some sex workers working "illegally"¹⁰² reported that they had been harassed, raped, exploited, blackmailed and subjected to extortion by the police on a regular basis.¹⁰³

2. Lack of awareness and inaccessibility of justice related-services

Another major hurdle for women to access justice is the lack of awareness of their rights and legal mechanisms available to them,¹⁰⁴ due in part to the paucity of information programmes by justice sector actors. Such lack of awareness and information also undermines the prospects of success for those women who attempt to seek justice by bringing complaints. Furthermore, the lack of information, such as not knowing whether an alleged perpetrator has been remanded in custody or is at liberty, causes women to distrust the justice system and often makes them fearful about their personal safety. Women may also miss important developments in legal cases in which they are involved if they are not properly informed.¹⁰⁵ However, Tunisia's obligations under the CEDAW require that women be made aware of their

⁹⁶ FGD, Kef, Kasserine, and Tunis, March-April 2016.

⁹⁷ FGD, Kef, Kasserine, and Tunis, March-April 2016.

⁹⁸ Article 49 of Law No.82-70 on the Internal Security Forces.

⁹⁹ FGD, Kef, Kasserine, and Tunis, March-April 2016.

¹⁰⁰ FGD, Kef, Kasserine, and Tunis, March-April 2016.

¹⁰¹ FGD, Kef, Kasserine, and Tunis, March-April 2016.

¹⁰² See Amnesty International Report, p. 45.

¹⁰³ Amnesty International Report, p. 45 and 46.

¹⁰⁴ Tunisia Gender Profile 2014, drafted within the framework of a mission of identification of a program promoting equality between men and women in Tunisia, funded by the European Union, June 2014, available (in French) at:

http://eeas.europa.eu/delegations/tunisia/documents/page_content/profil_genre_tunisie2014_longue_fr.pdf, page 16.

¹⁰⁵ UN Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, ST/ESA/329, 2009, p.37.

human rights, including so that they can be empowered to seek to enforce their rights and to gain access to justice.¹⁰⁶

In that respect, legal aid is a critical element for women victims of violations of their rights to access and understand the justice system and the remedies to which they are entitled and which are available for them.¹⁰⁷ While the Tunisian authorities have taken a number of positive steps to grant legal aid for representation before the courts, and in other areas (e.g., exemption from legal costs, appointment of experts and translators, execution costs), regardless of the type of case, whether criminal or not, legal representation is not covered by legal aid.¹⁰⁸ In fact, Law No. 2002-52 of 3 June 2002 provides for the possibility of refusing legal aid depending on the type of cases without having to provide further justification. Before legal aid is provided, those applying for it are required to provide information that,¹⁰⁹ in turn, necessitates knowledge of the legal provisions on which their case relies. Such requirement acts as a general barrier to access to justice to which women are disproportionately exposed to, due to the lack of information and knowledge about their rights and related legal mechanisms, as well as the persistence of illiteracy among women, particular in rural areas of the country. For example, most of the women who participated in the FGDs did not know about the possibility (since a 2014 Ministry of Health decree) for victims of domestic/family violence to obtain a document to be exempted from having to pay a fee for the medical certificate.¹¹⁰ However this exemption is not provided for victims of rape or sexual assault. In her 2015 report, the Special Rapporteur on the independence of judges and lawyers noted that legal aid in Tunisia was underfunded and that eligibility conditions were too restrictive. With respect to this, the Special Rapporteur concluded that the formal appointment of counsel by the State was insufficient to satisfy the obligations of the State under article 14 para.3(d) of the ICCPR. Tunisia is indeed required to take "positive action" to ensure that applicants effectively enjoy their right to free legal assistance.¹¹¹

Another concern that women participating in the FGDs organised by ICJ highlighted relates to the Tunisian authorities' failure to ensure protection for them against being exposed to the risk of further violence and abuse within the Court buildings themselves. Indeed, it appears that even on the few instances where women finally made it to Court, they are not free from violence and abuse. This is because the authorities fail to take measures to ensure that women complainants do not find themselves in the same waiting rooms at court as the alleged perpetrators of violence against them. While sharing the same waiting room generally may seem acceptable, it disproportionately and detrimentally affects women as the practice is allowed even in cases involving gender-based violence.¹¹² Indeed, many women who participated in the ICJ's FGDs were subjected to violence by the accused in waiting rooms at courts.¹¹³

¹⁰⁶ CEDAW, General Comment No. 33, para. 32.

¹⁰⁷ UN Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, ST/ESA/329, 2009, p.39.

¹⁰⁸ *Ibid.*, p. 45.

¹⁰⁹ Article 1 of the Law N°2002-0052 of June 2, 2002. See also EuroMed Justice II Project, Study on Access to Justice and Legal Aid in the Mediterranean Partner Countries, 2010, p. 49 available at:

http://www.enpi-info.eu/library/sites/default/files/attachments/English_book_Study_Access_to_Justice.pdf

¹¹⁰ FGD, Kef, Kasserine, and Tunis, March-April 2016.

¹¹¹ Special Rapporteur on the Independence of Judges and Lawyers, Mission to Tunisia, A/HRC/29/26/Add.3, 26 May 2015, para 60.

¹¹² EuroMed Justice II Project, Study on Access to Justice and Legal Aid in the Mediterranean Partner Countries, 2010, p. 56 available at:

http://www.enpi-info.eu/library/sites/default/files/attachments/English_book_Study_Access_to_Justice.pdf

¹¹³ FGD, Kef, Kasserine, and Tunis, March-April 2016.

Tunisia also fails to ensure the availability of and accessibility to other justice related-services facilities that are necessary for women to evidence their claims and obtain justice and redress for violations of their rights. For example, the 2014 decree adopted by the Ministry of Health requiring Tunisian authorities to provide medical certificates free of charges in cases of family violence does not apply to victims of sexual violence. Additionally, even complementary medical examinations require the payment of fees, which many women cannot afford.¹¹⁴ Even when women have the financial means to obtain these services, they are often unavailable in geographically remote areas. As a result of this, women subjected to sexual violence are deterred from complaining and pursuing justice.

Many victims of violence receive adequate support only once they are referred to specialised counselling centres run by civil society organisations. This process is often relatively slow and, as a result, women may wait a long time before a referral occurs and, even when they are referred, these centres are only available in the main cities.¹¹⁵ The paucity of services in remote parts of the country, in turn, is a significant obstacle to access to justice for women living in those areas.

The CEDAW Committee has observed that the “concentration of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to gain access to them, the complexity of proceedings [...], the lack of access to [...] legal aid, as well as the often-noted deficiencies in the quality of justice systems (e.g., gender-insensitive judgments or decisions owing to a lack of training, delays and excessive length of proceedings, corruption) all prevent women from gaining access to justice.”¹¹⁶ The Committee recommended State parties to “ensure the creation, maintenance and development of courts, tribunals and other entities, as needed, that guarantee women’s right to access to justice without discrimination throughout the entire territory of the State party, including in remote, rural and isolated areas, giving consideration to the establishment of mobile courts, especially to serve women living in remote, rural and isolated areas, [...]” It also emphasised the importance of States taking on the responsibility to ensure that women have, among many other things, financial aid, crisis centres, shelters and medical services available to them.¹¹⁷

3. Discriminatory attitudes by justice sector actors

The ICJ is particularly concerned by the gender stereotypes and discriminatory attitudes of justice sector actors, in particular judges and police officers. Such prejudices constitute a major obstacle to access to justice for women since they can undermine the application of even the most protective laws. Participants in the ICJ seminar highlighted their concern that despite a significant number of women within the judiciary, discriminatory attitudes persisted, including from female judges.¹¹⁸

For example, domestic violence against women is often perceived as a private family matter that does not belong in the justice system. It is striking that all participants in the FGDs experienced police officers’ dismissive and biased attitudes when trying to lodge a complaint at the police station; for example, women reported that police officers sought to play the role of mediators to pressure them to withdraw their complaints using various arguments, such as blaming the woman or invoking the reputation of the family.¹¹⁹

¹¹⁴ Amnesty International Report, p. 62.

¹¹⁵ Amnesty International Report, p.63.

¹¹⁶ CEDAW, General Comment No. 33, para. 13.

¹¹⁷ CEDAW, General Comment No. 33, , para. 16(b).

¹¹⁸ ICJ, Seminar on “Mapping and addressing obstacles to access to justice for women in Tunisia”, 9-10 May 2016, Tunis.

¹¹⁹ FGD, Kef, Kasserine, and Tunis, March-April 2016.

Another example concerns judges' attitudes in connection with divorce proceedings, where judges tend to first require a criminal conviction in connection with spousal violence or an admission by the husband of the same before granting a divorce ruling to women who have alleged harm as the reason for seeking a divorce in the first place.¹²⁰

Similarly, legal provisions on adultery are at times misused or serve as an obstacle due to the way justice sector actors interpret them. In addition, women who report rape may open themselves up to suspicions of engaging in prostitution (article 231 of the Criminal Code) or to charges of having committed an "affront to public decency" (article 226 and 226bis Criminal Code). Such attitudes on the part of law-enforcement officials have a disproportionate and detrimental impact on women, deterring some rape victims from reporting the crime because they fear prosecution if their complaint does not result in the successful prosecution of the alleged perpetrator.¹²¹

Social and gender prejudices also account for cases where women were given no information or provided with inaccurate information. A large number of participants in the FGDs explained that lack of clear information places them at risk of further violations of their rights.¹²² For example, at abortion facilities, some staff members tried to deter women from getting an abortion by claiming that the consent of the father was required.¹²³ Women victims of sexual assaults have been subjected to forced or otherwise involuntary virginity tests during their medical examination on the spurious grounds that it was necessary to ascertain whether they had had sexual intercourse or supposedly to detect the types of physical injuries they may have suffered as a result of being sexually assaulted.¹²⁴

Stereotypes and gender biases against women by justice system officials, such as police officers and judges lead to direct and indirect discrimination, which are key reasons why women face obstacles when accessing justice.¹²⁵ The impartiality of the justice system is key in order for judges to be able to deliver effective remedies that are not compromised with biased assumptions.¹²⁶

According to the CEDAW Committee, in justice systems influenced by stereotypes, professionals, including judges, prosecutors and police officers often adopt rigid standards about what is considered an acceptable behaviour for a woman and penalise whoever does not conform to these standards. This not only affects the interpretation and application of law but also has far-reaching consequences on the credibility and weight that is attributed to women's statements and other evidence provided by them, or on the way in which investigations into crimes against women are conducted.¹²⁷

Obstacles related to societal norms, gender stereotypes and economic and social realities in Tunisia

Within any society, stereotypes and gender-based norms often prevent women from accessing justice. Normalising discrimination and social pressure at women's expense in the name of so-called honour and in order to avoid "shame", together with women's lack of knowledge of their rights, constitute critical obstacles to the realisation of women's right of access to justice. Women's role both in society and within their own family can create an

¹²⁰ Amnesty International Report, p. 5.

¹²¹ Amnesty International Report, p.46.

¹²² FGD, Kef and Kasserine, March 2016.

¹²³ Amnesty International Report, p. 65.

¹²⁴ Amnesty International Report, p. 58 see also p. 78.

¹²⁵ CEDAW, General Comment No. 28, para.16

¹²⁶ CEDAW, General Comment No. 33, para. 28.

¹²⁷ CEDAW, General Comment No. 33, para. 26 and 27.

obstacle to their access to justice. When women are not financially independent and/or lack knowledge of their rights, it is difficult for women to even know they have the possibility to use the justice system to achieve a legal remedy for violations of their rights, let alone actually resorting to it.

1. Cultural norms and gender stereotypes

Despite the Tunisian authorities' efforts to combat discrimination against women and to address stereotypical roles of women, gender societal norms continue to impede access to justice for women, both through undermining their willingness to seek justice and as a result of biased attitudes among justice-system actors. The CEDAW Committee expressed its concern at the continuing patriarchal attitudes, the deep-rooted stigmas concerning women and their status and role within the society and the current norms, practices and traditions in Tunisia.¹²⁸

Cultural frameworks and religious beliefs are significant factors influencing women's roles and responsibilities within society.¹²⁹ Women are left to believe that the violations of their rights, especially gender-based violence, are normal. As a result, women are pressured not to complain about these violations in order to protect their honour and family's reputation, regardless of the abuse they suffered. Moreover, due to the stigma related to sexual violence, women in Tunisia find it difficult to report these acts.

In particular, family pressure continues to emerge as an obstacle in various ways: certain issues are seen as "private matters" that do not require public (or judicial) interference, all of which results in a normalisation of violence.¹³⁰ Victims are also expected to protect the "interest of the family,"¹³¹ including through the fear of repudiation and shame.

Some categories of women also face further violence and discrimination in accessing justice due to their status, race and ethnicity. In Tunisia, single women, including single mothers, suffer from a lack of psychological and financial assistance and further discrimination in access to education, employment, health care, and protection from violence and, as a result, experience even greater difficulties in accessing and obtaining justice and redress for violations of their rights.¹³²

2. Obstacles related to economic and social realities faced by women in Tunisia

There are persistent patriarchal attitudes and deep-rooted stereotypes about roles that affect women's responsibilities and entitlements within Tunisian society. Traditions, cultural norms and practices have encouraged discrimination against women and girls in different aspects of life, including employment, decision-making processes, marriage, family, and violence against them.¹³³

Women are often not financially independent from their husbands or families, a precarious financial situation that results in an additional barrier to accessing justice. In fact, women are not necessarily able of filing complaints without the permission of their husband and/or other family members because they lack financial resources to pay the legal fees and other necessary legal services on their own. This is even more problematic if the woman is seeking

¹²⁸ CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, para.24.

¹²⁹ CEDAW, CEDAW General Recommendation No. 23: Political and Public Life, 1997, A/52/38, para. 9.

¹³⁰ ONFP, *Enquête Nationale sur la Violence à l'Égard des Femmes en Tunisie 2010*, p. 68, available at: <http://www.onfp.nat.tn/violence/e-book/violence.pdf>

¹³¹ Amnesty International Report, page 18.

¹³² CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, para.56.

¹³³ CEDAW, Concluding Observations, CEDAW/C/TUN/CO/6, 22 October 2010, para. 25.

to file a claim for domestic violence and the attacker is the one providing financially for the family. This was identified as a major obstacle by women participating the FGDs.¹³⁴

Furthermore, while generally women in Tunisia have relatively high levels of education, women continue to face challenges with regard to access to justice due to their lack of knowledge about their rights and about how to navigate the legal system more generally. The education gap with respect to legal knowledge may not be disproportionate between women and men; however, when combined with social pressures and stereotyping regarding gender-based crimes and women's financial dependence, women's lack of knowledge about their rights disproportionately affects them; the lack of access to legal services, especially in more remote communities, further compounds women's plight. Women's lack of awareness about their rights is particularly significant when considering marital rape. Many women are unaware that what they endure is in fact rape. More generally, as explained by women participating in the FGDs, they are not aware of their rights and find the justice system very complicated and bureaucratic. They also identified female illiteracy as a significant obstacle.¹³⁵

Limited access to health services specifically needed for women may also impede access to justice. For example, while in Tunisia access to abortion has been available since 1973 and state-provided abortion should be available in 24 clinics,¹³⁶ many women do not have access to abortion services.¹³⁷ This affects women's access to justice, especially if the woman has become pregnant as a result of rape and is fearful of the consequences financially and/or socially of raising a child as a single mother.

Recommendations

In light of the above, the ICJ therefore calls on the Tunisian authorities to address the above-mentioned obstacles to women's access to justice through:

- i) Ensuring that laws and policies fully comply with international law and standards on access to justice, in particular the right to a remedy and reparation, the prohibition of discrimination and the principle of gender equality, taking into account both barriers common to men and women and specific obstacles, experiences and needs of women, including by:**
 - Adequately defining and fully criminalising acts of rape in line with international standards and through a gender neutral definition, including by explicitly criminalising marital rape and by ensuring that the legislation caters for all circumstances where the victims' prior, free and informed consent was absent as a result of coercion through "fear of violence, duress, detention, psychological oppression or abuse of power", or "by taking advantage of a coercive environment";**
 - Repealing article 227bis(4) of the Criminal Code, and fully criminalising sexual assault in line with international standards;**
 - Repealing article 218(4) of the Criminal Code on the effects of withdrawal of relative's complaint in domestic violence cases;**

¹³⁴ FGD, Kef, Kasserine, and Tunis, March-April 2016.

¹³⁵ FGD, Kef, Kasserine, and Tunis, March-April 2016.

¹³⁶ See HRC Report of the Working Group on the issue of discrimination against women in law and in practice, Mission to Tunisia, 30 May 2013, A/HRC/23/50/Add.2, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50.Add.2_A_EV_English.pdf

¹³⁷ According to Ahlem Belhadj, the former president of ATFD in an interview conducted by Tunisia Live, available at: <http://www.tunisia-live.net/2014/07/27/abortion-in-tunisia-a-shifting-landscape/>

- **Removing additional legal barriers and addressing discriminatory attitudes that undermine criminal investigations and prosecutions of gender-based violence, such as the challenges that victims face in obtaining an initial medical certificate, and the unreasoned preference accorded to the evidence of the alleged perpetrators of violence against women over that of their victims;**
 - **Defining and fully criminalising other forms of sexual violence such as sexual assault;**
 - **Amend article 226ter of the Criminal Code to define and fully criminalise sexual harassment in line with international standards, including by removing the required proof of the perpetrator's intent and focusing instead on the harmful nature of behaviour itself; and revising article 226(4) to ensure defamation claim against the victims does not result in undermining women's access to justice for sexual harassment;**
 - **More generally, ensuring that legal provisions do not have a discriminatory effect and taking effective measures to prevent and address discrimination in practice and to guarantee substantive equality in the enjoyment of rights;**
 - **Ensuring that the Draft Law on Violence against Women addresses various forms of gender-based violence and provides adequate protection to all women, through both emergency and long-term measures, respecting their integrity and dignity and providing effective penal sanctions, civil remedies, and remedial and protective provisions;**
 - **Recognising women as equal rights bearers and granting women equal legal capacity, equality before the law and protection of the law in all spheres and circumstances;**
 - **Adopting legislation guaranteeing equality and prohibiting discrimination in all fields of women's lives, including in the work place;**
 - **Revising and removing all discriminatory legal provisions, in particular the Personal Status Code articles on child custody and inheritance;**
 - **Establishing adequate and accessible legal protection from discrimination and unequal treatment in law and practice;**
 - **Ensuring that international human rights treaty provisions can be consistently used and invoked in court proceedings, including through providing adequate training to all law enforcement officials, including judges, prosecutors, police officers and lawyers;**
- ii) Removing all obstacles related to the administration of justice, both at the structural and institutional levels and with regard to knowledge and attitudes of justice sector actors, including through:**
- **Establishing gender-sensitive legal procedures and processes and ensuring the forms of redress available are designed to respond to the particular needs of women;**
 - **Increasing the number of forensic experts and more generally, increasing access to required medical certificates both by expanding the number of clinics as well as the hours of operation to ensure that women are able to obtain the relevant forensic medical evidence enabling them in turn to seek justice for violations of their rights, including sexual assault and rape;**

- Exercising effective due diligence in order to prevent, investigate, prosecute, sanction and ensure access to remedies in instances of gender-based violence by public and private actors, including by ensuring that the prosecuting authorities investigate any such instances diligently and that any case of gender-based violence be prosecuted effectively whenever warranted by the evidence, even where no formal complaint has been lodged;
 - Revising existing accountability mechanisms, such as through the establishment of effective oversight and monitoring mechanisms, the elaboration of clear codes of conduct, guidelines and directives and the accountability of officials who do not adhere to them;
 - Ensuring that where officials, in particular police officers, fail to conduct an effective investigation into incidents of gender-based violence that are brought to their attention, their omission be actionable as a breach of their obligations;
 - Training judges, prosecutors, police officers and other State officials at all levels on Tunisia's domestic and international obligations to ensure women's access to justice, including gender equality and non-discrimination and eliminate discriminatory and abusive attitudes based on gender stereotypes among officials, in particular police officers, and with regard to the misuse of legal provisions, such as provisions on adultery or the practice from judges requiring a criminal conviction for spousal violence before granting a divorce ruling for harm;
 - Providing adequate financial and human resources to support women's engagement with the Tunisian justice system, including by recruiting and training more female police officers and ensuring female police officers are in charge of registering complaints of violence against women, and to advance gender equality and non-discrimination against women, ensuring access to justice-related services in more remote areas, and creating more women's shelters and centres that offer all services, including health, legal, financial and psychological assistance;
 - Removing restrictions to legal aid and increasing financial and human resources to make it accessible to all women in need;
- iii) Improving access to education and legal information regarding women's human rights, including on what the realisation of women's right of access to justice requires in law and practice;
- iv) Developing awareness programmes to improve women's knowledge of their rights and available services, for example, by disseminating information on women's guarantees of equality through easily accessible formats such as radio broadcasts and in cooperation with civil society organisations and experts; and
- v) Taking steps to address the social and practical factors that impede women's access to justice including: women's status in society, lack of financial independence and gender-based stereotypes and prejudices that operate in society.