

Achieving Justice for Gross Human Rights Violations in Tunisia

Baseline Study, May 2018

ICJ Global Redress and Accountability Initiative

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ICJ Global Redress and Accountability Initiative

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TABLE OF CONTENTS

BASELINE ASSESSMENT	3
1 General human rights situation in the country	3
2 Accountability of perpetrators of gross human rights violations	7
2.1 International law and standards on accountability	7
2.2 Inadequate criminalization of gross human rights violations	9
2.3 Sentences not commensurate with the crime	13
2.4 The principle of legality, including the principle of non-retroactivity	13
2.5 Double jeopardy and statute of limitations	16
2.6 Responsibility of superiors and superior orders	17
2.7 The use of military courts	17
3 Access to effective remedies and reparation for victims of gross human rights violations	19
3.1 International law and standards on remedies and reparation	19
3.2 Domestic laws, institutions and practices related to the right to effective remedies and reparation	20
3.3 Right to an effective judicial remedy in the context of criminal proceedings	21
3.4 Other remedies in civil and administrative proceedings	23
3.5 Court ordered reparation	23
4 Independence and accountability of justice actors	25
4.1 The role of justice actors and institutions in the pursuit of redress and accountability	25
4.2 The role of the public prosecutor and prosecutorial discretion	26
4.3 The investigating judge and the direction of the investigation	27
4.4 Specific status for SCC judges	28
4.5 The role of the public prosecutor and investigating judges in relation to proceedings before the SCC	28
ANNEX: GLOBAL ACCOUNTABILITY BASELINE STUDIES	30
Methodology	30
Partners and key stakeholders	32

BASELINE ASSESSMENT

The Tunisian justice system, be it through criminal, civil or administrative procedures, fails in many respects to fulfil the right of victims of gross human rights violations to a remedy and to reparation. Nor does it adequately implement the related obligation on the State to investigate and prosecute crimes under international or national law. Based on an assessment of relevant Tunisian legal instruments, and how they are interpreted and applied in practice, against international norms and standards, this baseline study identifies various legal and practical obstacles that prevent victims from realizing their right to a judicial remedy and reparation and hamper accountability.

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

The nature of these obstacles is twofold: legal obstacles arising from the non-conformity of Tunisian legislation with international law norms, and practical obstacles, mainly due to the lack of independence of the prosecution and judiciary. As a result, reforms have to be far-reaching and holistic in order not only to ensure legal and policy frameworks are in line with international law and standards but to also change related practices.

In that respect the transitional justice framework offers an opportunity to address this current state of impunity. In particular, the recently created Specialized Criminal Chambers (SCC) have the potential to contribute both to provide a measure of accountability and justice for victims as well as initiate a more thorough reform of the justice system. Given that virtually all cases of human rights violations committed during the December 2010 to January 2011 uprising have been tried before military courts, this means that civilian justice mechanisms and actors, including SCC judges, at present lack the experience and capacity for investigation and prosecution of alleged perpetrators. In this regard, the SCC could serve as a vehicle for the exchange and transfer of experiences and knowledge for the rest of the Tunisian justice system, if accompanied by the necessary legal and policy reforms identified in this baseline. At the same time, key gaps and unresolved questions related to the operation and functioning of those Chambers need to be addressed to guarantee that they will be able to achieve these objectives.

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

1 General human rights situation in the country

The toppling of the Ben Ali regime in January 2011 in Tunisia marked the beginning of a wave of political and social changes in the Middle East and North Africa region. Tunisia emerged as the most promising case of democratic transition among all of the countries that underwent a popular uprising. Following the adoption of a new Constitution in January 2014 (the 2014 Constitution), Tunisian transitional authorities were replaced by a newly elected Parliament (the Assembly of the People's Representatives, ARP) and a President of the Republic. These political reforms also saw the adoption of new legislation and policies.

Several legislative reforms aimed at strengthening the independence of the justice system, as foreseen in the Constitution, were adopted. However, those have only been slowly implemented due to a series of factors, such as the establishment of a new High Judiciary Council (HJC), hampering the creation of other key institutions, in particular the Constitutional Court.¹ This being said, the transition created expectations and the potential for greater respect for the rule of law. As a result, victims and lawyers have in the intervening years brought several cases concerning violations committed in the past and during the uprising before the Tunisian courts, in particular military tribunals. Concerns for the victims of past human rights violations were high on the political agenda and were also reflected in the enactment of the Transitional Justice Law in 2013.²

For decades, Tunisian law enforcement officers and security services committed widespread violations of human rights, including torture and other ill-treatment, arbitrary arrests and detention, unlawful killings and enforced disappearances. Numerous similar violations were also committed during the December 2010 to January 2011 uprising (the 2011 Uprising) and some continue today.

To date, scores of violations have gone unpunished and perpetrators of human rights violations have either not been held accountable or have been sentenced to inappropriately light penalties in relation to the gravity of the crimes committed. This lack of accountability has contributed to a general climate of impunity in Tunisia and rendered illusory the victims' rights to an effective remedy and adequate reparation for the harm suffered. The capacity of the Tunisian justice system to provide redress and accountability for human rights violations is undermined by persistent flaws and weaknesses both in law and practice. 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 cases concerning human rights violations. Indeed, most of the cases involving gross human rights violations committed during the 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.

The various mechanisms created during the transition in Tunisia to address past human rights violations have the potential to tackle impunity and contribute to the realization of victims' rights to effective remedies and reparation. While reparation initiatives initially focused predominantly on providing compensation to certain categories of victims, pardoning individuals convicted under the previous regime, and conducting investigations into human rights violations committed during the uprising, the adoption of the 2013 Transitional Justice Law constituted a key development. The primary mechanism for addressing these issues is through the establishment of the Truth and Reconciliation Commission ("*Instance Vérité et Dignité*", IVD) with competence over violations that took place from 1 July 1955 until 31 December 2013 (the date of the entry into force of the Transitional Justice Law).³

¹ For further information, see ICJ statement on the amendments to the HJC law, March 2017, available at: <https://www.icj.org/tunisia-amendments-to-the-high-judicial-council-law-would-weaken-the-independence-and-authority-of-the-judiciary>.

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

³ Law No.53-2013 of 24 December 2013, Title II, Articles 16 and 70.

The Transitional Justice Law includes a broad definition of “transitional justice”⁴ and defines the range of violations to which it is addressed as “gross or systematic violations of any human rights committed by the State’s apparatus or by groups of individuals who acted in the State’s name or under its protection, even if they did not have the capacity or authority to do so” as well as “gross or systematic violations of human rights committed by organised groups”.⁵ The IVD has received over 60,000 complaints from victims alleging one or several violations.

Article 11 of the Transitional Justice Law recognizes that “the State has the responsibility to provide sufficient, effective and adequate reparation depending on the gravity of the violation and the personal situation of each victim”, taking into account the State’s available resources. Such reparation can be granted on an individual or collective ground based on “moral and material compensation, restoration of human dignity, forgiveness, restitution of rights, rehabilitation and reinsertion”.⁶ Furthermore, the State is required to meet the legal costs relating to all human rights claims under the law, pursuant to the laws on legal aid and on legal assistance before the Administrative Court.⁷

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

While the IVD is not mandated directly to address criminal responsibility, which is described by the Transitional Justice Law as instead falling within the remit of judicial and administrative bodies pursuant to the legislation in force (Article 7), the Law also refers to “specialized chambers within the first instance tribunal located in the courts of appeal” (Article 8).⁸ In application of the 2013 Law, the SCC were formally established by Decree No. 2014-2887 of 8 August 2014 (the 2014 Decree)⁹ within the Tribunals of First Instance, 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”.¹⁰

⁴ Article 1 of the law defines transitional justice as an “integrated process of mechanisms and methods implemented to understand and deal with human rights violations committed in the past by revealing the truth, holding those responsible accountable, providing reparations for the victims and restoring their dignity in order to achieve national reconciliation, preserve and document the collective memory, guarantee the non-recurrence of such violations and allow the transition from an authoritarian state to a democratic system which contributes to consolidating human rights”.

⁵ Law No.53-2013 of 24 December 2013, Article 3.

⁶ Law No.53-2013 of 24 December 2013, Article 11.

⁷ Law No.53-2013 of 24 December 2013, Article 13.

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

⁹ 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, Gabès, 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, Gabès, Sousse, El Kef, Bizerte, Kasserine and Sidi Bouzid.

¹⁰ Law No. 53-2013 of 24 December 2013, Article 8.

However, the absence of any additional law or decree leaves fundamental issues on hold,¹¹ 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. In the absence of significant further reforms, there is a risk that the existing flaws of the criminal justice system that have contributed to impunity may be replicated when the SCC come to adjudicate cases.

Other developments send contradicting signals as to the political will of authorities to seriously address impunity and fully realize victims' rights to remedies and reparation. For example, a Draft Law on the "Repression of Attacks against Armed Forces", approved by the Council of Ministries on 8 April 2015 and subsequently abandoned, included a provision that provided for the exclusion of criminal liability for members of the armed forces in case of injury or death of someone involved in different types of attacks against the army as defined by this law.¹² This draft law was recently re-submitted to Parliament.

Unlike the draft law on the Repression of Attacks against Armed Forces, a Counter-Terrorism law was adopted after a series of attacks against members of the security forces and the army and two deadly attacks in the Bardo Museum and Sousse. However, overly broad and imprecise definitions in many offences created under the Law extend its reach far beyond truly terrorist acts such as hostage-taking, killings or causing serious injuries, and other such violence. In some aspects, such as offences of glorification and incitement to terrorism, the provisions are so broadly drafted that they have the potential to criminalize the peaceful exercise of fundamental freedoms, including the right to freedom of expression. Some provisions could result in the wrongful prosecution of journalists and whistleblowers. The Law also provides immunity from criminal prosecution for security forces when using force in the course of their duties. The provision in question could potentially allow law enforcement officers who use force in violation of international standards and the right to life, such as intentional use of lethal force when it is not strictly unavoidable in order to protect life, to escape justice. Other provisions of the Law raise serious concerns for the right to a fair trial, the right to liberty, and the right to privacy. In particular, provisions allowing a person to be held in police custody for up to 15 days without access to a lawyer or a judge are inconsistent with the right to liberty, fair trial guarantees and guarantees for the prevention of torture and other abuses in detention.¹³

Similarly the recent third attempt in April 2017 by the Government to have a draft law on economic reconciliation adopted by the parliament, submitted in July 2015 but withdrawn in 2016, raises strong concerns among civil society organizations. The draft law would, in particular, amend the 2013 Transitional Justice Law and provide for the discontinuation of corruption charges against members of the former regime in exchange of the return of an agreed amount of money when it is proven that this money was obtained illegally.

¹¹ 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).

¹² See ICJ joint statement with other international NGOs on this topic, May 2015, available at: <https://www.icj.org/wp-content/uploads/2015/05/Tunisia-Security-Bill-joint-statement-News-Press-releases-2015-ENG.pdf>.

¹³ ICJ, *Tunisia's law on counter-terrorism in light of international law and standards*, August 2015, available at: <https://www.icj.org/wp-content/uploads/2015/08/Tunisia-CT-position-paper-Advocacy-PP-2015-ENG-REV.pdf>.

2 Accountability of perpetrators of gross human rights violations

2.1 International law and standards on accountability

With respect to all human rights, whether those applicable to a State under customary international law, or those taken up through party status to international and/or regional human rights instruments, States have both negative and positive obligations: negative duties *not* to interfere with the legitimate enjoyment of rights (e.g. to respect the non-derogable right of all persons not to be arbitrarily deprived of life); and positive duties to protect rights from interference by others (e.g. to take legislative, administrative, judicial, educative and other necessary measures to guarantee the enjoyment of the right to life by all persons within the State's jurisdiction). The latter positive duty to protect includes the requirement to criminalize acts that constitute gross human rights violations (such as torture and ill-treatment, extrajudicial killings, enforced disappearance and sexual violence) in order to ensure that perpetrators are held to account.

A specific feature of the duty to protect is the obligation to investigate, prosecute and punish all acts that amount to gross violations of human rights. Principle 19 of the UN Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity in this regard provides that: "States shall undertake *prompt, thorough, independent and impartial investigations* of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are *prosecuted, tried and duly punished*" (emphasis added).¹⁴ In the "transitional justice" setting it is important to recall that, while truth commissions or similar mechanisms are an important aspect of the right to truth (as an element of reparation for victims), they must be used in combination with the investigation of facts undertaken with a view to prosecuting those responsible for gross violations of human rights.¹⁵

More generally, the creation by States of special mechanisms and processes to address past large scale human rights violations, often referred to under the general concept of "transitional justice", can provide additional opportunities for victims beyond the ordinary justice system. Such mechanisms may have the potential to provide victims with reparation more speedily or efficiently than would be the case through individual court cases, particularly where there is a very great number of violations, victims and perpetrators. As highlighted in the Basic Principles on the Right to Remedy and Reparations, "States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations".¹⁶ However, "transitional justice" measures that are not capable of fulfilling all victims' individual rights to effective remedies and reparation, and the State's obligations to bring those responsible to justice, can never be invoked by a State as a valid basis for denying an individual victim access to a full judicial remedy, reparation and justice as provided for under international law and standards.

The duty to investigate and hold perpetrators to account requires that

¹⁴ Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add.1 (2005).

¹⁵ See, for example, *La Cantuta v Peru*, Inter-American Court of Human Rights, Judgment of 29 November 2006, Series C, No. 162, para 224.

¹⁶ 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 under General Assembly resolution 60/147 (2006), Principle 16.

investigations be undertaken by independent and impartial investigating authorities: independent of those suspected of being involved, including of any institutions impugned; and impartial, acting without preconceptions, bias or discrimination.¹⁷ For example, investigations into allegations made against security and military forces should be undertaken by an independent commission of inquiry, comprised of members that are independent of any institution, agency or person that may be the subject of investigation.¹⁸ Furthermore, such investigations must be thorough and effective. This requires adequate capacity and resources to be provided to investigating authorities. In the context of extrajudicial killings, and applicable also to other investigations into gross violations of human rights, the revised Minnesota Protocol sets out various recommendations on the practical implications of the need for thorough and effective investigations.¹⁹ The Updated Principles also recall that investigations must be prompt, reflecting the requirement that the duty to investigate is triggered as soon as authorities become aware of allegations of gross human rights violations, regardless of whether a formal complaint has been made.²⁰

Where prompt, thorough, independent and impartial investigations conclude that there is a prima facie case that an offence(s) constituting gross human rights violations has been committed, several consequences follow. Alleged perpetrators must be made subject to prosecution, involving all persons allegedly responsible, including superiors, by proceedings that adhere with international fair trial standards.²¹ In the context of unlawful killings, the Human Rights Committee has clarified that this means that: "Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, leading to de facto impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".²² Where a prosecution leads to conviction, the punishment imposed must be commensurate with the seriousness of the crime.²³

Ensuring the accountability of perpetrators of gross human rights violations also forms key elements of the right of victims to effective remedies and reparation. In the case of extrajudicial killings, for example, the Human Rights Committee has explained that the duty to investigate, prosecute and punish arises from the obligation of States parties to the ICCPR to provide an effective remedy to victims of human rights violations, set out in Article 2(3) of the ICCPR, when read in conjunction with the right to life under Article 6.²⁴ Reparation includes the right to

¹⁷ In the context of the investigation of extrajudicial killings, for example, see ICJ, *Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution—Investigation and Sanction* (2015), pp. 134-138. See also ICJ, *Practitioners Guide No 7: International Law and the Fight Against Impunity* (2015), especially Chapter V.

¹⁸ For example, see: Human Rights Committee, Concluding Observations: Sri Lanka, UN Doc CCPR/C/79/Add.56 (1995), para 15; and *Minnesota Protocol on the Investigation of Potentially Unlawful Death: Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (United Nations, 2016) – Minnesota Protocol, Principle 11.

¹⁹ Minnesota Protocol, *ibid*, Principles 12-17. See also: ICJ Practitioners Guides No 7 and 9, above note 17; and the UN Manual on the Effective Investigation and Documentation of torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (United Nations, 2004).

²⁰ See, for example, ICJ Practitioners Guide No 7, above note 17, p. 135.

²¹ See, for example: ICJ Practitioners Guide No 7, above note 17, especially Chapter VI; UN Human Rights Committee, 'Draft General Comment No 36. Article 6: Right to life', UN Doc CCPR/C/GC/R.36/Rev.2 (2015), para 29; Minnesota Protocol, above note 18, para 1.

²² Draft General Comment 36, *ibid*, para 29.

²³ See, for example, ICJ Practitioners Guide No 7, above note 17, pp. 217-222.

²⁴ Draft General Comment 36, above note 21, para 29. See also ICJ, *Practitioners Guide No 2: The right to a remedy and to reparation for gross human rights violations* (2007), chapters IV and VIII.

satisfaction and guarantees of non-repetition. In the context of accountability, satisfaction incorporates two key elements: 'justice' through prompt, thorough, independent and impartial investigations that lead to judicial and administrative sanctions against perpetrators; and truth, involving the verification and full and public disclosure of facts.²⁵ Guarantees of non-repetition are likewise geared towards the combatting of impunity and adopting measures to prevent the commission of further acts amounting to gross violations of human rights.²⁶

A range of legal, policy and institutional obstacles as well as practices hamper the accountability of perpetrators of gross human rights violations in Tunisia. The following section focuses on the most significant factors contributing to impunity.

2.2 Inadequate criminalization of gross human rights violations

Although Tunisia has ratified most international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention on the Protection of All Persons from Enforced Disappearance (ICPED), it has failed to ensure that its national legislation criminalizes all human rights violations of a criminal character in line with the definitions of such offences under international law.²⁷ In addition, while the 2014 Constitution introduces explicit prohibitions of gross human rights violations, it does not explicitly recognize the non-derogable nature of certain rights in times of emergency, in line with Article 4(2) of the ICCPR.²⁸

a) Extrajudicial executions

Tunisian law does not adequately protect the right to life. Article 22 of the Constitution is vague and, by not defining the "extreme cases provided for by law" in which the right to life may be infringed upon, risks undermining the

²⁵ See, for example: Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 16, paras 3(b), 4 and 22(b) and (f); and ICJ Practitioners Guide No 2, *ibid*, chapters V and VII(IV).

²⁶ See, for example: Draft General Comment 36, above note 21, para 29; Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 16, para 23; and ICJ Practitioners Guide No 2, above note 24, chapter VI.

²⁷ Tunisia has ratified the: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights; Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT); International Convention on the Protection of All Persons from Enforced Disappearance; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of Persons with Disabilities (CRPD); and Convention on the Rights of the Child. In addition, it has accepted individual complaint procedures for the CAT, ICCPR, CEDAW and CRPD.

²⁸ Article 4 of the ICCPR provides in relevant part as follows: "1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." The listed articles include among other things the right not to be arbitrary deprived of life, the prohibition of torture, the prohibition of retroactive criminal laws, and the right to freedom of thought, conscience and religion. The Human Rights Committee has highlighted additional non-derogable aspects of other rights (such as aspects of the right to fair trial under article 14 or the prohibition of arbitrary detention under article 9) in its General Comment no. 29 on states of emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (31 Aug 2001).

essence of the right. Furthermore, the Constitution does not explicitly recognize the non-derogable character of the right to life and prohibition of arbitrary deprivation of life, including in times of emergency, thereby potentially opening the door for unlawful derogations from the right to life.

Although various forms of homicide are criminalized under the Criminal Code, the defences under the Criminal Code and the laws that permit law enforcement officers to use force, including lethal force, do not conform to international standards. In particular, criminal responsibility for the use of force to defend the life of a person other than oneself or family members is entirely at the discretion of the judge. Article 40 of the Criminal Code grants extremely wide discretion for anyone to use lethal force, including against persons trespassing or involved in theft and looting carried out with violent means, without there necessarily being any threat to life or serious injury. Neither Article 39 nor Article 40 of the Criminal Code contain any requirements that the use of force is necessary and proportionate in the particular circumstances in which it is used. Article 42 is also extremely broad, permitting any use of force pursuant to laws or orders of a competent authority, and contains no limitations. This defence is considered again in the section below on superior orders (3.2.6).

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

The use of force to deal with public gatherings also does not meet international standards. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials state that, for unlawful but non-violent assemblies, law enforcement officials shall avoid the use of force or, if that is not practicable, must restrict any force to the minimum extent necessary.²⁹ The general limitations on recourse to firearms under the Basic Principles mean that firearms could never be justified in dispersing non-violent assemblies. For violent assemblies, firearms can only be used when less dangerous means are not practicable and only if necessary. Furthermore, conditions set out in Principle 9 of the Basic Principles must also be met.³⁰

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

²⁹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, Principle 13.

³⁰ Basic Principles on the Use of Force and Firearms, *ibid*, Principle 9.

was strictly unavoidable in order to protect life. In Case No. 95646, the First Instance Military Tribunal of El Kef also found that the use of firearms fell within the framework of Law No. 69-04 but not within Articles 20 and 21.

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

b) Torture and other ill-treatment

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

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

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

c) Enforced disappearances and secret detention

Despite having ratified the ICPED, Tunisian authorities have not criminalized enforced disappearances in Tunisian criminal law, as required by Article 4 of the ICPED and as mandated, since 1992, by the earlier UN Declaration on the Protection of All Persons from Enforced Disappearance. Existing crimes that prohibit abduction (Criminal Code, Article 237) and arrest, detention or abduction without a judicial order (Criminal Code, Article 250) do not necessarily cover all the conduct that must be criminalized under the definition in Article 2 of the ICPED because, in particular, both offences are restricted in the type of deprivation of liberty, unlike Article 2 of the Convention which, in addition to

arrest, detention and abduction, also criminalizes “any other form of deprivation of liberty”. The offences under Tunisian law also differ from the Convention definition in so far as they relate to any person, as opposed to specifically “agents of the State” or “persons acting with the authorization, support or acquiescence of the State”. Furthermore, neither Tunisian offence recognises another essential element of the crime of enforced disappearance, the “refusal to acknowledge the deprivation of liberty” or the “concealment of the fate or whereabouts of the disappeared person”. Instead, Article 250 is restricted to cases where no judicial order has been obtained.

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

d) *Sexual violence*

As repeatedly stressed by the Committee established under the Convention on the Elimination of Discrimination against Women (CEDAW), States must, pursuant to the Convention, address, prevent and redress sexual violence against women, including, in particular, through effective criminal justice responses. This requires that criminal laws, procedures and practice appropriately and adequately define and prohibit all forms of sexual violence and provide for dissuasive sanctions and punishments commensurate with the gravity of the offence, in turn fulfilling a deterrent function.³¹ A key component of this is ensuring that legal definitions of rape, sexual assault and of consent to sexual intimacy do not embody wrongful stereotypes.³²

In particular rape and sexual assault continue, despite a series of amendments, to be addressed in the Tunisian Penal Code under the title/chapter of “crimes against decency” – as opposed to serious crimes against the person, physical integrity and sexual autonomy.

Article 227 of the Tunisian Criminal Code criminalizes rape when: a) it is “committed with violence, the use or threat of use of a weapon” against a person who is ten years of age or above; or b) when committed “without the above-mentioned means [against a] person [who] is under 10 years old”; and c) when committed in any other way. It also specifies that consent is considered absent if the victim is under the age of 13. The first two offences are punishable by death,³³ while the latter carries a sentence of life imprisonment.

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

These provisions fall short of international standards on various grounds. First, not only is rape not properly defined in the Criminal Code, but in Tunisia it is generally understood as the non-consensual penetration of the vagina by the penis.³⁴ It follows that the definition of rape does not encompass anal or oral

³¹ CEDAW Committee, General Recommendation No 19: Violence against women, in UN Doc A/47/38 (1992), para. 24; Human Rights Committee, General Comment No 28: Equality of rights between men and women (article 3), UN Doc CCPR/C/21/Rev.1/Add.10 (2000), para.11.

³² See *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010); CEDAW, Article 5.

³³ The ICJ is unconditionally opposed to the death penalty in all circumstances; the organization considers that the use of the death penalty constitutes a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment.

³⁴ Amnesty International, *Assaulted and Accused: Sexual and Gender-Based Violence in Tunisia*, 2015, p. 53, available at: <https://www.amnesty.org/en/documents/mde30/2814/2015/en/>.

penetration or through the use of objects. Nor does it acknowledge that men and boys may be victims of rape.³⁵ Furthermore, insofar as requiring the use or threat of violence for the crime to have occurred, and by providing that only a victim below the age of 13 is incapable of lawfully consenting, these provisions fail to recognize and adequately criminalize acts of rape committed in circumstances where the victims' prior, free and informed consent was absent as they had been coerced through "fear of violence, duress, detention, psychological oppression or abuse of power", or "by taking advantage of a coercive environment".³⁶

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

2.3 Sentences not commensurate with the crime

Provisions of the Tunisian Criminal Code that codify gross human rights violations as crimes under Tunisian law frequently provide the possibility for judges to impose serious punishments, including lengthy prison sentences. However, contrary to international standards, where persons responsible for such violations are successfully prosecuted, the sentences they actually receive are rarely appropriate to the gravity of the crimes committed. This is due to two reasons. First, such persons are often convicted of less serious offences, such as violence against the person instead of torture, which carries a lesser punishment. Second, judges have in some cases used their broad discretion, pursuant to Article 53 of the Criminal Code, to reduce the sentence imposed. For example, even following the 2011 amendments to the crime of torture, a person convicted of torture for the first time (in a case where the victims did not suffer amputation, fracture or a "permanent disability"), could theoretically see a prison sentence of eight years reduced to a six-month suspended sentence. Furthermore, the judges need not base this reduction on any objective factors such as the degree of participation and guilt of the accused in the crime.

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

2.4 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

³⁵ See International Criminal Court, Elements of Crimes, 2011, available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>; and *Prosecutor v Akayesu*, Case No ICTR-96-4, Trial Judgment 2 September 1998, paras. 596-598.

³⁶ International Criminal Court, Elements of Crimes, 2011.

enshrined in various international human rights treaties³⁷ and is a right from which no derogation is permitted, under ICCPR Articles 4 and 15.³⁸ Furthermore, Article 15(1) of the ICCPR 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.³⁹

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.

Article 28 of the 2014 Constitution and Article 1 of the Criminal Code prohibit the prosecution of persons in the absence of a previously existing law criminally proscribing the conduct in respect of 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 members of the IPJJ (*Instance Provisoire de la Justice Judiciaire*), 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.⁴⁰

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 SCC judges will 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.

³⁷ See: ICCPR, Article 15; European Convention on Human Rights, Article 7; Arab Charter on Human Rights (ACHR), Article 6; African Charter of Human and Peoples’ Rights, Article 7(2); Rome Statute of the International Criminal Court, Article 22.

³⁸ Article 4(2) of the ICCPR includes Article 15 among the provisions that cannot be subject to derogation. See also: Human Rights Committee, General Comment No 29: States of emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 7; African Charter of Human and Peoples’ Rights, Article 27(2); and ACHR, Article 4(2).

³⁹ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Strasbourg: Engel Publisher, 1993), pp. 276 and 281. See also *Baumgarten v. Germany*, Human Rights Committee Communication 960/2000, UN Doc CCPR/C/78/D/960/2000 (2003), paras 9.2 to 9.5.

⁴⁰ Interview with a member of the IPJJ (*Instance Provisoire de la Justice Judiciaire*), 7 August 2016.

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.

The answer to this dilemma is to be found under international law, noting that the *nullum crimen, nulla poena sine lege* principle (noted above) does not prevent prosecution of a person for a crime that existed in international law, even if it was not expressly recognized in domestic law. Article 15(2) of the ICCPR 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.⁴¹ 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.⁴²

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 Transitional Justice Law would constitute an example of arbitrary deprivation of life that must be criminalized in order to protect the right to life.⁴³ 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.

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

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

⁴² *González Medina and family v. Dominican Republic*, Inter-American Court of Human Rights (IACtHR) judgment of 27 February 2012, para 285(e). See also *Case of Contreras et al. v. El Salvador*, IACtHR judgment of 31 August 2011, para 185.d. For a case involving extra-judicial killings and enforced disappearances, see *Case of La Cantuta v. Peru*, IACtHR judgment of 29 November 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>.

⁴³ The right to life obliges States to take measures to “strictly control and limit the circumstances in which a person may be deprived of his life by such authorities”: see Draft General Comment 36, above note 21, para 24.

understating of international standards, in contravention of the principle of non-retroactivity.⁴⁴

2.5 Double jeopardy and statute of limitations

The abolition of the limitation period in the Tunisian Constitution in relation to the crime of torture is consistent with international standards.

Other gross human rights violations should properly be characterized as serious offences under Tunisian law and therefore be subject to a ten-year limitation period. However, many of the provisions actually used to prosecute human rights violations have been considered minor offences and thereby subject to a three-year limitation period only, including crimes involving torture and other ill-treatment, which have been prosecuted under Articles 101, 103, 218 and 219 of the Criminal Code.

Since the 2011 Uprising, some jurisprudence of the Military First Instance Tribunals and Appeal Courts demonstrates a willingness to apply an expansive interpretation of the exception to the statute of limitations in some cases involving gross human rights violations.

The abolition of the limitation period for cases falling within Article 8 of the Transitional Justice Law is to be welcomed, since these crimes concern gross human rights violations. However, it remains unclear the extent to which Article 148(9) of the Constitution extends this to other crimes that do not amount to gross violations or to other cases involving gross human rights violations that are not transferred to the SCC under article 8 of the Transitional Justice Law.

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”.⁴⁵

Additionally, according to Article 14(7) of the ICCPR, in order for the *ne bis in idem* principle to apply, there must have been a final judgment given in the

⁴⁴ Truth and Dignity Commission Annual Report 2015, p. 50.

⁴⁵ Updated Impunity Principles, above note 14, Principle 26(b). See also Principle 22, which states: “States 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”.

criminal proceedings.⁴⁶ However, the prohibition does not apply 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”.⁴⁷ 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.

2.6 Responsibility of superiors and superior orders

a) Superior responsibility

Under Article 32 of the Tunisian Criminal Code, accomplice liability is broadly defined and could include superior law enforcement officials who order, solicit, induce or instigate the commission of a crime. It also extends to superiors who aid, abet or assist the principal perpetrators in enjoying impunity. However, it is not clear if failing to report a subordinate for a criminal offence would be sufficient to fall within Article 32.

There is no specific provision in the Criminal Code setting out the liability of superior law enforcement officials over their subordinates. Furthermore, the law on criminal omissions (Law No. 48-66) applies to all persons and imposes no specific obligations on law enforcement officials to prevent crimes committed by those under their control. Furthermore, the judgments of the military courts brought since the 2011 Uprising present a confused picture.

b) Superior orders

Both Article 42 of the Tunisian Criminal Code and Article 46 of Law No. 82-70 could be construed as granting broad exemption for liability for persons who commit crimes based on an order given by a superior. The only limitations are that the order is from a “competent authority” or, in the case of Tunisia’s Internal Security Forces, is “in the framework of legality”. These provisions have the potential to grant subordinates impunity for gross human rights violations where they claim to be acting on the orders of their superiors.

2.7 The use of military courts

a) Jurisdiction

The jurisdiction of military courts should exclude ordinary crimes, crimes involving human rights violations and crimes under international law. Their jurisdiction should be limited to offences of a military nature committed by military personnel. This section examines the use of military courts in Tunisia to hear cases involving gross human rights violations and the rights of victims in such proceedings.⁴⁸

⁴⁶ *Schweizer v. Uruguay*, Human Rights Committee Communication 66/1980, UN Doc A/38/40 (1982) 117, para 18.2.

⁴⁷ Human Rights Committee, General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32(2007).

⁴⁸ For further information relating to the jurisdiction of Tunisian military courts, the composition, selection and appointment of military court judges, proceedings in trials

The provisions of the Tunisian Code of Military Justice and Law No.82-70 that grant military courts jurisdiction over non-military offences, including gross human rights violations, run counter to international law and standards. In his report on Tunisia, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence recommended that the Tunisian authorities should “ensure that the jurisdiction of military tribunals is limited to military personnel who have committed military offences”.⁴⁹

With regard to the creation of the SCC, according to a SCC judge interviewed by the ICJ, the SCC are meant to be chambers with a specific matter-jurisdiction, sitting within the ordinary justice system as other chambers situated within a Tribunal of First Instance.⁵⁰ 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.

Furthermore, while Article 8 of the 2013 Law listing of specific gross human rights violations is not exhaustive, it omits certain key crimes. This being said the absence of specific definition of the terms “gross violations of human rights” in this 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 (see the earlier discussion in section 3.2.4).

b) Lack of independence

Military courts in Tunisia cannot be considered independent and impartial. Not only does the executive and, in particular, the Minister of Defence, who also sits as President of the Military Judicial Council (MJC),⁵¹ control the recruitment and appointment process of military judges, but the disciplinary process for such persons is entrusted to the MJC, which is also dominated by members of the Ministry of Defence. In addition, military judges remain within the chain of command. Consequently, a military judge’s failure to comply with an order from his superior might, under Tunisian law, be considered to constitute an infringement to the “general disciplinary rules” and lead to disciplinary proceedings.

Furthermore, prosecutors and investigating judges in Tunisian military courts are also members of the military and are subsumed within the military structure.

before military courts, the composition and role of the Military Judicial Council and the competences and independence of military prosecutors and investigating judges see ICJ report, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 13 May 2014, Chapter IV, available at, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

⁴⁹ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mission to Tunisia (11-16 November 2012), UN Doc A/HRC/24/42/Add.1 (2013), para 85(c).

⁵⁰ ICJ interview with a SCC judge, 1 September 2016.

⁵¹ The list of candidates authorized to sit for the examination is established by a commission set up by an order of the Minister of Defence and chaired by the General Prosecutor Director of Military Justice (Law No.2011-70, article 10). The modalities and programme of the examination are also fixed by an order of the Minister of Defence (Law-Decree No.2011-70, Article 11). The composition of the MJC is set out at article 14 of Law No. 2011-70.

They therefore lack the necessary independence and impartiality to conduct investigations of gross human rights violations, as required by international standards.⁵²

The independence of military prosecutors and judges in Tunisia is of particular concern given that high-ranking officials in the Ministry of Defence and in the armed forces, who were in power during the 2011 Uprising when numerous individuals were killed and injured by the armed and security forces, remained in their post during the investigation and prosecution of such offences by the military justice system. The prosecutors and judges mandated to investigate, prosecute and adjudicate the offences were, at the time of the proceedings, thus under the control of the individuals allegedly responsible for the violations.

c) *Victims*

In Tunisia, victims were initially not able to participate in military court proceedings. Even after September 2011, victims have faced numerous obstacles including a lack of transparency, lengthy delays, inadequate investigations, re-traumatization through repeated questioning and, ultimately, the impunity of those responsible.

In addition, although an additional level of appeal before a military appeal court was introduced into the military court system, and limited appeals can be made to the military chamber of the Court of Cassation, these do not meet international standards, which require that judgments and sentences for criminal offences imposed by a military tribunal must be subject to appeal before a higher court.⁵³

It is also unclear whether the SCC jurisdiction would extend to cover civil claims by victims of human rights violations adjudicated by the SCC.

3 Access to effective remedies and reparation for victims of gross human rights violations

3.1 International law and standards on remedies and reparation

Every person who is a victim of a human rights violation, whether amounting to a 'gross' human rights violation or otherwise, has the right to effective remedies and reparation. Broadly speaking, this entails the right of victims to defend their rights, to obtain recognition of a violation(s), to cessation of any continuing violation(s) and to adequate reparation. It requires that rights-holders have equal and effective access to justice mechanisms, including through access to judicial bodies that have the competence to adjudicate and provide binding decisions as to the remedies and reparation to be granted to victims.⁵⁴ It should be recalled that, where appropriate, such as in cases of the unlawful killing of a person, a 'victim' includes "the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".⁵⁵

⁵² Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/20/19 (2012), para 57.

⁵³ ICCPR; Article 14(5). See generally, Report on Chile, Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II.66 Doc.17 (1985), Ch. VIII, para 172; Draft universal Declaration on the Independence of Justice ("*Singhvi Declaration*"), Principle 5(f); and Draft Principles Governing the Administration of Justice Through Military Tribunals (Decaux Principles), UN Doc E/CN.4/2006/58 (2006), Principle 15.

⁵⁴ See, for example: Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 16, paras 3 and 11; and ICJ Practitioners Guide No 2, above note 24, especially chapter III.

⁵⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 16, para 8.

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation recall that adequate, effective and prompt reparation is intended to promote justice by redressing gross human rights violations, requiring reparation to be proportionate to the gravity of the violation(s) and the harm suffered.⁵⁶ Full and effective reparation entails:⁵⁷

- Restitution, aimed at re-establishing, to the extent possible, a victim's situation as it was before the violation was committed;
- Compensation, calling for fair and adequate monetary compensation (including for medical and rehabilitative expenses, pecuniary and non-pecuniary damage resulting from physical and mental harm caused, loss of earnings and earning potential and for lost opportunities such as employment and education);
- Rehabilitation, aimed at enabling the maximum possible self-sufficiency and functioning of the victim, involving restoring previous functions affected by the violation and the acquisition of new skills that may be required as a result of the changed circumstances of the victim resulting from the violation;
- Satisfaction, including through the cessation of any continuing violation(s), justice in the form of the holding to account of the perpetrator(s) of the violation, and truth in the form, amongst other things, of the verification and full and public disclosure of facts, the search, recovery and identification of direct victims and public apology and commemorations; and
- Guarantees of non-repetition, geared towards the combatting of impunity and adoption of measures to prevent the commission of further acts amounting to gross violations of human rights, including through monitoring of State institutions (including civilian oversight of military and security forces), training of law enforcement and other officials, the adoption and dissemination of codes of conduct for public officials, law, policy and institutional reform, the protection of lawyers and human rights defenders representing the interests and rights of victims, and the strengthening of the independence and effectiveness of judicial mechanisms.

3.2 Domestic laws, institutions and practices related to the right to effective remedies and reparation

While out of court reparation initiatives initially focused predominantly on providing compensation to certain categories of victims, pardoning individuals convicted under the previous regime and conducting investigations into human rights violations committed during the uprising, the adoption of the 2013 Transitional Law identified the IVD as the main body tasked with achieving the objectives of this Law, in particular revealing the truth and preserving memory; reparation and rehabilitation for individual and collective victims of human rights violations; accountability (apart from criminal liability); institutional reform; and reconciliation.

This section will however focus on practical and legal obstacles that prevent victims from realizing their right to a judicial remedy and reparation in the specific context of criminal proceedings in Tunisia, as well as other types of judicial proceedings.

⁵⁶ Ibid, para 15.

⁵⁷ See, for example: Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 16, paras 15-23; and ICJ Practitioners Guide No 2, above note 24, especially chapters V, VI and VII.

Under the Tunisian legal system, victims of gross human rights violations, as with other victims of crime, can decide whether to join criminal proceedings and claim compensation before the criminal courts or to pursue a separate civil claim against the alleged perpetrator in the civil courts. In addition, the victim of a gross human rights violation can also bring a claim for compensation before the Administrative Court, which adjudicates cases between individuals and the public administration.

3.3 Right to an effective judicial remedy in the context of criminal proceedings

a) Initiating criminal proceedings

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

However, the lack of independence of the prosecutor frequently prevents an investigation actually being opened when a complaint is filed (see further below, at 3.4.2). Furthermore, where law enforcement officials are responsible for the violations, the individuals involved in receiving, filing and investigating the complaint may be the same individuals, or their colleagues from the same police or National Guard unit. Consequently, filing a complaint does not necessarily lead to the opening of criminal proceedings. In such cases, the remedy available to victims (in the form of criminal proceedings) remains merely theoretical as opposed to providing practical and real access to justice.

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

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

As a result, for example, and following a mission in 2011, the UN Special Rapporteur on torture noted with regret that "there is no clear strategy or timeline for addressing the huge backlog of cases and preserving the evidence of torture and abuse subject to adjudication as a matter of transitional justice. Furthermore, no official or institution seems to be in charge of these cases, nor of informing the public about the status of the complaints".⁵⁸ He also noted the apparent lack of a plan to provide legal assistance to those victims who wished to file complaints.⁵⁹

The issue of initiating criminal procedures gained renewed interest in the context of the creation of the SCC and the question of the transfer of cases by the IVD. 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 involving 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

⁵⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc A/HRC/19/61/Add.1 (2012), para 75.

⁵⁹ Ibid.

forced migration for political reasons transferred by the IVD. Article 42 specifies that the IVD refers to the Office of the Public Prosecutor (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 of the Law 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 procedures 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.

b) The role of civil party

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

Victims, including family members, also lack rights in relation to the conducting of autopsies and medical examinations as no provisions exist to ensure that where the victim has died as a result of the violation, the family is notified immediately upon identification of the body and that a medical or other qualified representative be present at the autopsy as foreseen under international standards.⁶⁰ Furthermore, investigating judges have complete discretion both regarding the appointment of experts and to determine whether an expert should recuse him or herself from a case, with no right of appeal against such a decision. The numerous reports of false autopsies and medical reports in relation to cases involving gross human rights violations demonstrates the need to enhance the rights of victims in this regard.

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

⁶⁰ UN Principles on the Effective Prevention and Investigation of Extra-lgal, Arbitrary and Summary Executions, recommended by ECOSOC resolution 1989/65, para 16.

on equality of arms between parties to a judicial proceeding and the requirement for judges to act without bias.

The ICJ welcomes the fact that victims of human rights violations are able to apply for and receive legal aid. However, it remains concerned about the effectiveness of this system. A recent study highlighted how only a very limited number of individuals within the statistical sample benefited from legal aid, largely due to the fact that many individuals do not know about its existence.⁶¹ In addition, the absence of criteria to determine the insufficiency of income to qualify for legal aid leaves great discretion to the legal aid body and does not guarantee equality of treatment between applicants.

c) *Victim and witness testimony and protection*

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

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

3.4 Other remedies in civil and administrative proceedings

Tunisian law establishes a framework whereby civil liability can be imposed on both the perpetrator of gross human rights violations as well as the State, in the event that such acts were committed by public officials in the exercise of their duty. In addition, administrative claims can be brought in order to annul a decision or to establish the State’s liability regarding an administrative decision.

Although civil claims can be brought by victims regardless of whether or not criminal proceedings have been sought, the requirement to wait until criminal liability has been determined can result in extensive delays for victims, contrary to international standards.

Furthermore, the liability of the State is limited to acts committed by public officials in the exercise of their duty.

3.5 Court ordered reparation

a) *Reparations flowing from criminal proceedings*

Tunisian law permits victims of gross human rights violations to claim reparation from the accused where they have joined criminal proceedings as a civil party

⁶¹ Avocats Sans Frontières and ATL MST/SIDA, *L'état de l'aide légale en Tunisie*, 29 April 2014, pages 85 and following, available at <http://www.asf.be/blog/publications/letat-de-laide-legale-en-tunisie>.

and the suspect is convicted. The Court is, however, restricted to ordering compensation and sanctioning the accused and does not have any explicit authority to order other forms of reparation. Although in some instances the State has been joined as a respondent to criminal proceedings and has been required to pay civil compensation to the victims, the approach of the courts in this regard is not consistent. In cases where the State has not been joined, separate civil or administrative claims would have to be brought against the State, as detailed in the following section. A presumption should be established by law that the State be joined as a respondent to assess its civil liability in all criminal proceedings relating to gross human rights violations where the acts or omissions may be attributable to the State, so as to ensure a consistent approach and to facilitate the ability of victims to claim compensation from the State without having to bring separate civil and administrative proceedings.

The UN Basic Principles on the Right to a Remedy and Reparation state that compensation is payable for “any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”.⁶² As indicated earlier (section 3.3.1), examples of the types of economically assessable damage include:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁶³

The judgments of the First Instance Military Tribunals of Tunis and El Kef in cases brought since the 2011 Uprising reflect some but not all elements of this framework, and, overall, demonstrate an inconsistent approach, which does not meet international standards both with regard to compensation for “moral harm” and in relation to material harm.

Also of concern is the use of the minimum wage as a basis for calculating material harm caused to family members of the deceased. Neither the Military Court of Tunis nor El Kef explained why this figure was appropriate as opposed to considering the actual and potential earnings of the deceased. In addition, the basis on which compensation was awarded is not clearly defined and does not allow for the full range of harm to be compensated for. For example, lost opportunities and the costs of medical or other services were not considered, while mental harm was not assessed in any meaningful way.

b) Reparation in civil and administrative proceedings

While criminal prosecution is an important form of reparation for victims of gross human rights violations, the right to other forms of reparation should not be dependent on whether or not the perpetrator has been prosecuted through criminal proceedings. This has been affirmed by the Committee against Torture and the Committee on Enforced Disappearances.⁶⁴ The Committee against Torture has also recognized that: “Civil liability should be available independently

⁶² Basic Principles on the Right to a Remedy and Reparation, above note 16, Principle 20. See also, Committee against Torture, General Comment No 3: Implementation of article 14 by States parties, UN Doc CAT/C/GC/3 (2012), para 10.

⁶³ Basic Principles on the Right to a Remedy and Reparation, above note 16, Principle 20. See also Committee against Torture, General Comment No 3, *ibid*, para 10.

⁶⁴ Committee against Torture, General Comment No 3, above note 62, para.26; and Committee on Enforced Disappearances, Concluding Observations: Spain, UN Doc CED/C/ESP/CO/1 (2013), para 30.

of criminal proceedings and the necessary legislation and institutions for such purpose should be in place".⁶⁵

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".⁶⁶ In particular, Tunisian law does not clearly enough provide that the assessment take 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.⁶⁷

In terms of the ability to obtain other forms of reparation, the Committee against Torture, in relation to Tunisia, has affirmed: "article 14 of the Convention not only recognizes the right to fair and adequate compensation but also requires States parties to ensure that the victim of an act of torture obtains redress. The Committee considers that redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case".⁶⁸ While administrative proceedings can bring an end to a violation through annulment proceedings, other forms of reparation are not explicitly provided for through civil and administrative proceedings.

4 Independence and accountability of justice actors

4.1 The role of justice actors and institutions in the pursuit of redress and accountability

The equal administration of justice for all without fear or favour is essential to the ability of a State to discharge its obligations to hold perpetrators of gross human rights violations to account and to provide effective remedies and reparation to victims.⁶⁹ In turn, the equal administration of justice relies on several factors, including:

- The operation of independent judicial mechanisms comprised of judges whose independence is protected from interference by the executive branch or third parties (including, for example, as a result of dismissal or disciplinary action initiated on the basis of judicial decisions that are unfavourable to the executive, or other forms of interference or intimidation, or threats from police, security forces or private actors);
- The impartial adjudication by judges of cases, which may be negatively

⁶⁵ Committee against Torture, General Comment No 3, above note 62, para 26.

⁶⁶ Basic Principles on the Right to a Remedy and Reparation, above note 16, Principle 20. See also Committee against Torture, General comment No 3, above note 62, para 10.

⁶⁷ Basic Principles on the Right to a Remedy and Reparation, above note 16, Principle 20. See also Committee against Torture, General comment No 3, above note 62, para 10.

⁶⁸ *Saadia Ali v. Tunisia*, Committee against Torture Communication 291/2006, UN Doc CAT/C/41/D/291/2006 (2008), para 15.8. For example, Principle 9 of the Basic Principles of Justice for Victims of Crime, adopted under General Assembly resolution 40/34 (1985), recommend that governments "review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions". See also Committee on Enforced Disappearances, Concluding Observations: France, UN Doc CED/C/FRA/CO/1 (2013); Committee on Enforced Disappearances, Concluding Observations: Spain, UN Doc CED/C/ESP/CO/1 (2013), paras 29 and 30.

⁶⁹ See, for example: Practitioners Guide No 7, above note 17, pp. 318-325; and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 16, para 12.

- influenced, for example, by appointment processes for judges, the internal allocation of cases and/or corruption;
- The accountability of judges and prosecutors, including for corruption or lack of adherence with fair trial standards;
 - The competence of judges and prosecutors, for example including as a result of adequate training and knowledge of international law and standards, particularly concerning obstacles to redress accountability and the available means to overcome such challenges;
 - The knowledge and skills of lawyers and human rights defenders that act to pursue accountability or redress for victims; and
 - The ability of such lawyers and other representatives to act free from external interference, undue influence or persecution.

4.2 The role of the public prosecutor and prosecutorial discretion

Prior to the 2011 Uprising, the Tunisian legal framework established a system where the OPP was subordinated to the executive. This undermined the independence and impartiality of prosecutors whose career progression depended on loyalty to the regime. Provisions in the 2014 Constitution that place oversight of prosecutors' selection and careers in the hands of the High Judicial Council and require prosecutors to act with impartiality are an improvement. However, the OPP would be best placed to fulfil its role if it were also strictly separated from judicial functions, in accordance with Article 10 of the UN Guidelines on the Role of Prosecutors and Article F(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Hierarchical control of the prosecution service in the hands of the executive remains, as does the Minister of Justice's ability to direct prosecutors and to issue instructions to prosecutors. Although international standards do not explicitly require the prosecution service to be institutionally independent from the executive, it is imperative that prosecutors can carry out their functions in an independent and impartial manner.

The almost total absence of investigations and prosecutions of cases of gross violations of human rights committed by law enforcement officers in Tunisia, despite ample documentation, supports contentions that prosecutors lack independence and impartiality.⁷⁰ When coupled with the broad discretion granted to prosecutors to decide whether to pursue or dismiss a complaint, this lack of independence has resulted in numerous complaints of gross human rights violations being dismissed by the OPP without an investigation.

The duty of prosecutors to act with objectivity and in the public interest, including by prosecuting cases against public officials and in particular gross human rights violations, is not explicitly reflected in Tunisian law or in domestic prosecutorial guidelines. Since the 2011 Uprising, there does not appear to have been a shift to address the failings of the past and to develop an appropriate policy focusing on gross human rights violations. Following a visit to Tunisia in November 2012, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stated: "Nothing in the visit persuaded the Special Rapporteur that a comprehensive prosecutorial strategy to deal with alleged cases of gross human rights violations had been set in place."⁷¹

Prosecutors in Tunisia are not explicitly tasked by national laws or standards with ensuring due process and upholding the rights of defence as well as the rights of victims. For example, there is no express obligation in Tunisian law for prosecutors to consult with victims of human rights violations before dismissing

⁷⁰ See also Human Rights Committee, Concluding Observations: Tunisia, UN Doc CCPR/C/TUN/CO/5 (2008), para 11.

⁷¹ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/HRC/24/42/Add.1 (2013), para 45.

proceedings or to inform victims of their rights. Furthermore, the general right of parties to receive information from the reporting judge regarding criminal proceedings is largely ineffective. In practice, the rights of both suspects and victims are frequently ignored.

Decisions of the prosecutor to dismiss a complaint cannot be challenged by way of judicial review. Although victims can request that the prosecutor opens an investigation or can bring a prosecution directly against the accused, this has not provided an effective alternative for victims of gross human rights violations. As detailed above at section 3.3.3(a), this is due in part to the fact that the victim must from the outset bear the risk of indeterminate and possibly significant costs of such proceedings.

4.3 The investigating judge and the direction of the investigation

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

As noted by the UN Human Rights Committee in 2008, investigations into gross human rights violations in Tunisia can take an unreasonable amount of time.⁷² This has been confirmed since the 2011 Uprising by the Special Rapporteur on torture who stated in his 2012 report that he had "heard credible testimonies about a pattern of a lack of timely and adequate investigation of torture allegations by prosecutors or investigating judges".⁷³

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

Furthermore, although the investigating judge has the relevant powers to conduct searches, seize evidence and question witnesses, in practice the Ministry of the Interior has, in cases involving gross human rights violations, during the 2011 Uprising, refused to cooperate with orders of the investigating judge and to ensure access to evidence held by the Ministry.

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

Another concern is the lack of sufficient resources to ensure effective investigations into all gross human rights violations. As the Special Rapporteur on torture has noted: "The judiciary and the Prosecutor's office currently lack the capacity to process the volume of cases of torture and ill-treatment".⁷⁴

⁷² Human Rights Committee, Concluding Observations: Tunisia, UN Doc CCPR/C/TUN/CO/5 (2008), para 11.

⁷³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Tunisia, UN Doc A/HRC/19/61/Add.1 (2012), para 29.

⁷⁴ Report of the Special Rapporteur on torture, *ibid*, para 75.

4.4 Specific status for SCC judges

There has been some discussion on whether SCC judges should have conditions of tenure distinct from other judges and whether nominations to the SCC would involve additional remuneration or other special benefits. These special conditions are yet to be decided by the Ministry of Justice.⁷⁵ Furthermore, the IVD has called for these judicial appointments to be “irremovable” and that the appointment be done outside of the general appointment process.⁷⁶

While international standards do not provide for a specific status for judges adjudicating cases of gross human rights violations, the ICJ has emphasized that the well-established guarantees and safeguards should be scrupulously applied to ensure that SCC judges 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”.⁷⁷ The provisional character of an appointment can greatly affect the security of tenure.

4.5 The role of the public prosecutor and investigating judges in relation to proceedings before the SCC

Article 8 of the 2013 Law 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 cases of gross human rights violations 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 approach, the SCC would adopt the findings of the IVD and move directly to the trial phase of proceedings as an exceptional procedure under the “transitional justice” framework.⁷⁸ 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.⁷⁹

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

⁷⁵ Interview with a member of the IPJJ, 7 August 2016.

⁷⁶ IVD Annual Report meeting with NGOs, 14 July 2016.

⁷⁷ Report on the Situation of Human Rights in Venezuela, OAS Doc OEA/Ser.L/V/II.118 Doc.4 Rev.2 (2003), para 159.

⁷⁸ ICJ interview with a member of the IPJJ, 7 August 2016.

⁷⁹ ICJ interview with a SCC judge, 1 September 2016.

proceedings,⁸⁰ 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.

⁸⁰ Truth and Dignity Commission Annual Report 2015, p. 18.

ANNEX: GLOBAL ACCOUNTABILITY BASELINE STUDIES

The aim of this report is to provide a baseline assessment of the situation in Tunisia pertaining to the accountability of perpetrators of gross human rights violations and the access to effective remedies and reparation of victims of such violations; alongside an assessment of the independence and accountability of judges and lawyers and the ability of justice mechanisms and justice actors to provide for accountability and redress. The report is part of the ICJ's Global Redress and Accountability Initiative, currently focused on seven countries (Cambodia, Mozambique, Myanmar, Nepal, Tajikistan, Tunisia and Venezuela) with the aim to combat impunity and promote redress for gross human rights violations. It concentrates on the transformative role of the law, justice mechanisms and justice actors, seeking to achieve greater adherence of national legal and institutional frameworks with international law and standards so as to allow for effective redress and accountability; more independent justice mechanisms capable of dealing with challenges of impunity and access to redress; and judges, lawyers, human rights defenders, victims and their representatives that are better equipped to demand and deliver truth, justice and reparation.

In all regions of the world, perpetrators of gross human rights violations enjoy impunity while victims, especially the most vulnerable and marginalized, remain without effective remedies and reparation. Governments of countries in transition and/or experiencing a wider rule of law crisis often seek to provide impunity for perpetrators of gross violations of human rights, or make no effort to hold them to account, or misuse accountability mechanisms to provide arbitrary, politically partial justice. Yet international law requires perpetrators to be held accountable and victims to be provided with effective remedies and reparation, including truth and guarantees of non-recurrence. This is reinforced by the 2030 Sustainable Development Agenda, which recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice, are based on the rule of law and respect for human rights, and provide for accountability.

Impunity and lack of redress dehumanizes victims and acts as an impediment to the cementing of democratic values and the rule of law. Lack of accountability and claims for justice dominate national debates, frequently leading to a paralysis or reduced functioning of the institutions of the State and detracting from the pursuit of other rule of law and development initiatives. Impunity threatens a nascent democracy by rendering its constitution hollow, weakening its judiciary and damaging the political credibility of its executive. Public institutions often act in ways that bring them into disrepute and undermine the public confidence in them that is required for sustainable transition: through the legislature enacting laws providing for impunity; through law enforcement and the judiciary acting on a selective basis or without independence; and/or through the executive ignoring rule of law based judgments by higher courts. A failure to guarantee redress and accountability has too often also resulted in former structures of power, to the extent that they enjoy impunity, transforming into criminal and hostile elements that may perpetuate violence and conflict.

Methodology

This assessment is based on both existing ICJ publications and on-going work and monitoring of the developments in Tunisia with regards to redress and accountability for gross human rights violations as well as related transitional justice mechanisms and processes. Given the extensive work done on those topics in Tunisia by the ICJ, this baseline is primarily based on recently published reports and briefs as well as information gathered through partners in the context of the research conducted for those publications and as part of the on-going

monitoring of the human rights situation on the ground.

The ICJ published in May 2016 a detailed analysis of legal, policy and practical weaknesses and flaws pertaining to the Tunisian justice system that explain the current climate of impunity in this country and undermine victims' right to effective remedies and reparation.⁸¹ The ICJ also conducted an assessment of the Specialized Criminal Chambers, a key mechanism currently being established as part of the transitional justice framework in Tunisia.⁸² Additionally, the ICJ published a memorandum on the obstacles for women's access to justice,⁸³ as well as two position papers analysing draft laws regarding two key institutions for the independence of the judiciary and the right to an effective remedy, namely the High Judiciary Council (HJC)⁸⁴ and the Constitutional Court.⁸⁵

The methodology used for those publications is similar to that used for a baseline assessment. It consisted of an evaluation of the domestic legal framework and actual practice in Tunisia against international law and standards. This methodology combines complementary sources and tools. It includes desk review research, relying on international legal instruments, reports and jurisprudence of the main UN human rights mechanisms, as well as regional human rights courts, to clarify the meaning and scope of the right to remedy and reparation or to provide information on the extent to which the Tunisian justice system complies with international norms. It also takes into account relevant reports and documents published by international and local NGOs as well as other organisations. Furthermore, the methodology also consisted of field research and high-level missions to gather qualitative data on the way legislation and policies were interpreted and applied in practice through interviews and meetings with relevant judicial actors such as judges, prosecutors and lawyers, as well as victims and victims' associations and civil society organisations. The publication on women's access to justice is also based on focus group discussions with victims and a seminar involving key stakeholders. Finally, these publications build on earlier reports and papers published by the ICJ, including the ICJ's reports, "Enhancing the rule of law and guaranteeing human rights in the Constitution" and "The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future".⁸⁶

⁸¹ 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>.

⁸² ICJ, *Tunisia: The Specialized Criminal Chambers in Light of International Standards*, November 2016, available at: <https://www.icj.org/wp-content/uploads/2016/11/Tunisia-Memo-on-SCC-Advocacy-Analysis-Brief-2016-ENG.pdf>.

⁸³ ICJ, *Obstacles to Access to Justice for Women in Tunisia in Light of International Law and Standards*, June 2016, available at: <https://www.icj.org/wp-content/uploads/2016/06/Tunisia-Memo-WA2J-Advocacy-Analysis-brief-2016-ENG.pdf>.

⁸⁴ ICJ, *Tunisia – The new draft law on the High Judiciary Council in light of international law and standards*, September 2015, available at: <https://www.icj.org/wp-content/uploads/2015/09/Tunisia-Final-HJC-Draft-Law-Advocacy-Position-Paper-2015-ENG.pdf>. See also ICJ's position on the latest amendments to the HJC adopted law of 2016, April 2017, available at: <https://www.icj.org/tunisia-amendments-to-the-high-judicial-council-law-would-weaken-the-independence-and-authority-of-the-judiciary>.

⁸⁵ ICJ, *The Tunisian Draft Law on the Constitutional Court in light of international law and standards*, November 2015, available at: <https://www.icj.org/wp-content/uploads/2015/11/Tunisia-Draft-Law-Const-Court-Advocacy-Analysis-Brief-2015-ENG.pdf>.

⁸⁶ ICJ reports, *Enhancing the rule of law and guaranteeing human rights in the Constitution*, 1 February 2013, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/TUNISIA-CONSTITUTION-REPORT-FINAL.pdf>; and *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, May 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

Partners and key stakeholders

The ICJ has been engaged in the MENA region for decades, promoting the rule of law to safeguard and advance civil, cultural, economic, political and social rights; advocating for the independence of judges, lawyers and prosecutors; and ensuring the effective implementation of international human rights law and standards at the national level.

Throughout its interventions, the ICJ has built a strong working relationship with local partners including the Association of Tunisian Judges (Association des Magistrats Tunisiens - AMT), the Observatoire Tunisien pour l'Indépendance de la Magistrature (OTIM), the Tunisian Organisation against Torture (Organisation Tunisienne Contre la Torture - OTCT) and the Tunisian Organisation for Democratic Women (Association Tunisienne des Femmes Démocrates - ATFD) and other NGOs.

While the discussions over accountability and redress for victims remain focused on the work of the Truth and Dignity Commission ("*Instance Vérité et Dignité*", IVD), current debates among justice sector actors, NGOs, UN agencies and officials also revolve around the creation and operation of the Specialized Criminal Chambers (SCC). Indeed, this mechanism has the potential to play a critical role in providing accountability of alleged perpetrators of gross human rights violations. However, conflicting approaches and interpretations exist as to how the SCC would work in relation to the other transitional justice mechanisms, notably the IVD, and the rest of the ordinary justice system as well as the military courts.

There is a need not only to ensure that the SCC can deliver on justice and accountability, but to guarantee that they serve as an opportunity to raise awareness among justice practitioners, decision-makers and the general population in Tunisia on the need to reform the legal accountability frameworks and mechanisms in full respect of international standards; improve the knowledge of Tunisian judges, prosecutors, lawyers and human rights defenders of relevant international law and standards and enhance their capacity for investigating and prosecuting international crimes; and enhance the capacity of Tunisian lawyers and HRDs to litigate cases of international crimes on behalf of victims before available national, regional and international accountability mechanisms.

To that end, partnership with judges associations and local NGOs will be key to shape the functioning of the SCC. Target groups would include SCC judges, members of the HJC, the Constitutional Court, the IVD, public authorities, in particular the Ministry of Justice, as well as local and international organisations.

Over the past four years, the ICJ and its partners jointly organised workshops, capacity building training and conferences tackling different topics on the right to remedy and reparation for victims of human rights violations, the role of the judiciary in times of crisis, the representation of women in the judiciary and the prevention of torture and other ill-treatment. For example, the AMT and the ICJ jointly implemented a project on the independence of the judiciary in Tunisia from 2014 to 2016. Pursuant to their objectives to ensure an independent judiciary, the ICJ and the AMT in 2017 closely monitored the establishment of the HJC and will continue to do so to ensure the proper functioning of this institution.

ICJ's partnership with the ATFD was also vital to organise focus groups with women victims of gender-based violence to learn about the obstacles they faced when trying to access justice and to conduct a seminar involving practitioners from different backgrounds to discuss lessons learned and best practices reforming the laws in subject.

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