

Tunisia: The Specialized Criminal Chambers in Light of International Standards

November 2016

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) 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.

® Tunisia: The Specialized Criminal Chambers in Light of International Standards

© Copyright International Commission of Jurists
Published in November 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 their headquarters at the following address:

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

The cost of this publication has been met with the support from the Irish Department of Foreign Affairs and Trade - Stability Fund (Irish Aid). The ideas, opinions and comments expressed in this document are entirely those of the International Commission of Jurists and do not necessarily represent or reflect Irish Aid policy.

Tunisia: The Specialized Criminal Chambers in light of international standards

November 2016

Table of Contents

A. Nomination process and security of tenure for SCC’s judges	5
<i>i. Nomination of SCC judges</i>	5
<i>ii. Security of tenure for SCC judges and the question of a specific status</i>	7
B. Material jurisdiction of the SCC and definition of offences	8
C. The principle of legality, including the principle of non-retroactivity	10
D. Initiating procedures before the SCC and the question of the transfer of cases by the IVD	12
E. The role of the public prosecutor and investigating judges	12
F. <i>Ne bis in idem</i> and statute of limitations	13
G. Responsibility of superiors and superior orders	15
H. The right to reparation before the SCC	17
RECOMMENDATIONS	20

Under President Ben Ali's rule and during the previous government of Habib Bourguiba, law enforcement and other security officers were responsible for numerous human rights violations, including torture and other ill-treatment, extrajudicial killings, enforced disappearances, and arbitrary arrests and detention, in particular against political opponents and human rights defenders. Numerous human rights violations were also committed during the December 2010 to January 2011 uprising, and some of past practices continue today, although on a lesser scale.

To date, most of these violations have gone without redress and those responsible have either not been held accountable or have been sentenced to light penalties not commensurate with the gravity of the crimes committed. The International Commission of Jurists (ICJ) has previously identified persistent flaws and weaknesses of the Tunisian justice system,¹ both in law and practice, in particular with regards to its capacity to provide redress and accountability for human rights violations. These include: the broad discretion of the public prosecutor to dismiss cases without providing specific reasons and the failure to provide a means for 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 provisions on definitions of crimes and the principle of superior responsibility; and the inappropriate use of military courts to address human rights violations. Indeed, most of the cases of serious human rights violations committed during the December 2010 to January 2011 uprising have been tried before military courts in violation of international standards, and deviating from the normal course of the criminal procedure established under Tunisian law. As a result, to date, the Tunisian criminal justice system has been unable to provide effective accountability and redress for past human rights violations.

Addressing the abysmal legacy of human rights violations has therefore become a paramount priority for both the transitional authorities and civil society, culminating in the enactment of the Transitional Justice Law in 2013² (the 2013 Law), the establishment of the Truth and Dignity Commission (*Instance Vérité et Dignité*, IVD), and the adoption of other "transitional justice" measures, in particular the Specialized Criminal Chambers (SCC).

In application of the 2013 Law, the SCC were formally established by Decree No. 2014-2887 of 8 August 2014 (the 2014 Decree)³ within the Tribunals of First Instance (TFI) which are under the jurisdiction of nine Courts of Appeal. The SCC have jurisdiction over "cases related to gross violations of human rights, as defined in international conventions ratified by Tunisia and in the provisions of the current Law".⁴ However, the enforcement of other laws, such as the Code of Military Justice, has meant that human rights violations alleged to have been carried out by military or law enforcement officials have been so far adjudicated by military courts. According to a SCC judge interviewed by the ICJ, the SCC are meant to be chambers with a specific jurisdiction-matter, sitting within the ordinary justice system as other chambers situated within a TFI.⁵ This in principle would suggest that gross human rights violations should be removed from the jurisdiction of military courts and criminal chambers and transferred to the SCC. Yet, it is not entirely clear whether the SCC have exclusive jurisdiction over such violations, as nowhere is this made explicit. It is also unclear whether the SCC jurisdiction would extend to cover civil claims by victims of human rights violations adjudicated by the SCC.

In principle, the ICJ welcomes the establishment by States of specific mechanisms and processes, referred to under the general concept of "transitional justice" to address past violations, such as the IVD, that can provide additional redress for victims and society as a whole beyond the ordinary justice system. Such mechanisms may have the potential to deliver reparation for victims more

1 ICJ, *Illusory justice, prevailing impunity - Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, May 2016, available at: <http://www.icj.org/tunisia-illusory-justice-prevailing-impunity> (last accessed 27 July 2016).

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

3 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, Gafsa, Gabés, Sousse, El Kef, Bizerte, Kasserine and Sidi Bouzid, further amended by another decree to include one additional chamber in Sfax. See 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, Gafsa, Gabés, Sousse, El Kef, Bizerte, Kasserine and Sidi Bouzid.

4 Law No. 53-2013 of 24 December 2013, article 8.

5 ICJ interview with a SCC judge, 1 September 2016.

expeditiously than through a large number of individual judicial proceedings. For example, the IVD received over 60,000 complaints from victims alleging one or several violations.

However, the ICJ believes that “transitional justice” mechanisms and other measures must be a complement to, not a substitute for the ordinary justice system. The combination of these measures and ordinary judicial proceedings must be capable of fulfilling victims’ individual rights to a remedy and reparation, and the State’s obligations to bring those responsible for violations to justice.

In this regard, the ICJ welcomes the fact that the SCC were established within the ordinary justice system. However, the ICJ is concerned that while the SCC have the potential to become a key judicial accountability mechanism, their ability to fully discharge their functions might be undermined by the lack of a clear framework governing the functioning, procedures and operation of the SCC, as well as the interaction between the SCC and the rest of the ordinary justice system. Indeed, the 2014 Decree establishing the SCC merely provides that those chambers are “specialized in the field of transitional justice”, without specifying any other aspect of the rules of procedures before those chambers, nor addressing the related criminal justice institutions, such as judicial police, prosecutors or investigative judges.⁶ While the IVD’s 2015 Annual Report noted that a law on special procedures before those chambers would follow the establishment of the SCC,⁷ and that this question is currently being discussed among various stakeholders, to date no specific decree or legislation has been adopted to set out such procedures or to address other institutional arrangements.

As a result, it is assumed that the SCC would function within and in application of the existing Tunisian criminal law framework and rely on other current judicial institutions operating within the Tribunals of First Instance. This interpretation is based on the 2013 Transitional Law itself that refers to the ordinary courts and tribunals in charge of criminal matters (article 7). Furthermore, this law specifies that the IVD is to transfer cases to the Office of the Public Prosecutor (OPP). In addition, Law No. 2014-17 (2014 Law) states that the offences committed against those killed and injured during the uprising are considered gross violations under the 2013 Law (article 2) and that the cases which will be referred by the IVD to the OPP will be automatically transferred to the SCC (article 3). Finally, the 2014 Decree explicitly refers to the various laws governing the ordinary justice system, including the Code of Criminal Procedure, as a basis for its adoption.

However, the absence of any additional law or decree leaves fundamental issues on hold,⁸ including whether the IVD has exclusive jurisdiction to transfer cases to the SCC or whether victims have standing to lodge a complaint directly before the SCC. Furthermore, the reliance on the ordinary justice system and existing legal frameworks raises a further set of problems. As analysed in depth by the ICJ in its report,⁹ currently significant weaknesses remain in law and in practice, in violation of Tunisia’s international obligations, such as the inadequate definitions of certain crimes in the Criminal Code.

It is the ICJ’s view that resolving those issues in accordance with international standards is critical if the SCC are to deliver meaningful justice for victims and accountability. The SCC also have the potential to contribute to the reform of the Tunisian justice system as whole, provided that they do not replicate existing flaws of the criminal justice system when adjudicating cases.

In this memorandum, the ICJ analyses the guarantees relating to the selection and appointment of the SCC judges; the SCC material jurisdiction; and the legal and practical obstacles that might undermine the SCC’s ability to adequately discharge their functions. Given the mandate of the SCC, the memorandum also focuses on Tunisia’s international obligations to investigate and prosecute

6 A draft law on the establishment of specialized tribunals in charge of the cases of the martyrs of the revolution was submitted to the National Constituent Assembly (NCA) in August 2012. However in the absence of consensus on the text, on 19 May 2014, the plenary voted to send the draft law back to the General Legislative Committee, see Draft Law No. 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).

7 Truth and Dignity Commission Annual Report 2015, June 2016, p. 82, available at: <https://www.doc-droid.net/cVWRyKT/-2015.pdf.html> (last accessed 1 August 2016).

8 Apart from two provisions of 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 (articles 1 and 3).

9 ICJ, *Illusory justice, prevailing impunity - Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, May 2016, available at: <http://www.icj.org/tunisia-illusory-justice-prevailing-impunity> (last accessed 27 July 2016).

those responsible for violations that constitute crimes under international or national law, as well as to provide effective remedies and reparation for victims of human rights violations. Finally, the memorandum offers a set of recommendations for legal and policy reforms that, together with sufficient political will, should help ensure that the SCC are able to ensure accountability and deliver meaningful justice for victims in line with international law and standards.

A. Nomination process and security of tenure for SCC's judges

i. Nomination of SCC judges

To date, all of the judges nominated or "appointed" to sit within the SCC have been judges from the ordinary courts. Therefore the appointment procedure amounts to a transfer rather than a formal appointment of a person as a new judge following a formal selection process.

Under the Law No. 67-29 on the Organization of the Judiciary, the High Judicial Council and the Statute for Judges, of 1967 the Minister of Justice had the power to decide to transfer a magistrate for "*nécessité de service*" (needs of the service) and, under article 20, to control short-term assignments. Restrictions on the arbitrary transfer of judges have since been adopted and remain in force until the creation of the new High Judicial Council. Transfers are made by a decree of the Prime Minister, with the assent of the *Instance Provisoire de la Justice Judiciaire* (IPJJ), a temporary judicial body established in 2013 to oversee the selection, appointment, promotion and transfer of judges.¹⁰ Law No. 2013-13 on the establishment of the IPJJ provides that judges cannot be transferred, promoted or appointed to a new position without their written consent.¹¹ Law No. 2013-13 does not prohibit transfers for "*nécessité de service*". Article 12(4) defines this necessity as one arising from the need to fill a vacancy or nominate judges to new judicial functions or to respond to increases in workload within a tribunal or to assign judges to newly created tribunals. However, in order for the Minister of Justice to make any transfers, at least three conditions must be met. The first is that while all judges are equally eligible when filling service requirements, prior to transferring a particular judge to a new place of work, it is mandatory to verify whether another judge is interested in and available for the position. In such a case, the interested judge should be appointed. Second, the IPJJ must give priority to judges in the nearest judicial division.¹² Finally, the duration of the nomination for "*nécessité de service*" cannot exceed one year, unless the judge gives his or her express consent to remain in the new post. Procedurally, Law No. 2013-13 permits decisions to promote, transfer and add names to the promotion roster to be challenged before the IPJJ within seven days from the publication of the decision. The IPJJ then has to rule on the challenge within seven days. A decision of the IPJJ can be appealed to the Administrative Tribunal, which has six months to decide the case.¹³

Despite the adoption of those new safeguards against the arbitrary transfer of judges after the 2011 uprising, so far in practice the ICJ has noted that executive interference continues to constitute a threat to the independence of the judiciary in Tunisia.¹⁴

The 2013 Law, that foresees the creation of the SCC, does not provide any specific criteria for the judges' nomination, except that these chambers are to be composed of judges who "have not taken part in political trials and who receive specific training in transitional justice."¹⁵ In November 2015, the IPJJ nominated 45 judges, chosen among sitting judges within the criminal chambers of Tribunals of First Instances, to serve as SCC judges.¹⁶ A member of the IPJJ interviewed by the ICJ explained

¹⁰ Law No. 2013-13 on the establishment of the *Instance Provisoire de la Justice Judiciaire*, 2 May 2013, article 14, available at: http://www.legislation.tn/detailtexte/Loi-num-2013-13-du-02-05-2013-jort-2013-037_2013037000131 (last accessed 7 August 2016).

¹¹ Law No. 2013-13, article 12.

¹² Law No. 2013-13, article 12, paras. 5 and 6.

¹³ Law No. 2013-13, article 15.

¹⁴ See for more details, ICJ, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 13 May 2014, p. 27, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf> (last accessed 1 September 2016).

¹⁵ Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organisation, article 8.

¹⁶ For a copy of the decision issued by the IPJJ on 13 Nov 2015 in relation to the nomination of SCC judges to Tribunals of First Instance to look into cases related to transitional justice,

that the nomination decision was taken to fill vacancies opened in the newly created SCC when no candidates had come forward. However, the SCC judge interviewed by the ICJ noted that the judges had not been consulted on their nomination and that he personally did not see an opening to fill a vacancy. Rather, he was merely informed that he had been designated for the SCC.¹⁷

The IPJJ member stressed that the *Instance* had authority to proceed with this transfer without the consent of judges concerned based on the ground of “*nécessité de service*” provided for by article 12(4) of the Law No. 2013-13. The decision explicitly refers to a combination of laws and decrees defining the mandate of the IPJJ to organize and supervise matters related to the judiciary and in relation to transitional justice, in particular to Law No. 2013-13 on the establishment of the *Instance Provisoire de la Justice Judiciaire*, Law No. 67-29 on the Organization of the Judiciary, the High Judicial Council and the Statute for Judges, the 2013 Law, and the 2014 Decrees. The IPJJ member indicated that, the SCC newly appointed judges are expected to continue performing the duties under their previous position, the SCC assignment being seen as additional functions.¹⁸

Some of the SCC judges expressed concerns or dissatisfaction with their new position to the IPJJ member consulted by the ICJ, in part due to the lack of clarity over the functions they must perform and the impact this could have when undergoing assessment for judicial performance. However, at the time of this publication, none of them had filed a formal complaint against the procedure, nor an appeal against the decision of appointment itself as provided by article 15 of the Law No. 2013-13.¹⁹

While the requirements of ensuring the proper administration of justice in newly created court chambers may constitute a valid justification to assign judges to new judicial functions, the lack of clarity of the conditions of work for the SCC judges should require seeking their consent for such nomination. International standards provide that the consent of the judge should be sought in case of assignment and transfer decisions by the judicial authority. The Singhvi Declaration for instance states that “judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge”.²⁰

Furthermore, the criteria for nominating SCC judges lack clarity. In general, the appointment of new judges needs to be “carried out according to objective and transparent criteria based on proper professional qualification”.²¹ Under the UN Basic Principles on the Independence of the Judiciary, “[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law”.²² Although the current procedure relates to the nomination of existing judges to new judicial functions, the above-mentioned international standards, by way of analogy would call for specific qualifications for judges nominated to adjudicate gross human rights violations. More specific and detailed criteria should be spelled out, such as past experience in prosecuting offences of this nature. The criteria set out in the 2013 Law provides little indication in that regard when referring to judges who “have not taken part in political trials and who receive specific training in transitional justice.”²³

In addition, those criteria also raise a number of particular concerns. First the terms “political trial” is not defined, raising concerns about its accordance with the principle of legality, and leaving to

see <http://www.ivd.tn/ar/wp-content/uploads/2015/12/%D9%82%D8%B1%D8%A7%D8%B1-%D8%AA%D8%B3%D9%85%D9%8A%D8%A9-%D8%A3%D8%B9%D8%B6%D8%A7%D8%A1-%D8%A7%D9%84%D8%AF%D9%88%D8%A7%D8%A6%D8%B1-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A6%D9%8A%D8%A9-%D8%A7%D9%84%D9%85%D8%AA%D8%AE%D8%B5%D8%B5%D8%A9-%D9%81%D9%8A-%D8%A7%D9%84%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%A7%D9%86%D8%AA%D9%82%D8%A7%D9%84%D9%8A%D8%A9-%D8%A8%D8%A7%D9%84%D9%85%D8%AD%D8%A7%D9%83%D9%85-%D8%A7%D9%84%D8%A7%D8%A8%D8%AA%D8%A-F%D8%A7%D8%A6%D9%8A%D8%A9.pdf> (last accessed 7 August 2016).

17 ICJ interview with a SCC judge, 1 September 2016.

18 ICJ interview with a member of the IPJJ, 7 August 2016.

19 ICJ interview with a member of the IPJJ, 7 August 2016.

20 Draft Universal Declaration on the Independence of Justice (hereafter “Singhvi Declaration”), para. 15.

21 Universal Charter of the Judge, approved by the International Association of Judges on 17 November 2009, article 9.

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

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

subjective or arbitrary assessment what is a trial of political or non-political nature. If those terms are construed broadly, this could result in excluding the selection of numerous suitable and qualified judges. Second, judges who might have participated in what are considered “political trials” may have done so in good faith or out of fear of adverse consequences. Given the SCC’s jurisdiction over gross human rights violations, the 2013 Law criteria should be revised to set out a precise and appropriate standard which, for example, takes into the account the particular role a judge may have played in those trials. In addition, the criteria should avoid the vague and general terminology “political trials” and apply more relevant standards, in particular whether the trial in question constituted or was likely to have led to a serious human rights violation.

ii. Security of tenure for SCC judges and the question of a specific status

In addition to the lack of transparency and criteria used in relation to the nomination process of the SCC judges, the ICJ is concerned at the arrangements for security of tenure of these judges. While the existing Tunisian framework is meant to apply, that framework contains substantial flaws, as highlighted by the ICJ in two recent reports.²⁴ Currently operative laws on the judiciary do not adequately guarantee the security of tenure of judges. For example, article 107 of the 2014 Constitution, while protecting judges against arbitrary transfer, does not include a guarantee of security of tenure until a stated retirement age, and existing legislations fail to establish that judges may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, as required under international standards.

In addition, the nature of the cases the SCC are tasked, involving gross human rights violations, requires special protection and stronger guarantees to ensure judges can successfully carry out their mandate without fear of repercussions on their career or disciplinary actions. Article 107 of the 2014 Constitution does provide that judges “may not be transferred without their consent, and they cannot be dismissed or suspended from office or be subject to disciplinary action except in circumstances and under safeguards laid down in law and by a reasoned decision of the High Judicial Council.” However, this provision fails to enshrine fully the principle of security of tenure, as it protects judges against arbitrary transfer but does not include a guarantee of security of tenure until a stated retirement age.

Under international law, security of tenure is a basic condition for judicial independence.²⁵ Unless judges have long-term security of tenure, they may be vulnerable to pressure or undue influence from those in charge of renewing their posts. Judges should have guaranteed tenure until a set retirement age or the expiry of their term of office.²⁶ Furthermore, judges should only be subject to removal from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties.²⁷

The ICJ expressed concerns at the weaknesses of the current frameworks applicable to the SCC judges that could undermine their ability to perform their task. This raises the question whether the SCC should benefit from a specific status when sitting in these chambers in order to prosecute gross human rights violations in an effective, independent and impartial manner.

According to the IPJJ member consulted by the ICJ, there had been some discussion on whether SCC judges should have distinct conditions of tenure from other judges and whether these nominations would involve additional remuneration or other special benefits. These special conditions are yet to

24 See ICJ, *Tunisia - The New Draft Law on the High Judicial Council in Light of International Law and Standards*, 14 September 2015, available at: <http://icj2.wpengine.com/wp-content/uploads/2015/09/Tunisia-Final-HJC-Draft-Law-Advocacy-Position-Paper-2015-ENG.pdf> (last accessed 7 September 2016); and ICJ, *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 1 September 2016).

25 UN Basic Principles on the Independence of the Judiciary, Principles 11 and 12. See for further details, *ICJ Practitioners’ Guide on International principles on the independence and accountability of judges, and lawyers*, in particular Chapter 6, available at: <http://icj2.wpengine.com/no-1-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors> (last accessed 1 September 2016).

26 UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Section A, Principle 4(l).

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

be decided by the Ministry of Justice.²⁸ Furthermore, the IVD has called for these judicial appointments to be “irremovable” and that the appointment be done outside of the general appointment process.²⁹

While international standards do not provide for a specific status for judges adjudicating cases of gross human rights violations, the ICJ emphasized that the well-established guarantees and safeguards should be scrupulously applied to ensure they are able to carry out their mandate in full independence. In addition, it is also essential to clarify the time period for which judges are expected to serve within the SCC. As expressed by the Inter-American Commission on Human Rights, the provisional character of such judges “implies that their actions are subject to conditions and that they cannot feel legally protected from undue interference or pressure from other parts of judiciary or from external sources”.³⁰ The provisional character of an appointment can greatly affect the security of tenure.

B. Material jurisdiction of the SCC and definition of offences

Pursuant to article 8 of the 2013 Law, the SCC have jurisdiction over “cases related to gross violations of human rights, as defined in international conventions ratified by Tunisia and in the provisions of the current Law”. This article provides explicitly that such violations include, but are not limited to, “murder, rape and other forms of sexual violence, torture, enforced disappearances, and death penalty without fair trial guarantees” as well as cases referred by the IVD regarding “election fraud, financial corruption, misappropriation of public funds, and the coercion to forced migration for political reasons”.³¹

Pursuant to its international obligations, Tunisia must ensure accountability for human rights violations. In cases of gross human rights violations and crimes under international law, this accountability must consist in individual criminal responsibility, whereby persons responsible are brought to justice. Such crimes include, among others, torture and other ill-treatment, enforced disappearances, extrajudicial killings, crimes against humanity, and war crimes.

This entails, in part, that where violations are alleged or otherwise suspected to have occurred, the State must ensure that they are subject to an effective investigation; where established violations constitute crimes under international or national law, those responsible must be brought to justice.³² These obligations must also 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.³³

The UN Human Rights Committee (HRC), in relation to the International Covenant on Civil and Political Rights (ICCPR), to which Tunisia is a party, has stressed, that “a failure by a State Party to investigate allegations of violations” or to bring perpetrators to justice for violations of certain

28 Interview with a member of the IPJJ on 7 August 2016.

29 IVD Annual Report meeting with NGOs on 14 July 2016.

30 Report on the Situation of Human Rights in Venezuela, OAS document OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29 December 2003, para. 159.

31 Law No. 53-2013 of 24 December 2013, article 8, paras. 2 and 3 respectively.

32 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).

33 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 (ECHR).

rights “could in and of itself give rise to a separate breach of the Covenant”.³⁴ The duty to investigate human rights violations is set out in numerous other international instruments and requires an effective investigation that is prompt, thorough, independent and impartial.³⁵ With respect to the obligation to prosecute, the HRC specified that “[w]here the investigations (...) reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice”. It further explained that “[t]hese obligations arise notably in respect of those violations recognized as criminal under either domestic or international law.”³⁶ Under the ICCPR these would include, for example, the prohibitions against torture and cruel, inhuman or degrading treatment (article 7) and extrajudicial executions and other arbitrary deprivation of life (article 6). Tunisia also has specific obligation to similarly criminalize, investigate and prosecute torture and ill-treatment under the Convention against torture (CAT), and enforced disappearance under the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED). Tunisia is also a party to the Rome Statute for the International Criminal Court (ICC Statute), which requires the criminalization of genocide, war crimes and crimes against humanity. The scope of these obligations to ensure accountability and fight impunity, have also been elaborated through other instruments.³⁷

In this regard, while the SCC provide in principle a mechanism to prosecute certain human rights violations; the scope of the SCC’s material jurisdiction as defined by the 2013 Law is not adequate to discharge the range of Tunisia’s international obligations. These include ensuring criminal accountability for, at a minimum, the following crimes: torture and other cruel, inhuman or degrading treatment or punishment (which includes rape and other sexual violence);³⁸ extrajudicial killings;³⁹ enforced disappearance;⁴⁰ as well as war crimes, crimes against humanity, and genocide.⁴¹

Although article 8 of the 2013 Law listing of specific gross human rights violations is not exhaustive, the ICJ is concerned that it omits certain key crimes.

The absence of specific definition of the terms “gross violations of human rights” in the 2013 Law, while problematic, does not necessarily constitute an obstacle for the SCC to exercise their jurisdiction. The 2013 Law itself refers to international conventions for the purpose of defining those gross violations.

However, the Tunisian Criminal Code has been applied inconsistently in human rights cases, resulting in either applying inadequate and inaccurate definitions or by relying on other types of offences, despite Tunisia being party to treaties requiring it to define and criminalize certain abusive conduct. For example, the CAT was ratified by Tunisia in 1988, but torture was not made a specific offence under the Criminal Code until 1999.⁴² The definition adopted in 1999 is not in line with the definition contained in the CAT. However, judges have been reluctant to refer or to directly apply international

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

35 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 (hereinafter UN Principles on Extra-legal Executions), recommended by the Economic and Social Council Resolution 1989/65, 24 May 1989 1, Principle 9; Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 9 December 1988, adopted by the UN General Assembly Resolution 43/173, 9 December 1988 at Principles 33 and 34; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/10034 (1975), article 9; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman 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.

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

37 See for example, Updated Impunity Principles, in particular Principles 19-30. For more details, see ICJ *Practitioners Guide on International Law and the Fight Against Impunity*, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf> (last accessed 27 July 2016).

38 CAT, articles 2, 4 and 16; ICCPR, articles 2 and 7; and HRC, General Comment No. 31, para. 18.

39 ICCPR, articles 2 and 6; and HRC, General Comment No. 31, para. 18.

40 ICPED, articles 4-10; and HRC, General Comment No. 31, para. 18.

41 ICC Statute, articles 6, 7 and 8.

42 Law No. 99-89 of 2 August 1999.

law in domestic cases, and torturous acts committed prior to 1999 were often 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 five years.⁴³ Similarly Tunisia currently has no separate offence criminalizing enforced disappearance as defined in the ICPED, which Tunisia ratified in 2011.

Under international law, a State's domestic legal arrangements cannot serve as a basis for failure to perform an international obligation. 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. The Constitution itself is silent on whether international human rights treaties to which Tunisia is a party are automatically incorporated into Tunisian law such that they should be applied directly by national courts. Despite there being no constitutional obstacle to the direct application of treaties to which Tunisia is a party, in the vast majority of criminal cases involving gross human rights violations judges have failed to invoke these treaties.

The ICJ is concerned at the lack of legal clarity which has led to the operative ineffectiveness of international human rights treaties in Tunisian law.

These deficiencies undermine the ability of the SCC to adjudicate cases involving gross human rights violations, taking into account the gravity and nature of conduct constituting offences as defined under international law. This uncertainty could also have an impact on the way the definitions, based on international human rights treaties and standards and used by the IVD, will be addressed when such cases are transferred to the SCC. For example, the definition of rape under the Criminal Code is highly restrictive and gender biased falling short of international standards as developed.⁴⁴

It is therefore crucial to clarify the scope of the SCC's jurisdiction, including by spelling out explicitly the minimum set of human rights violations that constitute criminal acts and give rise to individual criminal responsibility, based on Tunisia's international legal obligations. This will ensure that the obligations to effectively investigate and prosecute are fully implemented.

C. The principle of legality, including the principle of non-retroactivity

The principle of legality means that any criminal offence must be clearly defined in law in a way that is not vague or overbroad. Related to this principle is that of non-retroactivity of criminal law. Under this principle, 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*). The non-retroactivity principle is enshrined in various international human rights treaties⁴⁵ and is a right from which no derogation is permitted, under ICCPR articles 15 and 4.⁴⁶ Furthermore article 15(1) allows a person to be held accountable for an act that did not necessarily constitute a criminal offence under national law at the time it was committed, if it constituted a crime under international law at the time.⁴⁷

While this principle is a fundamental tenet of the rule of law and an essential guarantee to avoid revenge or politically motivated trials during times of transition, it may also hamper prosecutions of offences committed long before the establishment of criminal accountability proceedings, if applied in an excessively restrictive manner that does not accord with international law and standards.

43 For a more detailed analysis of these laws, see ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, available at: <http://icj2.wpengine.com/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf>, (last accessed 27 July 2016).

44 See ICJ, *Obstacles to Access to Justice for Women in Tunisia in Light of International Law and Standards*, June 2016, pp. 9-11, available at: <http://icj2.wpengine.com/wp-content/uploads/2016/06/Tunisia-Memo-WA2J-Advocacy-Analysis-brief-2016-ENG.pdf> (last accessed 7 September 2016).

45 See ICCPR, article 15; ECHR, article 7; Arab Charter on Human Rights, article 6; ACHPR, article 7(2); ICC Statute, article 22.

46 Article 4(2) of the ICCPR includes article 15 among the provisions that cannot be subject to derogation. See also, HRC, General Comment No. 29, para. 7; ACHR, article 27(2); and Arab Charter on Human Rights, article 4(2).

47 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.

Both article 28 of the 2014 Constitution and article 1 of the Criminal Code prohibit the prosecution of persons without a previously existing law criminally proscribing the conduct on which the prosecution is based. This principle has been applied broadly in cases involving gross human rights violations, including where treaties to which Tunisia is party require criminalization of such conduct but Tunisia did not adequately implement these treaties into domestic legislation. This is particularly the case in relation to acts of torture committed before 1999. Requests by lawyers to consider the acts under the offence of “torture”, as defined in the CAT ratified in 1988 by Tunisia, have been held to breach the principle of non-retroactivity. Equally for the case of enforced disappearance, this principle risks preventing any prosecution due to the fact that currently, no separately-defined offence of enforced disappearance is provided for under Tunisian criminal law despite the ratification of the ICPED by Tunisia in 2011.

Through meetings with justice sector actors, including judges, IVD representatives and IPJJ members, the ICJ has been made aware that this reading of the principle of non-retroactivity is being raised in the context of the functioning of the SCC. While some judges and experts in Tunisia argue that international treaties are to be implemented in line with the Constitution, others stress that this would amount to a violation of the principle of legality that requires the criminalization of the act be found in the domestic law itself.⁴⁸

This latter interpretation of the principle of legality is not in line with international standards and practice. First, the 2014 Constitution itself prohibits the use of non-retroactivity claims in the context of the “transitional justice system”. However, the wording of this provision is vague and does not specify whether this exclusion of the principle of non-retroactivity applies to all cases of gross human rights violations. This creates the risk that the SCC judges interpret this provision in a restrictive way, using the Criminal Code as a basis to identify the crimes to be prosecuted, thereby omitting certain forms of gross human rights violations. On the other hand, this constitutional provision should not be construed as allowing the SCC judges to completely disregard the principle of non-retroactivity to prosecute conducts that were not criminalized at the time they were committed, which would be a clear violation of international law.

Under international law, as noted above the *nullum crimen, nulla poena sine lege* principle does not prevent prosecution of a person for a crime which existed in international law, even if it was not expressly recognized in domestic law. Furthermore article 15(2) specifies 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”. More generally 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.⁴⁹ 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 exclude criminal responsibility.⁵⁰

It should be noted that not all elements of conduct constituting gross human rights violations and crimes under international law are set out explicitly in the text of the treaties. Some have been clarified by the jurisprudence of courts and quasi-judicial authorities, such as human rights treaty bodies. For example, the gross human rights violation of “death penalty without fair trial guarantees” listed in article 8 of the 2013 Law would constitute an example of arbitrary deprivation of life that must be criminalized in order to protect the right to life.⁵¹ 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.

48 Interview with a member of the IPJJ on 7 August 2016.

49 Inter-American Court of Human Rights, *Barrios Altos v. Peru*, Judgment of March 14, 2001, para. 41.

50 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).

51 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.” See HRC General Comment No. 6: Article 6 (Right to life), 1982, para. 3.

While it is critical that an overly restrictive application of the non-retroactivity principle not be invoked as a basis to foster impunity, it is equally important that it be scrupulously respected where applicable. The ICJ remains concerned that the mandate of the SCC may be seen as extending to the prosecution of conduct that is criminalized neither under international law nor under Tunisian law in violation of the principle of legality. The cases to be referred by the IVD to the SCC regarding “election fraud, financial corruption, misappropriation of public funds, and the coercion to forced migration for political reasons” would not all amount to gross human rights violations, although some may have been committed in the context of such violations. There is serious doubt that they constituted crimes at the time they were committed, even under a broad understating of international standards, in contravention of the principle of non-retroactivity.⁵²

D. Initiating procedures before the SCC and the question of the transfer of cases by the IVD

Under the current 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*;⁵³ by the public prosecutor on the instruction of the Minister of Justice;⁵⁴ or, where the prosecutor decides not to proceed with an investigation, by the victim of a crime.⁵⁵ However, in practice, criminal proceedings concerning gross violations of human rights are usually triggered by the victim filing a complaint with either the judicial police or the public prosecutor.⁵⁶

While the Code of Criminal Procedure is meant to govern the main procedures before the SCC in the absence of any specific law or decree, a restrictive interpretation of some provisions of the 2013 Law raises concerns over the way the SCC would be seized of cases of gross human rights violations.

Article 8 of the 2013 Law defining the jurisdiction of the SCC over gross human rights violations provides that the chambers also adjudicate cases of election fraud, financial corruption, misappropriation of public funds, and the coercion to forced migration for political reasons transferred by the IVD. Article 42 specifies that the IVD refers to the OPP “cases where gross human rights violations are proven”. High-ranking judges interviewed by the ICJ interpret article 42 as granting the IVD exclusive power to transfer cases to the SCC, excluding the possibility for victims to lodge a complaint based on the Code of Criminal Procedure.

Such an interpretation is not only in breach of international law and standards; it may also be incompatible with other provisions of the transitional justice laws in Tunisia. First, article 42 is part of the section defining the functions of the IVD, not that of the SCC. In addition, article 3 of the 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, appears to describe cases referred to the SCC by the IVD as one option among others by providing a specific procedure for such transfers. Most importantly, this restriction risks hampering Tunisia’s obligation to investigate and prosecute alleged human rights violations. Indeed, given the fact that the SCC are meant to have exclusive jurisdiction over gross human rights violations, including when military courts could have jurisdiction, and that the timeframe for victims to submit cases to the IVD elapsed on 15 June 2016, any other potential gross human rights violations not submitted to the IVD may not be subject to an investigation and prosecution.

E. The role of the public prosecutor and investigating judges

As highlighted earlier, no procedures, additional institutions or governing legal framework have been

52 Truth and Dignity Commission Annual Report 2015, p. 50.

53 Code of Criminal Procedure, articles 2 and 20.

54 Code of Criminal Procedure, articles 21 and 23; and Law No. 87-80 of 29 December 1987, article 1.

55 Code of Criminal Procedure, articles 2 and 36.

56 For a more in depth discussion into this process see, ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, available at <http://icj2.wpengine.com/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf> (last accessed 27 July 2016).

established or identified to regulate the work of the SCC. Those chambers therefore must be considered to operate under the existing Code of Criminal Procedure and related Laws. This includes the investigation and prosecution stages of the proceedings prior to reaching the trial phase before the SCC. As a result the OPP and investigating judges before each TFI where a Specialized Chamber is located would fulfil their functions for the cases of gross human rights violations adjudicated by the SCC. Under the 2014 Constitution, the OPP continues to be considered part of the judiciary and enjoys the same constitutional guarantees as the judiciary.⁵⁷ According to article 115 it has a responsibility to abide by the “framework of criminal policy of the State.” However, there are no further details in the Constitution regarding what guidelines the prosecutors should follow when exercising their functions.

Articles 28 and 47 of the Code of Criminal Procedure require a preliminary and full investigation into all cases involving “crimes”⁵⁸ and article 30 states that public prosecutors must first appraise all complaints received by them. This includes conducting a preliminary inquiry by collecting evidence, questioning the suspect, taking witness statements and writing a report.⁵⁹ It also requires the prosecutor to refer the case to an investigating judge for investigation.⁶⁰

Article 8 of the 2013 Law, however, provides that the IVD is to transfer the cases to the SCC. Article 42 refers to cases of gross human rights violations that are “proven” being transferred by the IVD to the OPP. Furthermore, article 3 of the 2014 Law states that the OPP shall automatically refer the cases related to the period of the uprising it received from the IVD to the SCC. This would imply that the OPP is not expected to carry out its functions of investigation. Indeed, in the absence of specialized prosecutors and investigating judges, article 42 has been interpreted by some justice sector actors in Tunisia as allowing the SCC to rely on the investigations that had been conducted by the IVD for the purposes of establishing that a gross human rights violation had occurred. Under this conception, the SCC adopt the findings of the IVD and move directly to the trial phase of the proceedings as an exceptional procedure under the “transition justice” framework.⁶¹ However, this interpretation remains contentious and other experts have dismissed it. These experts say that because the SCC is part of the ordinary criminal justice system, it should follow the ordinary criminal law procedures, including for the investigation and pre-trial phase.⁶²

The ICJ expresses serious concerns over the impact of an inadequate and expedited procedure before the SCC that does not comply with fair trial principles, in case the evidence gathered by the IVD is solely and directly used at the trial phase without the OPP conducting its own investigation. This approach would undermine greatly the guarantees of the right to a fair trial and the obligation to hold persons criminally accountable for human rights violations under international law. Furthermore, and despite investigative judges having served as observers before the IVD to oversee its fact-finding and investigative proceedings,⁶³ the ICJ considers that training of all justice sector actors in investigations and prosecutions of gross human rights violations, and not only transitional justice for the SCC judges, is crucial if this mechanism is to contribute to the reform of the justice system in practice in line with international standards.

F. *Ne bis in idem* and statute of limitations

The *ne bis in idem* principle (also known as the prohibition of double jeopardy) is found in article 132bis of the Code of Criminal Procedure. It provides that “[n]o one who has been acquitted may be prosecuted again for the same acts, even if they are classified as a different offence”. The scope of the principle as defined in this provision is overly broad. It prevents prosecution of acquitted persons for not only the same offence, but also for the same acts.

Pursuant to article 5 of the Code of Criminal Procedure, a limitation period of 10 years applies to all serious offences defined as “crimes” and three years for all lesser offences defined as “*délits*”.⁶⁴ Be-

57 2014 Constitution, article 115.

58 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).

59 Code of Criminal Procedure, article 26.

60 Code of Criminal Procedure, article 28.

61 ICJ interview with a member of the IPJJ, 7 August 2016.

62 ICJ interview with a SCC judge, 1 September 2016.

63 Truth and Dignity Commission Annual Report 2015, June 2016, p. 18.

64 Code of Criminal Procedure, article 5.

fore the uprising in 2011, some conduct considered gross human rights violations under international law, such as torture and ill-treatment, would fall within the category of "délits" and would therefore be subject to the three year limitation period.⁶⁵ Since the limitation period for civil lawsuits runs parallel to the corresponding criminal lawsuit,⁶⁶ victims wishing to bring claims of reparation in civil proceedings had to file their claim within the limitation period. The Decree No. 106-2011 extended the limitation period for torture from 10 to 15 years.⁶⁷ However, the 2014 Constitution recognized the non-applicability of statutory limitations for the crime of torture.⁶⁸

More generally, article 148(9) of the Constitution provides that "[t]he 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*). Article 42 of the 2013 Law further confirms an exception to the principle of *ne bis in idem* or double jeopardy with regard to cases referred by the IVD to the SCC, while article 9 provides for the imprescriptibility (impossibility of removing from jurisdiction) of any judicial complaint for cases of gross human rights violations.

These exceptions are in line with international law and standards. Indeed article 14(7) of the ICCPR provides that "[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." However, principle 26(b) of the Updated Impunity Principles provides an exception stating 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.⁶⁹

Additionally, in order for the *ne bis in idem* principle to apply, according to article 14(7) of the ICCPR, there must have been a final judgment given in the criminal proceedings.⁷⁰ However, there is no prohibition where, for example, "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."⁷¹ Thus, 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 proper application of this principle under international law and standards is crucial due to the numerous failings of the Tunisian criminal justice system to adequately prosecute cases of gross human rights violations that occurred before, during and after the 2011 uprising. It is therefore imperative to ensure that the current provisions of the Code of Criminal Procedure are not applied broadly as to result in impunity for perpetrators of gross human rights violations. The SCC must have the ability to re-open cases that have stalled, or were dismissed without prejudice before military courts, as well as allowing for the right of a substantive appeal to military court rulings.⁷²

65 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%).

66 Code of Criminal Procedure, article 8.

67 Decree No. 106-2011 of 22 October 2011.

68 2014 Constitution, article 23.

69 Principle 26(b); See also Principle 22 of the Updated Impunity Principles, 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."

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

71 HRC General Comment No. 32.

72 For a more detailed analysis of the military court system in Tunisia, see ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, available at:

<http://icj2.wpengine.com/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Themat->

Similarly, the exclusion of statute of limitations for all cases of gross human rights violations is recognized under international standards. For example the HRC has affirmed that unreasonably short periods of statutory limitation should be removed.⁷³ The Basic Principles on the Right to a Remedy and Reparation and the Updated Impunity Principles affirm that statutes of limitations do not apply to gross human rights violations that amount to crimes under international law.⁷⁴ 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.”⁷⁵ The Basic Principles on the Right to a Remedy and Reparation state that in such cases the time limits should not be “unduly restrictive”.⁷⁶ 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.⁷⁷

It should be noted that the vague wording of article 148(9), merely referring to the context of the implementation of “the transitional justice system” does not guarantee that these exclusions would apply to other crimes that do not amount to gross violations or crimes under international law or to other cases involving gross human rights violations that are not transferred to the SCC under article 8 of the 2013 Law.

G. Responsibility of superiors and superior orders

Given the large number and scale of gross human rights violations committed over the period covered by the 2013 Law, it is expected that the SCC would give highest priority on prosecuting those officials highest up in the chain of command among law enforcement and security agencies. These officials should obviously be held accountable for their own conducts when they amount to crimes under international or national law. In some instances they may also hold some responsibility for the acts of their subordinates, known as superior responsibility. This is imperative in order to ensure accountability throughout the command structure.

There are no provisions in the Criminal Code directly addressing superior responsibility. Various forms of accomplice liability are covered. Articles 32 and 33 of the Criminal Code define the criminal responsibility for accomplices of an offence. According to article 32, complicity entails 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 fulfil 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”.⁷⁸ Anyone convicted could be sentenced to five years’ imprisonment and a fine of 10,000 dinars (approximately 4,500 USD).

Following the 2011 uprising, courts have sometimes relied more on those articles to prosecute some high-ranking officials. However, these provisions are inadequate. 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

[ic-report-2016-ENG.pdf](#) (last accessed 27 July 2016).

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

74 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 6; and Updated Impunity Principles, Principle 23.

75 Updated Impunity Principles, Principle 23.

76 Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 7.

77 Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Judgment, 26 September 2006, para. 151. See also from the 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.

78 Law No. 48 of 1966 on criminal omissions, article 1.

to take sufficient measures to prevent or report the violations.⁷⁹ Under article 4 of the CAT, not only must direct acts of torture be criminalized, but also “an act by any person which constitutes complicity or participation in torture.” In this regard, the Committee against Torture has affirmed 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”.⁸⁰ 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”.⁸¹ As noted above, officials who issue an order to carry out torture must be considered by national law to have committed a crime through complicity or participation within the meaning of article 4(1) of the Convention.⁸²

Similarly, the HRC has stated in relation to article 7 of the ICCPR that “[t]hose who violate article 7 [prohibition on torture and ill-treatment], whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible”.⁸³ In numerous instances the Committee against Torture has emphasized the importance of holding to account individuals in senior positions.⁸⁴ The ICC Statute, which criminalizes genocide, war crimes, and crimes against humanity, sets out the responsibility of superior officers, whether military or others in a position of responsibility under article 28 for those who fail to prevent or punish the criminal activity of their subordinates. This provision requires various elements for this mode of liability to be established including the existence of a relationship of subordination between the accused and those who are about to commit or have committed the crimes, the knowledge of the accused of the involvement of the subordinates in a crime, the failure by the accused to prevent the commission of the crime or to punish the subordinates, and that the commission of the crimes resulted from the superior’s failure to exercise control.

Article 32 of the Criminal Code applies a broad definition of accomplice liability that could entail superior law enforcement officials and could extend it 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. Furthermore there is no specific provision in the Tunisian Criminal Code setting out the liability of superior law enforcement officials over their subordinates. The law on criminal omissions (Law No. 48-66) applies to all persons but imposes no specific obligations on law enforcement officials to prevent crimes committed by those under their control.

Furthermore, in practice, it is unclear what elements of superior responsibility the Tunisian courts apply. In some of the cases brought in relation to the 2011 uprising, the military courts interpreted article 32 differently. The courts expanded the interpretation of article 32 for instance, to convict former president Ben Ali⁸⁵ for his inaction and silence over the killings of demonstrators. However, it applied article 32 restrictively to other senior law enforcement superiors even though they were alleged to have taken material acts or were present at killings of demonstrators.⁸⁶

In relation to 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 Internal Security Forces limits this immunity in relation to orders given to officers of the Internal Security Forces by requiring that the order must be given “by their superior in the framework of legality”. This is pursuant to international law standard that not only requires holding superiors liable

79 See for example, ICPED, article 6(1): and ICC Statute, article 28.

80 Committee against Torture, General Comment No. 2, para. 26.

81 Ibidem.

82 See e.g. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/25/60 (10 April 2014), paras. 48 and 50. See also HRC, General Comment No. 20: Article 7, A/44/40 (1992), para. 13 and more generally, Updated Impunity Principles, Principle 27(b).

83 HRC, General Comment No. 20: Article 7, A/44/40 (1992), para. 13.

84 Committee against Torture, Concluding Observations: Indonesia, A/57/44 (2002) 22, para.43(a); see also Human Rights Committee, Concluding Observations: Serbia and Montenegro, A/59/40 vol. I (2004) 68 at para. 75(12).

85 First Instance Permanent Military Court of El Kef, Case No. 95646, p. 703.

86 Case No. 95646, Judgment.

for the acts of those under their effective control, but that also makes 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 clearly establish that an order of a superior or public authority can never be invoked as justification in the criminal proceedings contemplated by those treaties.⁸⁷ The HRC and the Committee against Torture have affirmed the principle and called on States to incorporate it in domestic law.⁸⁸

The Basic Principles on the Use of Force also recognize 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."⁸⁹

Both the ICC 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 ICC Statute explicitly recognizes 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.

In practice, Tunisian courts stated that a defence of superior orders is inadmissible unless it is a "lawful" order. If the order is from Internal Security Forces commanders, it has to be "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.

It is therefore crucial for the SCC to investigate and prosecute those bearing special responsibility in gross human rights violations, by including in the procedures to be applied by those chambers the principle of superior responsibility. In that regard, it should hold responsible superior law enforcement officials who knew or had at the time reason to know that their subordinates were committing or about to commit a crime and did not take all the necessary measures within their power to prevent or punish the crime. Of similar importance is the need to ensure that the Criminal Code and Law No. 82-70 do not allow any individual who is responsible for a gross human rights violation to rely on an order received from a superior officer or public authority to escape criminal responsibility.

H. The right to reparation before the SCC

As noted above the procedures and operation of the SCC relate primarily to Tunisia's obligations to investigate alleged human rights violations and prosecute perpetrators when such violations amount to crimes under international or Tunisian law. However the obligation to investigate and prosecute is part of the victims' 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.

Apart from criminal proceedings, the right to an effective remedy and reparation for victims of human rights violations is an integral part of international human rights law.⁹⁰ In that regard, the SCC, although primarily responsible for adjudicating criminal accountability, can play an important role in discharging the obligation of remedy and reparation for victims. Conversely, if they do not carry out their work properly, they also risk undermining victims' individual right to remedy and reparation. It

87 CAT, article 2(3); ICPED, article 6(2). See also from the Committee against Torture: General Comment No. 2, para. 26; Concluding Observations: Egypt, A/49/44 (1994) 14, para. 89; Concluding Observations: Panama, A/48/44 (1993) 52, para. 339; Concluding Observations: Senegal, A/51/44 (1996) 19, para.114; Concluding Observations: Uruguay, A/52/44 (1997) 16, paras.91 and 93; Concluding Observations: Mauritius, A/54/44 (1999) 15, para.123; and Concluding Observations: Poland, A/55/44 (2000) 21, paras. 88 and 93.

88 HRC, General Comment No. 31, para. 18. See also HRC, General Comment No. 20, article 7, A/44/40 (1992), para. 3; Committee against Torture, Concluding Observations: Armenia, A/51/44 (1996) 17, para.97; HRC, Concluding Observations: Ecuador, A/53/40 vol. I (1998) 43, para. 280; and Committee against Torture, Concluding Observations: El Salvador, A/55/44 (2000) 28, para. 158.

89 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 26.

90 Basic Principles on the Right to a Remedy and Reparation.

is therefore critical to identify the gaps in the current legislation to be applied by the SCC.

Since the 2011 uprising, transitional justice initiatives have been established in Tunisia and many victims brought claims of reparation before Tunisian courts or the IVD. Under articles 1 and 7 of the Code of Criminal Procedure, a victim can join criminal proceedings as civil party if an offence leading to harm, gives rise to civil action. A civil claim 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.⁹¹ According to article 167 of the Code of Criminal Procedure, in a judgment 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 practice, the judge is limited in ruling for compensation and a sanction for the accused and does not have explicit authority to order other forms of reparation.

Furthermore, Tunisian courts have not been in accordance on the scope of harm that may be subject to reparation or the amount of compensation offered to victims even in the same case.⁹² These inconsistencies, coupled with the lack of explanation regarding how different forms of compensation are assessed and awarded, undermine the ability of victims to claim adequate and effective reparation, including compensation.

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".⁹³ 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.⁹⁴

Finally it is important to note that the Code of Criminal Procedure does not include State responsibility and the possibility of bringing civil claims against the State. Other laws explicitly recognize State liability for the acts of public officials, such as article 49 of Law No. 82-70 on the Internal Security Forces that provides for State liability for civil compensation only for "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. However, the courts have not been consistent in this regard.

Under international law and standards, victims of human rights violations have a right to "adequate, effective and prompt reparation for harm suffered".⁹⁵ The full scope of this is set out in the UN Basic Principles 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, adopted by consensus by all UN Member States. The Principles affirm the obligation, among others, of States to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice [...] irrespective of who may ultimately be the bearer of responsibility for the violation; and [p]rovide effective remedies to victims, including reparation." The right to and effective remedy and reparation is also reflected in all of the principal international human rights treaties. Article 2(3) of the ICCPR provides that States must provide for effective remedies for ICCPR violations. As explained by the HRC:

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by

91 Code of Criminal Procedure, article 7.

92 ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, pp. 110-113, available at: <http://icj2.wpengine.com/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf> (last accessed 27 July 2016).

93 Basic Principles on the Right to a Remedy and Reparation, Principle 20. See also Committee against Torture, General comment No. 3, para. 10.

94 Ibidem.

95 Basic Principles on the Right to a Remedy and Reparation, Principle 11(b). See also the Updated Impunity Principles, Principle 31.

articles 9, paragraph 5, and 14, paragraph 6 [concerning, respectively, aspects of the right to liberty and fair trial], the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes 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 bringing to justice the perpetrators of human rights violations.⁹⁶

The CAT guarantees in article 14(1) the right to redress, including “an enforceable right to fair and adequate compensation.” The Committee’s General Comment No. 3, sets out at length what is required under article 14 in respect of the right to reparation, and requires that not only compensation, but also guarantees of non-repetition, restitution, rehabilitation, satisfaction and the right to truth be available.⁹⁷ Similarly, 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.”

The notion of reparation includes material and moral damages and encompasses a variety of different forms.⁹⁸ For example, the Basic Principles on the Right to a Remedy and Reparation state that reparation includes: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁹⁹ 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.¹⁰⁰

While criminal prosecution may constitute a component 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.¹⁰¹ The Committee against Torture has also recognized that “[c]ivil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place.”¹⁰²

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.”¹⁰³

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, victims have to bring separate civil or administrative claims against the State if the latter was not a respondent in a criminal proceeding.

The ICJ is concerned that the current flaws in the criminal law framework and the civil claim procedures with regard to reparation for victims of human rights violations will be replicated before the SCC, in particular in the absence of specific legislation governing those chambers. 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 approach and to facilitate the ability for victims to claim compensation from the State without having to bring separate civil and administrative proceedings.

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

97 Committee against Torture, General Comment No. 3, paras. 6-18.

98 ICPED, article 24(5); and see the Updated Impunity Principles, Principle 34.

99 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.

100 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, article 34.

101 Committee against Torture, General Comment No. 3, para. 26; and Committee on Enforced Disappearances, Concluding Observations: Spain, CED/C/ESP/CO/1, 12 December 2013, para.30.

102 Committee against Torture, General Comment No. 3, para. 26.

103 Committee against Torture, General Comment No. 3, para. 26. See also, Committee on Enforced Disappearances, Concluding observations: Spain, 13 November 2013, 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”.

RECOMMENDATIONS

The ICJ notes that a number of general legislative and policy reforms related to the criminal justice system are needed, including amendments to the Criminal Code and Code of Criminal Procedure.¹⁰⁴ In the interim, however, there is much that can be done to address the concerns highlighted above in relation to the SCC. The ICJ calls on the Tunisian authorities to take specific measures to ensure that the SCC are able to address accountability and deliver meaningful justice for victims in line with international law and standards. To that end, the ICJ makes the following recommendations to the Tunisian Government, in particular the Minister of Justice, the Assembly of the People's Representatives and other relevant authorities, in accordance with their respective areas of responsibility:

i. Enact comprehensive legislation and related decrees and other administrative rules:

- a. Setting forth the specific procedures in full compliance with international law to be applied by the SCC, consistent to ensure the application of fair trial standards when prosecuting alleged human rights violations and the right to an effective remedy and reparation for victims. Such procedures should be distinct from the Code of Criminal Procedure, which should not apply to SCC cases;
- b. Stating that no transitional justice measures or provisions can be applied or interpreted in a manner inconsistent with Tunisia's international legal obligations;
- c. Clarifying the relationship between the SCC and other ordinary criminal chambers and civil and other courts to ensure the latter two play a complementary role in addressing gross human rights violations;
- d. Defining further the jurisdiction of the SCC to include all crimes under international law that amount to gross human rights violations or serious violations of international humanitarian law or under domestic law, particularly under treaties to which Tunisia is party. Such crimes should include, in particular torture and other cruel, inhuman or degrading treatment or punishment (which includes rape and other sexual violence), extra-judicial killings, enforced disappearance, as well as war crimes, crimes against humanity, and genocide; and
- e. Establishing specialized prosecution services, investigating judges, judicial police and witness and victims protection units in line with international standards and with adequate resources to work in coordination with the SCC.

ii. Ensure all professionals administering justice within and with the SCC receive adequate training on international law and standards in relation to investigations and prosecution of gross human rights violations;

iii. Ensure upcoming nominations of SCC judges are conducted through a transparent process and based on prescribed criteria based on merit, integrity and without discrimination, that judges' consent for nomination is sought and that judges are nominated to exclusively serve within the SCC;

iv. Specify that the SCC are established for the time necessary to carry out their mandate, ensure the term of the SCC judges is not provisional and that once appointed they may only be removed in exceptional, strictly limited and well defined circumstances provided for by law, that include the judge's incapacity or the judge behaving in such a way that renders him/her unfit to carry out the duties of their office, following a fair procedure;

v. Ensure that SCC judges and other justice sector actors are able to apply directly treaties to which Tunisia is a party in the course of the SCC proceedings;

¹⁰⁴ See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, available at: <http://icj2.wpengine.com/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf> (last accessed on 27 July 2016); and ICJ, *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 1 September 2016).

vi. Ensure that all human rights violations, including violations that were not transferred by or submitted to the IVD, are investigated in a thorough, effective, prompt and impartial manner and that when such violations amount to crimes under international law or domestic law alleged perpetrators are prosecuted in fair trials;

vii. Ensure victims of human rights violations falling under the SCC's jurisdiction can lodge a complaint of any gross human rights violation or serious violation of international humanitarian law before the OPP in order to access the SCC and that the OPP is required to give reasons for any decision to dismiss a case without proceeding to an investigation;

viii. Ensure that formal mechanisms are created between the SCC and the ordinary criminal justice system to guarantee exchange of experiences and continued training of justice sector actors;

ix. Ensure that exceptions to articles 132bis and 121 of the Tunisian Criminal Code are clearly defined with regard 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 Set of Principles for the protection and promotion of human rights through action to combat impunity;

x. Ensure that the principle of non-retroactivity does not prevent the SCC from prosecuting acts that constituted crimes under international law or amounted to other offences at the time of their commission;

xi. Ensure that impunity for gross human rights violations is not permitted due to the application of limitation periods and to this end:

- a. 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.

xii. Include in the procedures to be applied by the SCC the principle of criminal accountability for superior law enforcement officials who knew or had at the time reason to know that their subordinates were committing or about to commit a crime and did not take all the necessary measures within their power to prevent or punish the crime;

xiii. Ensure that the Criminal Code and Law No. 82-70 do not allow any individual who is responsible for a gross human rights violation to rely on an order received from a superior officer or public authority to escape criminal responsibility;

xiv. 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;

xv. Establish in the procedures to be applied by the SCC 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; such reparation should include, as appropriate, one or more of the forms of reparation recognized under international law, namely, compensation, guarantees of non-repetition, rehabilitation, restitution, satisfaction and the right to the truth for victims and are consistent with the approach taken in civil proceedings;

xvi. Ensure that the requirement for criminal liability to be determined first prior to victims being able to lodge a civil claim does not apply before the SCC; and

xvii. Ensure that the SCC contribute to the full realization of the victims' right to effective, prompt and adequate reparation in all its forms recognized under international law.

Commission Members

August 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 Dacic, 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. Mónica Pinto, Argentina

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



**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