

Tunisia: Procedures of the Specialized Criminal Chambers in Light of International Standards

July 2017

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Following the 2010 uprising that toppled the regime of Ben Ali, the Tunisian transitional authorities undertook a wide range of legal and institutional reforms to address the legacy of human rights violations committed before and during the uprising.

In spite of the enactment of the 2013 Transitional Justice Law (the 2013 Law)¹ establishing the Truth and Dignity Commission ("*Instance Vérité et Dignité*", IVD) and providing for the creation of Specialized Criminal Chambers (SCC) through decrees, such initiatives have yet to produce full accountability for perpetrators and justice for victims.

While the SCC were formally set up pursuant to Decree No. 2014-2887 of 8 August 2014 (the 2014 Decree)² and a number of judges have been nominated to sit within those chambers, to date the procedures to be followed by the SCC and related institutional arrangements suffer from numerous gaps and a significant lack of clarity.

Particularly since the SCC has a criminal character as a mechanism envisaged under the Chapter III on accountability of the 2013 Law and as confirmed by the 2014 Decree, clear procedures are not only a prerequisite for the proceedings before them to be effective in practice, clear procedures are also essential for the respect of Tunisia's international obligations, including the duty to investigate and prosecute human rights violations, the right of victims to an effective remedy and the right of the accused to a fair trial. For example article 9 of the International Covenant for Civil and Political Rights (ICCPR) provides that deprivation of liberty is permitted only "on such grounds and in accordance with such procedure as are established by law" and article 14 provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Although the creation of the SCC is foreseen in the 2013 Law (Article 8), their procedures remain unclear. The Tunisian "transitional justice" framework, in particular the 2013 Law, is seen by many justice sector actors and other stakeholders as setting up a special regime, departing from the existing criminal justice system for the operation of the SCC.³ Those who hold this perspective base it on both the institutional arrangements provided for under the 2013 Law, which appear to give a prevailing role to the IVD over the Office of the Public Prosecutor (OPP), and on an interpretation of the Law's other provisions, such as with regard to the IVD having the monopoly of transferring cases to the SCC. However, if the 2013 Law and implementing Decrees are seen as a totally separate regime, then it is internally lacking the comprehensive and detailed procedures that would be necessary to ensure the effective operation of the SCC, analogous to those that exist under the Code of Criminal Procedure (CCP) for the ordinary justice system.

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

² Decree No. 2014-2887 of 8 August 2014. See Decree No. 2014-4555 of 29 December 2014 modifying Decree No. 2014-2887 of 8 August 2014, on the creation of specialized criminal chambers in the field of transitional justice within the tribunals of first instance in the Courts of Appeals of Tunis, Gafsa, Gabés, Sousse, Le Kef, Bizerte, Kasserine and Sidi Bouzid further amended by Decree No. 2016-1382 of 19 December 2016 to include 4 additional chambers in Mednine, Monastir, Napeul and Kairouan.

³ ICJ interviews with Tunisian judges, 16 June 2017. See also, Pourzand Pejman, *L'évaluation des acteurs de la chaîne pénale engagés dans le cadre de la justice transitionnelle en Tunisie, eu égard à leur capacité de prendre en charge les dossiers d'atteintes graves aux droits de l'homme: analyse critique et recommandations*, published for the purpose of the UNDP and OHCHR Training Programme for the SCC judges, July 2015, p. 17.

Indeed, the incomplete institutional architecture set up by the 2013 Law in relation to the criminal proceedings before the SCC leaves several procedural questions unanswered. In principle those chambers are only to perform the trial phase of the proceedings. In the absence of any related specialised criminal justice institutions, such as specialised judicial police, prosecutors or investigating judges, it is assumed that current institutions operating within the ordinary criminal justice system as well as related procedures, notably the CCP, are applicable. Indeed the 2016 amended version of the 2014 Decree provides for the SCC to be situated within the Tribunals of First Instance (TFI) located in thirteen Courts of Appeal. The 2013 Law, 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 (the 2014 Law) and the 2014 Decree all refer one way or another to the various laws and institutions governing the ordinary justice system. The interplay between the "transitional justice" framework and the existing ordinary procedural law and judicial institutions is however not clearly addressed.

Finally relying on existing institutions and procedures raises its own set of problems, notably in light of persistent flaws and weaknesses in the Tunisian justice system more generally as identified by the International Commission of Jurists (ICJ) in previous publications.⁴

The ICJ therefore believes that while the establishment of specialised instruments and mechanisms could contribute to ensuring accountability and justice in the context of the transition in Tunisia, they must complement, and not be a substitute for, the ordinary justice system. The ICJ is also of the view that for the SCC's procedures to be effective, they must comply with international law and standards, in particular Tunisia's obligation to effectively investigate and prosecute serious human rights violations, the right of victims to an effective remedy and the guarantees for a fair trial.

In this memorandum, the ICJ specifically addresses procedural matters pertaining to access to the SCC, the investigation and prosecution phases, and fair trial guarantees taking into account the specialised "transitional justice" framework and existing criminal procedures and institutions. The SCC must be accessible to victims to ensure their right to an effective judicial remedy. Furthermore, the investigation and prosecution phases must also comply with Tunisia's obligation to investigate and prosecute perpetrators of such violations. In that regard the procedural and institutional arrangements, in particular under the 2013 Law, raise serious concerns as to consistency with international standards. The memorandum also looks into the extent to which those current gaps in the "transitional justice" framework or in existing criminal procedures fall short of international fair trial rights and guarantees. It offers a set of recommendations to provide guidance on how to resolve those procedural matters, through amendments to the 2013 Law and reforms of other existing procedures, in line with international law and standards. This is critical if the SCC are to deliver on their potential to contribute to addressing persistent impunity, realizing victims' rights, and reforming the criminal justice system as a whole in Tunisia. This memorandum is part of a series of ICJ publications that aim to address the substantive and procedural legal challenges that might impede the SCC work and ability to adequately address the legacy of serious human rights violations in Tunisia.⁵

⁴ See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, available at <http://icj2.wpengine.com/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf>, (last accessed 30 May 2017).

⁵ 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>

I. Access to the SCC as a judicial remedy

In general, anyone who claims to be a victim of a human rights violation should have access to an effective remedy and for certain kinds of violations, including those of a criminal character under international or national law, this includes specifically the right to have his or her claim considered by a competent judicial authority. While the SCC mechanism on its face represents a new form of judicial remedy in Tunisia, the ICJ is concerned that the “transitional justice” framework and existing criminal procedures in fact both undermine the right to judicial remedy in violation of international law and standards.

a) Limitations to victims’ role in instituting proceedings under domestic law

Under article 8 of the 2013 Law, the SCC shall 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 2013 Law.”⁶ Despite the fact that those chambers are located within a number of existing courts, several provisions contained in the “transitional justice” framework provide for *ad hoc* procedures giving a leading role to the IVD with regard to how cases are instituted before the SCC.

First article 42 of the 2013 Law specifies that the IVD refers to the OPP “cases where gross human rights violations are proven”. The IVD is tasked under the 2013 Law to receive complaints for a wide range of past human rights violations. As of 15 June 2016, the deadline for victims to submit files, the IVD had received over 60000 cases. Chapter III of the IVD Procedures Guide of January 2016 (IVD Procedures Guide) outlines the procedures that the IVD shall follow to receive victims’ complaints.⁷ Article 3 of the 2014 Law further provides that when cases are referred by the IVD to the OPP, the latter “automatically” transfers such cases to the SCC.

High-ranking judges interviewed by the ICJ interpret those provisions, in particular article 42 and article 3, as granting the IVD exclusive power to transfer cases to the SCC, excluding the possibility for victims to lodge a complaint based on the CCP.⁸ Justice sector actors argue that the “transitional justice” framework, when it comes to initiating criminal proceedings, displaces existing procedures. Indeed under the current CCP “any offence gives rise to criminal proceedings, aimed at applying penalties, and to a civil action if harm was caused.” Where human rights violations are codified in the Criminal Code, they are covered by article 1 of the CCP and are dealt with in the same way as other crimes.⁹ Tunisian criminal proceedings can be initiated in three ways: by the public prosecutor on their own motion, also known as *proprio motu*;¹⁰ by the public prosecutor on the instruction of the Minister of Justice;¹¹ or, where the prosecutor decides not to proceed with an investigation, by the victim of a crime.¹² However, there is no provision in the CCP allowing the victim to challenge by way of judicial review a decision of the prosecutor to dismiss a complaint.

⁷ IVD, Procedures Guide, issued based on IVD’s decision of 19 September 2014 and published in January 2016, available at:

<http://www.ivd.tn/ar/wp-content/uploads/2015/12/%D8%AF%D9%84%D9%8A%D9%84-%D8%A7%D9%84%D8%A5%D8%AC%D8%B1%D8%A7%D8%A1%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%A7%D9%85%D9%91.pdf> (last accessed 29 May 2017). See also article 6 of the IVD Investigation Committee Procedures Guide (hereinafter IC Procedures Guide), issued on the basis of IVD’s Decision No. 6 of 20 January 2016, available at: <https://www.docdroid.net/gShNixt/-pdf.html>, (last accessed 29 May 2017).

⁸ ICJ interviews with Tunisian judges, 16 June 2017.

⁹ Tunisian Code of Criminal Procedure, article 1.

¹⁰ Tunisian Code of Criminal Procedure, articles 2 and 20.

¹¹ Tunisian Code of Criminal Procedure, articles 21 and 23 and Law No. 87-80 of 29 December 1987, article 1.

¹² Tunisian Code of Criminal Procedure, articles 2 and 36.

With regard to civil claims, under the Tunisian legal system, victims of gross human rights violations can pursue a separate civil claim and civil liability can be imposed on both the perpetrator of gross human rights violations and on the State, where the acts were committed by public officials in the exercise of their duty.¹³ It can be exercised at the same time as the criminal case or separately before the civil courts. If a separate civil claim is brought, the civil court must wait for the decision in any criminal case before it adjudicates the case. 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.

The deadline to submit complaints to the IVD is now closed. It remains uncertain whether the SCC will have exclusive jurisdiction for cases of past gross human rights violations to the exclusion of other civilian criminal courts and military courts, but this seems probable since the 2014 Law also allocated all cases of gross human rights violations committed during the 2010 Uprising to the SCC, including presumably cases currently pending before military courts. Consequently, those provisions and their interpretation described to the ICJ, would in practical terms make the IVD the only avenue for criminal justice for violations within the jurisdiction of the SCC. The civil and administrative courts would arguably retain jurisdiction over the non-criminal aspects of such cases.

Furthermore given the high number of complaints received by the IVD and the limited capacity of the SCC, the ICJ understands that the IVD is currently developing criteria for the selection of cases from among the files it has received, to be transferred to the SCC. This may further impact access to those Chambers.

As such, the SCC jurisdiction *ratione materiae* includes any gross human rights violations as defined by international conventions ratified by Tunisia and by the 2013 Law. While there is no reference in the 2013 Law to a limitation *ratione temporis* to the SCC jurisdiction, the prevailing view of the IVD having an exclusive power to refer cases to the SCC would result in applying the same period as the one covered by the IVD mandate, namely from 1 July 1955 to 31 December 2013 (article 17).

Article 3 of the 2013 Law provides for a definition of gross human rights violations for the purpose of the 2013 Law, referring to the gravity or the "organized" nature of the violations, as well as to the quality of the perpetrators, be they "organs of the State", or "groups or individuals who acted on its behalf or under its protection, even if they did not possess the quality or the authority to act". In addition, pursuant to article 8 of the 2013 Law, gross human rights violations falling within the jurisdiction of the SCC include, but are not limited to, "murder, rape and other forms of sexual violence, torture, enforced disappearances, and death penalty without fair trial guarantees". This provision also includes, albeit not as examples of gross human rights violations, cases referred to the SCC by the IVD regarding "election fraud, financial corruption, misappropriation of public funds, and the coercion to forced migration for political reasons".¹⁴

Article 53 of the IVD Procedures Guide gives the authority to the IVD to receive complaints and decide whether to close a file if the allegations against officials do not qualify as gross human rights violations as defined by the 2013 Law. This provision also provides the IVD with the power to decide to refer cases to the SCC when they amount to such violations. IVD's decisions to close a case can be challenged through specific procedures under the IVD Investigation Committee Procedures Guide (IC

¹³ Tunisian Code of Criminal Procedure, article 7. The various aspects and types of civil liability are governed by articles 82-85 of the Code of Obligations and Contracts. In addition article 49 of the Law No. 82-70 on the Internal Security Forces (ISF) explicitly recognises State liability for the acts of employees of the ISF.

¹⁴ Law No. 53-2013 of 24 December 2013, article 8, respectively paras. 2 and 3.

Procedures Guide).¹⁵ Article 54 of the IVD Procedure Guide also provides that when the Council of the IVD decides to close a case, every person involved in the investigation can ask for a certificate of closure of file.

b) Analysis under international standards

In addition to the Universal Declaration of Human Rights (UDHR)¹⁶, numerous international and regional treaties to which Tunisia is a party specifically recognise the right to a remedy.¹⁷

While the SCC constitute a judicial remedy having jurisdiction over gross human rights violations, the limitations and gaps contained in the 2013 Law and its associated framework as well as the way it is being interpreted might be inconsistent with international standards, besides being also potentially incompatible with other provisions of the "transitional justice" laws in Tunisia.¹⁸ Indeed if the SCC are ultimately treated by Tunisian authorities as the exclusive venue for judicial remedies for the violations in question, and the provisions of the CCP are ultimately confirmed to be inapplicable to SCC proceedings, at least in those aspects where the "transitional justice" framework does actually set out procedures, albeit incomplete ones, these would then unduly limit access to the SCC for victims in violation of their right to a judicial remedy.

First, the exclusive power given to the IVD to transfer cases to the SCC restricts the ability of victims to seek justice for the violations, as (assuming the CCP is considered to be inapplicable to such violations) it would remove the legal standing the victims otherwise would have under the CCP. The United Nations *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* ("UN Impunity Principles") make clear that "[a]lthough the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures."¹⁹

Furthermore, under international law, States must ensure that "access to justice and to mechanisms for seeking and obtaining redress are readily available and that positive measures ensure that redress is equally accessible to all persons".²⁰ Cases of

¹⁵ The Investigation Committee's decisions of closing preliminary investigations and investigations of complaints is to be reasoned and eventually discussed before the IVD. It is the IVD's obligation to inform victims of the decisions (IC Procedure Guide, article 12). The IC Procedures Guide also allows the victims to challenge the IVD's decisions to close preliminary investigations and investigations into a complaint within 15 days from receiving the decision and the deadline is extended to another 15 days if the concerned individual resides outside Tunisia. After 45 days, no challenge is allowed (article 28). The challenge shall be examined the investigation committee of the IVD sitting in a different composition (article 30) or the legal committee if the appeal was with regards to investigations that are not preliminary (article 45).

¹⁶ Universal Declaration of Human Rights, (UDHR), article 8.

¹⁷ See for example the International Covenant on Civil and Political Rights (ICCPR), article 2(3); the International Convention on the Elimination of all forms of Racial Discrimination (CERD), article 6; the Convention against Torture (CAT), articles 13 and 14; the the Convention on the Rights of the Child (CRC), article 39; the International Convention for the Protection of All Persons from Enforced Disappearances (ICPED), articles 8(2), 17(2)(f), 20(2) and 24; and the African Charter on Human and Peoples' Rights (ACHPR), article 7(1)(a).

¹⁸ Not only is article 42 of the 2013 Law part of the section defining the functions of the IVD, not those of the SCC, but article 3 of the 2014 Law appears to describe cases referred to the SCC by the IVD as one option among others by providing specific procedures for such transfers.

¹⁹ Updated Set of principles for the protection and promotion of human rights through action to combat impunity ("UN Impunity Principles"), UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 19.

²⁰ Committee against Torture, General Comment No.3: Implementation of article 14 by States parties, CAT/C/GC/3, 16 November 2012, (hereinafter Committee against Torture, General Comment No.3, para.32; Human Rights Committee (HRC), General Comment No. 31 on the

certain “gross” or “particularly serious” human rights violations, such as torture, require “an effective judicial remedy”²¹. If the only venue for cases regarding the violations is the SCC, and the only route to the SCC is to have filed a complaint before the IVD prior to the already-expired deadline, victims who have not filed a complaint by the deadline would in effect be left with no access to a judicial remedy. The situation would be similar to or constitute a *de facto* limitation period that would be inconsistent with international standards.²²

It is also unclear whether ordinary civil and administrative courts would retain jurisdiction over civil claims for gross human rights violations under the CCP and the Code of Obligations and Contracts besides the SCC criminal judicial remedy. As recognized by the Committee against Torture, “Civil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place”.²³

The ICJ welcomes that in principle the definition of gross human rights violations used to define the scope of the SCC jurisdiction *ratione materiae* reflects many of the aspects of such violations under international standards, taking into account the gravity, including the number of victims, and the frequency of the offences, as well as the link between the perpetrator and the State authorities. However, depending on the interpretation and application of the SCC jurisdiction the ICJ is concerned that gaps could arise. An individual act, by its character, can amount to a gross human rights violation, without having to be systematic: examples include acts of enforced disappearance or torture. If the IVD decided not to transfer a case involving an individual act of this character, on the basis that it was isolated and not deemed committed in an “organised” manner, it should logically mean that ordinary criminal and civil courts could adjudicate this case on the reasoning that their jurisdiction was not excluded by the 2013 Law. If however the SCC is ultimately considered an exclusive venue for such acts due to their nature, excluding civil claims, this could lead to the victim being denied access to a judicial remedy, in breach of international standards. Furthermore, if a victim had pursued the IVD-SCC route only to be told ultimately that the SCC has not jurisdiction and he or she must return to the ordinary civil or criminal courts, the uncertainty will have added undue delay inconsistent with international standards.²⁴ As it stands this lack of clarity can result in restrictive interpretations denying or delaying an effective judicial remedy for victims.

In addition the ICJ welcomes the existence of proceedings to challenge the decision by the IVD to close a case, including when based on the ground that it does not amount to a gross human rights violation. The ICJ considers that a decision by the IVD not to transfer a case should be treated as a “closure” giving rise to the right to challenge and review the decision. However, it is possible that domestic authorities will give a restricted interpretation to the provisions for the review process and the related procedure to challenge IVD’s decisions under the IC Procedure Guide, allowing victims to challenge and receive review only to a formal decision to close a case, not

Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, (hereinafter HRC, General Comment No.31), paras.15 and 20; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Basic Principles on the Right to a Remedy and Reparation”), General Assembly resolution 60/147 of 16 December 2005, Principles 12, 24, 25.

²¹ See e.g. Basic Principles on the Right to a Remedy and Reparation, Principle 12; HRC, *Bautista v. Colombia*, Communication No. 563/1993 (27 October 1995), para. 8.2 (right to life, enforced disappearance); HRC, *Vicente v. Colombia*, Communication No. 612/1995 (29 July 1997), para 8.2 (right to life, enforced disappearance). Committee against Torture, General Comment No. 3, para.30 (torture and other cruel, inhuman or degrading treatment or punishment).

²² UN Impunity Principles, Principles 22 and 23 ; Basic Principles on the Right to a Remedy and Reparation, Principles 6 and 7.

²³ Committee against Torture, General Comment No. 3, para.26.

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

to decisions rejecting a transfer to the SCC. To ensure the review process is accessible and effective, it should be made clear that victims can use the review procedure to challenge decisions not to refer a case to the SCC for prosecution, even if the case may not be formally closed.²⁵

Even if the existing general CCP procedures for victims' access to the courts were to be held to be applicable to victims' access to the SCC, in light of current flaws in both law and practice in relation to the CCP procedures, changes would be needed to ensure full realization of the right of the victims to a judicial remedy.

Under international law, a judicial remedy must be secured through fair and impartial proceedings.²⁶ This requires that the judicial authority be free from bias for or against either party, and be independent and not subject to interference by the executive or other authorities.²⁷ Proceedings must also be accessible in practical terms.²⁸ Furthermore, to be effective a judicial remedy must be capable of providing redress.²⁹

However as highlighted in previous ICJ reports, in the particular context of Tunisia the subordination of the prosecutor's office to the executive combined with the involvement of law enforcement officials in serious human rights violations have both prevented investigations actually being opened when complaints have been filed. Consequently, filing a complaint of human rights violations does not necessarily lead to the opening of criminal proceedings even when such proceedings would clearly be required by international standards. In addition, the potentially significant and uncertain costs associated with these procedures can only operate as a deterrent to victims invoking such procedures. The absence of a mechanism for victims under the CCP to challenge a prosecutor's decision not to prosecute would, in this context, undermine the right of victims to a judicial remedy. At least in the case of gross human rights violations, interested parties should have a right to independent review of a decision by a prosecutor not to prosecute.³⁰

Moreover, even if civil judicial remedies were to remain available, civil claims should not be dependent on whether or not the perpetrator has been prosecuted through criminal proceedings.³¹ In particular the Committee against Torture has stated that "[i]f criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence of or undue delay in those criminal proceedings constitutes a failure on the part of the State party to fulfil its

²⁵ See for example EU Directive 2012/29/EU (25 October 2012) establishing minimum standards on the rights, support and protection of victims of crime, Article 11. International Commission of Jurists, Practitioners' Guide No. 10 : Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members (2015), p. 109.

²⁶ Basic Principles on the Right to a Remedy and Reparation, Principle 12.

²⁷ Article 14(1) of the ICCPR. See also European Court of Human Rights: *Keenan v the United Kingdom*, Judgment of 3 April 2001, para.123.

²⁸ HRC, General Comment No.31, para.15. See also Basic Principles on the Right to a Remedy and Reparation, Principle 12 (b) and (c); and see *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of AU held in Maputo from 4-12 July 2003, Principle H, (hereinafter Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa).

²⁹ Inter-American Court of Human Rights: Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, para.24; See also European Court of Human Rights: *Silver v the United Kingdom*, Judgment of 25 March 1983, para.113.

³⁰ See e.g. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 86; see also CoM Recommendation (2000)19, para.34 and para.1 of the Bordeaux Declaration, "Judges and Prosecutors in a Democratic Society", Council of Europe Committee of Ministers, CM (2009)192, 15 December 2009; EU Directive 2012/29/EU (25 October 2012) establishing minimum standards on the rights, support and protection of victims of crime, article 11 and Preamble para.43.

³¹ Committee against Torture, General Comment No. 3, para.26; and Committee on Enforced Disappearances, Concluding Observations: Spain, UN Doc. CED/C/ESP/CO/1, 12 December 2013, para.30.

obligations under the Convention.”³² Although civil claims can be brought by victims regardless of whether or not criminal proceedings have been sought under Tunisian law, the requirement to wait until criminal liability has been determined can result in extensive delays for victims, in breach of international standards. In addition over decades, many of these victims were harassed, pressured or threatened, with the aim of forcing them to withdraw their complaints, in some cases even after the toppling of Ben Ali’s regime.³³

In light of the above, the Tunisian authorities should ensure that the procedures governing the SCC are amended, through the reform of both the “transitional justice” framework and as necessary the existing criminal procedures, to ensure the full realization of the rights of victims to an effective remedy, including by:

- i. Amending article 42 of the 2013 Law and article 3 of the 2014 Law as well as related provisions to clearly provide for the victims of gross human rights violations with a direct access to the SCC similar to that under the CCP, or preserving their right to do so to either the SCC or the ordinary courts under the existing CCP, including when victims did not submit a file to the IVD;
- ii. Amending Articles 53 and 54 of the IVD Procedure Guide and related provisions of the IC Procedure Guide to ensure that the review process and the possibility to challenge IVD’s decisions will be applying to decisions not to transfer a case to the SCC and that such review be based on objective criteria for considering gross human rights violations in line with international standards;
- iii. Amending the provisions of the CCP to ensure, in their application to gross human rights violations, they are in line with the components of the right to an effective judicial remedy, including by: requiring the prosecutor to give reasons for any decision to dismiss a case without proceeding to an investigation; by removing the requirement that a civil party who either requests the prosecutor to conduct a preliminary investigation or summons the accused to appear before the First Instance Tribunal, bear the costs of the proceedings; by ensuring that civil claims are not unduly delayed by having to wait for criminal proceedings to end before they can be determined, and by establishing a right of judicial review for victims of crime where the prosecutor decides to dismiss a case prior to opening an investigation; and
- iv. Clarifying the relationship between the SCC and other ordinary criminal chambers and civil and other courts to ensure the latter courts can play a complementary role in adjudicating any cases of human rights violations, including with regard to civil claims and, in particular, for cases not referred to the SCC.

II. Procedural aspects of the prosecution and investigation phases

Under international human rights law, the criminal character of a violation also carries particular requirements in terms of the criminal character of the investigations and legal consequences for perpetrators. Authorities must investigate all such allegations promptly, thoroughly and impartially. Where sufficient evidence exists, those responsible for violations that constitute crimes must be prosecuted and, if convicted, punished accordingly.

³² Committee against Torture, General Comment No. 3, para.26. See also, Committee on Enforced Disappearances, Concluding observations on Spain, 13 November 2013, UN Doc. CED/C/ESP/CO/1 (para. 9) which recommended that Spain “should ensure that any natural person who has suffered harm as the direct result of an enforced disappearance is entitled to all the reparatory and compensatory measures provided for under the law, even if no criminal proceedings have been brought”.

³³ For a more in depth analysis see ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, available at:

<http://icj2.wpenline.com/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf>, (last accessed 30 May 2017), p.21.

a) Prosecution and investigation under the Tunisian “transitional justice” framework and related CCP provisions

The “transitional justice” framework, in particular the 2013 Law, related to the prosecution and investigation phases before the SCC is interpreted by justice sector actors in Tunisia as providing for a special regime that departs from the existing ordinary criminal procedure. However this interpretation appears to be more based on the powers given to the IVD and the absence of provisions governing the role of the OPP under the “transitional justice” framework, than on explicit legal provisions or distinct procedural rules.

Article 42 of the 2013 Law refers to “proven” cases of gross human rights being transferred by the IVD to the OPP and provides that “the IVD is subsequently informed of all measures adopted by the judiciary”. This is the only provision that refers to the function of the OPP in the 2013 Law. Article 42(3) does not even mention the OPP when referring to cases of “election fraud, financial corruption, misappropriation of public funds, and the coercion to forced migration for political reasons” being transferred by the IVD to the SCC. Furthermore, article 3 of the 2014 Law states that the OPP shall “automatically” refer the cases related to the period of the 2010 uprising it received from the IVD to the SCC.

The 2013 Law also entrusts the IVD with broad investigative powers, including some similar to the Judicial Police. Article 40 provides the IVD with the mandate to conduct investigations (using the French term “*instruction*”, which would normally refer to investigating judges under the CCP) of all violations using all necessary means, including accessing archives and summoning any person it deems necessary to interview or whom testimony it deems helpful. Article 40 further provides the IVD with the power to rely on public officials to carry out its mandate. This provision also gives the IVD the power to search public and private places and seize documents providing it with “the same prerogatives as the judicial police, while safeguarding procedural guarantees”.³⁴ The modalities of this power are further detailed in the IVD Procedures Guide. Article 28 lays down the conditions to conduct searches and article 32 provides that if the IVD is unable to carry out a search or a confiscation, it can resort to the OPP in line with article 66 of the 2013 Law that defines criminal offences in relation to the IVD’s mandate, such as hampering its work. However the IVD does not have the power to issue an arrest warrant or to order the detention of a person.

The investigative mandate of the IVD is further detailed in the IC Procedures Guide that defines the IVD Investigation Committee’s duties with regard to examining complaints they receive, including through the work of an investigation unit, headed by a judge, and comprised of investigation desks, each supervised by an investigator with rank of a judge appointed to the IVD (article 32). The ICJ was informed that several judges were assisting the IVD in this regard.³⁵ Article 40 of the 2013 Law also tasked the IVD with the mandate to protect a broad category of persons coming in contact with this institution, including victims, witnesses, and experts.

Many Tunisian justice sector actors interpret these provisions granting a broad investigative role to the IVD as evidence that the “transitional justice” framework substituted the IVD for the OPP with regard to the functions of investigation and prosecution.³⁶ They also argue that those provisions, in particular article 42 of the 2013 Law, allow for the SCC to rely on the investigations that had been conducted by the IVD and that the OPP would merely act as a “mail box”, transferring cases to the SCC without carrying out further investigations. Under this interpretation, the SCC judges themselves would be entitled to conduct additional investigation or witness

³⁴ Law No. 53-2013 of 24 December 2013, Article 40 para. 10.

³⁵ ICJ interview with a member of the IPJJ, 7 August 2016.

³⁶ ICJ interviews with Tunisian judges, 16 June 2017. See also, Pourzand Pejman, op. cit., pp. 10-11.

examination if necessary.³⁷ As a result the SCC would merely adopt the findings of the IVD and move directly to the trial phase of the proceedings as an exceptional procedure under the “transitional justice” framework.³⁸ However other experts have either qualified this interpretation or rejected it and suggested that the OPP remains in charge of deciding whether or not to prosecute, and that investigating judges are to be appointed to carry out the investigation work.³⁹ Some of those experts argue that as long as the SCC is part of the ordinary criminal justice system, they should follow the ordinary criminal procedures, including for the investigation and pre-trial phase,⁴⁰ or at least that at the trial phase the OPP is expected to carry out its function as defined under the CCP.⁴¹

While the 2013 Law grants an extensive role to the IVD with regard to the investigation of gross human rights violations, it does not specify detailed procedures, nor have any detailed procedures been otherwise enacted under the authority of the 2013 Law. The existing CCP, on the other hand, sets out detailed procedures for all stages of criminal proceedings and governs the duties and powers of the key criminal justice institutions such as the OPP and the investigating judges.

Pursuant to article 20 of the CCP the prosecution service initiates and conducts prosecutions. Under the 2014 Constitution, the OPP continues to be considered part of the judiciary and enjoys the same constitutional guarantees as the judiciary.⁴² According to article 115 it has a responsibility to abide by the “framework of criminal policy of the State.”

Articles 28 and 47 of the CCP require a preliminary and full investigation into all cases involving “crimes”⁴³ and article 30 states that public prosecutors must first appraise all complaints received by them. This includes conducting a preliminary inquiry by collecting evidence, questioning the suspect, taking witness statements and writing a report.⁴⁴ It also requires the prosecutor to refer the case to an investigating judge for investigation when the conduct qualifies as a “crime”.⁴⁵

The actual investigations are conducted by the Judicial Police, which is responsible for discovering offences, collecting evidence, searching for suspected perpetrators and handing them over to the courts before an investigation is opened.⁴⁶ The Judicial Police consists of public prosecutors of the First Instance Tribunals and their deputies, district court judges, investigating judges and members of the police and of the National Guard.⁴⁷

In practice, in Tunisia the work of investigating judges, prosecutors and their deputies has often been hindered by the refusal of members of the police and National Guard to execute orders. They have frequently only responded to the orders of the Ministry of the Interior. Furthermore, the law does not provide for a division of responsibilities within the police and the National Guard between officers that carry out functions of the Judicial Police and those that carry out other law enforcement functions.⁴⁸ Consequently, police and National Guard officers who are responsible for human rights violations, or their colleagues from the same unit, may be involved in receiving

³⁷ ICJ interviews with a Tunisian judge, 16 June 2017.

³⁸ ICJ interview with a member of the IPJJ, 7 August 2016.

³⁹ ICJ interviews with a Tunisian judge, 16 June 2017 and Pourzand Pejman, op. cit., p. 12.

⁴⁰ ICJ interview with a SCC judge, 1 September 2016.

⁴¹ ICJ interviews with a Tunisian judge, 16 June 2017.

⁴² 2014 Constitution, article 115.

⁴³ Under the Code of Criminal Procedure a “crime” is an offence that is punishable by the death penalty or imprisonment for more than five years (article 122).

⁴⁴ Code of Criminal Procedure, article 26.

⁴⁵ Code of Criminal Procedure, article 28.

⁴⁶ Code of Criminal Procedure, article 9.

⁴⁷ Code of Criminal Procedure, article 10.

⁴⁸ Law No.82-70 of 6 August 1982 only specifies the rank required to act as a Judicial Police Officer (article 5).

and filing a complaint about the same violations. Although, in practice, a victim can request the investigating judge or public prosecutor to transfer the case to a different police or National Guard unit, no legal provision explicitly provides for such a request and no right to appeal is provided for should such a request be refused.⁴⁹ In addition, when investigations into offences committed by members of the Internal Security Forces are carried out by members of the police or the National Guard they are often delayed and/or carried out in a superficial manner resulting in impunity.

b) Analysis under international standards

Under international law, where violations are alleged or otherwise suspected to have occurred, the State must ensure that they are investigated; where established violations constitute crimes under international or national law, those responsible must be brought to justice.⁵⁰ In this regard, as highlighted by the Human Rights Committee (HRC) in relation to the ICCPR, "a failure by a State Party to investigate allegations of violations" or to bring perpetrators to justice "could in and of itself give rise to a separate breach of the Covenant".⁵¹

The duty to investigate human rights violations is set out in numerous international instruments and requires an effective investigation.⁵² This obligation is linked to the victims' right to an effective judicial remedy. The European Court of Human Rights has noted that the right to a remedy set out in article 13 of the European Convention on Human Rights, requires "a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure".⁵³ 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.

The investigation must be conducted promptly, thoroughly and effectively through independent and impartial bodies.⁵⁴ Detailed criteria for ensuring an investigation meets these requirements have been set out in numerous international instruments.⁵⁵

⁴⁹ ICJ interview with civil party lawyers on 23 September 2014.

⁵⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 4; Principles 1, 19 and 21 of the UN Impunity Principles.

⁵¹ HRC, General Comment No. 31, paras.15 and 18.

⁵² CAT, article 12; ICPEd, articles 3 and 12; UN Declaration on Human Rights Defenders, adopted by UN General Assembly resolution 53/144, 9 December 1998, article 9(5). See also the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (UN Principles on Extra-legal Executions), Recommended by the Economic and Social Council resolution 1989/65 of 24 May 1989 1, Principle 9; Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 9 December 1998, adopted by the UN General Assembly resolution 43/173 of 9 December 1988 at Principles 33 and 34; The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/10034 (1975), article 9; UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the UN Principles on Investigation and Documentation of Torture), adopted by UN General Assembly resolution 55/89, 4 December 2000, Principle 2.

⁵³ *Aksoy v. Turkey* No.21987/93, European Court of Human Rights, judgment of 18 December 1996, para.98. See also, *Osman v the United Kingdom* No. 87/1997/871/1083, European Court of Human Rights, judgment of 28 October 1998, para.115-6; *Kurt v. Turkey* No. 15/1997/799/1002, European Court of Human Rights, judgment of 25 May 1998, para.140. See also, Eradicating impunity for serious human rights violations, Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, Guidelines VIII.1.

⁵⁴ Basic Principles on the Right to a Remedy and Reparation, Principle 3.

⁵⁵ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017.; and Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or

With regard to Tunisia the ICJ is of the view that the relationship between the IVD and the institutions of the criminal justice system, in particular the OPP, needs to be clarified for the SCC to be effective and provide accountability.

Under international law nothing in principle prevents a State from establishing different mechanisms of investigation, including some with specialized competencies, so long as they together implement the overall obligation to investigate human rights violations in all its aspects and with its various requirements. If truth commissions are used as a means of publically documenting the truth, those functions cannot displace the need for the investigation of facts undertaken with a view to prosecuting those individuals responsible for gross violations of human rights.⁵⁶ In that regard, the IVD's broad investigative role is to be welcomed as this mechanism is designed to conduct investigations to prepare cases for the SCC.

However the ICJ is concerned that the numerous gaps in the "transitional justice" framework pertaining to the IVD and the division of tasks between this institution and the criminal justice sector actors risk hampering the implementation of the obligation to effectively investigate and prosecute gross human rights violations. The incomplete specific arrangements under the 2013 Law and the IVD's powers are not sufficient to replace the entire prosecution and investigation phases of the criminal proceedings due to the many lacunae and unanswered questions. While the IVD can greatly contribute to building a case for prosecution, it cannot practically replace the OPP for the trial phase before the SCC. Irrespective of the interpretation chosen with regard to the applicability of the CCP to govern certain procedures subject to specific provisions of the "transitional justice" framework, the ICJ is of the view that the SCC remain closely linked with and dependent on a wide range of procedures to be carried out at the prosecution and investigation phases by the OPP and the investigating judge under the CCP.

For example, under international standards, and based on the CCP, prosecutors are to play an active role in criminal proceedings, including the institution of prosecutions.⁵⁷ They may also be required by the legal system to investigate crime and supervise the legality of investigations.⁵⁸ The Council of Europe Guidelines on eradicating impunity for serious human rights violations provide: "States have a duty to prosecute where the outcome of an investigation warrants this. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice."⁵⁹ Furthermore, the CCP itself provides for prosecutorial discretion of the OPP with regard to the decision to prosecute. If the OPP does not conduct its own investigation, it will not be able to exercise this power. While the prosecutors can use the investigative work carried out by the IVD, provided the standard of proof used to consider cases of gross human rights "proven" under Article 42 of the 2013 Law is clarified, they must be able to conduct further investigation to make their own determination in relation to the standard of proof applicable in criminal proceedings. This is particularly important given that it appears that the IVD is not meant generally to use the same standard of proof as in a criminal investigation as it is mandated to establish the truth about alleged gross human rights violations, not conduct an investigation with the view to bring criminal prosecutions per se. If cases were to be automatically relayed by the OPP to the SCC for trial without an assessment of whether the evidence already

Degrading Treatment or Punishment (the Istanbul Protocol), Professional Training Series No.8/Rev.1 of UN OHCHR, 2004.

⁵⁶ See, for example, *La Cantuta v Peru*, Inter-American Court of Human Rights, Judgment of 29 November 2006, Series C, No. 162, para 224.

⁵⁷ UN Guidelines on the Role of Prosecutors, Guideline 11. See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section F, Principle (g).

⁵⁸ *Id.*

⁵⁹ Eradicating impunity for serious human rights violations, Guidelines adopted by the Committee of Ministers of the Council of Europe on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, Guidelines VIII.1.

collected meets the criminal standard of proof, the case could fail at the trial phase for lack of evidence (that the OPP might otherwise have been able to correct).

Additionally in practical terms the OPP and investigating judges must retain at least some functions at the pre-trial phase within their own mandate because the IVD lacks the authority to perform certain acts such as issuing arrest warrants and ordering the detention of alleged perpetrators and is not meant to perform a function of criminally prosecuting alleged perpetrators. Therefore while the IVD will need to call on the OPP and investigating judge to assist this institution in its work as provided for under article 40 of the 2013 Law, the acts of procedure required under the CCP such as issuing arrest warrants and indictments would need to be carried out by the OPP and investigating judges at the later stage of the criminal prosecution phase, once cases have been formally referred by the IVD. For the OPP and investigating judge to be in a position to assist in such matters they will need to some extent to be informed or involved with the investigation.

This does not mean that the IVD's investigation findings should be dismissed by the OPP. Indeed its extensive investigative powers can contribute to ascertaining key components of gross human rights violations, including in collecting crucial evidence, such as through access to archives, in a way that might be more in line with international standards than when performed by the OPP given the current flaws in law and in practice of the Tunisian criminal justice system.

Indeed, those existing weaknesses of the ordinary system for criminal proceedings in Tunisia at the prosecution and investigation stages, if not remedied, could be expected to be particularly problematic for the kinds of cases to be addressed by the IVD. As such, while longer-term reform of the ordinary system remains necessary, the ICJ is of the view that the immediate creation of specialized prosecutors and investigating judges could assist in overcoming those flaws in relation to the pressing need for justice in relation to the cases covered by the "transitional justice" framework in Tunisia.

Provisions in the 2014 Constitution that place oversight of the selection and career progression of prosecutors in the hands of the High Judicial Council and require prosecutors to act with impartiality were an improvement compared to the previous system. However, hierarchical control of the prosecution service in the hands of the executive remains, as does the Minister of Justice's ability to direct prosecutors and to issue instructions to prosecutors. Although international standards do not necessarily explicitly require the prosecution service to be institutionally independent from the executive it is imperative that prosecutors can carry out their functions in an independent and impartial manner.

The UN Guidelines on the Role of Prosecutors recognise that prosecutors are "essential agents of the administration of justice."⁶⁰ Prosecutors are key in ensuring access to justice for victims of human rights violations and combating impunity.⁶¹ In order to allow them to fulfill their essential role, States must ensure that prosecutors "are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal or other liability."⁶² Consequently, they must guarantee the functional independence and the impartiality of prosecutors and provide them with appropriate resources.⁶³

⁶⁰ UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly Resolution 45/166 (1990), (hereinafter UN Guidelines on the Role of Prosecutors), Guideline 3.

⁶¹ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, 7 June 2012, para.35.

⁶² UN Guidelines on the Role of Prosecutors, Guideline 4.

⁶³ International standards on these issues and an assessment of the law and practice in Tunisia in light of these standards can be found in the ICJ's May 2014 report on the independence and accountability of the judiciary in Tunisia. See ICJ report, *The independence and accountability of the Tunisian judicial system: learning from the past to build a better future*, 13 May 2014,

The almost total absence of investigations and prosecutions of cases of gross violations of human rights committed by law enforcement officers in the past in Tunisia, despite the ample evidence available to prosecutors, suggests that prosecutors lack independence and impartiality.⁶⁴ When coupled with the broad discretion granted to prosecutors to decide whether to pursue or dismiss a complaint, the lack of independence of prosecutors in Tunisia has resulted in numerous complaints of gross human rights violations being dismissed without an investigation.

The duty of prosecutors to act with objectivity and in the public interest, including by prosecuting cases against public officials and in particular gross human rights violations, is not explicitly reflected in Tunisian law or in domestic prosecutorial guidelines. Since the 2010 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."⁶⁵

In light of the above, the Tunisian authorities should ensure that the procedures governing the SCC are amended, including through the reform of both the "transitional justice" framework and the existing criminal procedures when necessary in a way that ensures full respect of the obligation to investigate and prosecute gross human rights violations, including by:

- i. Ensuring all professionals administering justice within and with the SCC receive adequate training on international law and standards in relation to investigations and prosecution of gross human rights violations;
- ii. Establishing an effective criminal justice strategy to deal with the legacy of gross human rights violations;
- iii. Establishing specialized prosecution services, investigating judges, and judicial police in line with international standards and with adequate resources to work in coordination with the SCC;
- iv. Establishing a strict division of labour in relation to accusations of crimes committed by law enforcement officials, between police and National Guard officers who carry out the functions entrusted to the Judicial Police and officers who carry out other law enforcement functions;
- v. Amending Article 42 of the 2013 Law and Article 3 of the 2014 Law to clearly provide that cases investigated by the IVD are to be transferred to the specialized prosecutors who are to carry out their functions as defined in the CCP and in line with international standards;
- vi. Ensuring that the IVD's investigative function complements the role of the specialized judicial institutions in charge of the investigation and prosecution;
- vii. Establishing and publishing comprehensive prosecutorial guidelines for the implementation of criminal justice policy and ensure that they are available to any person on request;
- viii. Establishing a right of judicial review for victims of crime where the specialized prosecutor decides to dismiss a case prior to opening an investigation;
- ix. Establishing guidelines for investigating judges detailing the timeframe and procedures for conducting investigations, which meet international standards, such as those set out in the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UN Principles

available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, (last accessed 1 June 2017).

⁶⁴ See also HRC, Concluding Observations on Tunisia, UN Doc. CCPR/C/TUN/CO/5, 23 April 2008, para.11.

⁶⁵ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/24/42/Add.1, 30 July 2013, para.45.

- on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and their accompanying manuals; and
- x. Providing the specialized judicial institutions linked to the SCC with sufficient material and human resources for the investigations.

III. Fair trial guarantees before the SCC

While as noted earlier there are varying perspectives among national actors regarding how and whether the CCP will apply to the investigation and prosecution phases, the trial phase before the SCC is not regulated by any specific provisions under the 2013 Law and related laws and policies. The legal actors the ICJ spoke to in Tunisia assumed that the intention was for the CCP to apply in full at this stage. Given existing flaws in the CCP, the reforms more generally required for the existing procedures to be consistent with international standards (as previously outlined by ICJ in its 2016 Report *Illusory Justice, Prevailing Impunity*) are equally of urgent importance for the SCC proceedings. Furthermore the gaps and incomplete institutional arrangements under the “transitional justice” framework as well as the way it is being interpreted may also raise additional concerns as to the respect for fair trial guarantees at the trial phase. In this regard, the ICJ is particularly concerned at the impact the lack of clear procedures and responsibilities between the IVD and the OPP during the pre-trial phase would have on fair trial guarantees before the SCC.

The ICJ notes that given the specific jurisdiction of the SCC to hear cases of past gross human rights violations, including “execution without fair trial guarantees”, this is not only a question of compliance with international law but also a matter of legitimacy in that the SCC work and legacy would be compromised if they were to carry out their own proceedings in violation of fair trial guarantees. The 2014 Constitution itself provides that “the enactment of derogatory procedures that may prejudice the principles of fair trial” is prohibited (article 110). This is all the more so considering that in the past, in Tunisia most of the cases of gross human rights violations were adjudicated in a manner that involved numerous breaches of the right to a fair trial, not least because they were conducted by military courts.⁶⁶

International law, including article 14 of the ICCPR, is clear that in relation to all proceedings before the courts the right to a fair trial requires that all parties have the right to equality of arms.⁶⁷ As the HRC has explained, “this means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant”.⁶⁸ Indeed, the principle of equality of arms means that there must be procedural equality between the accused and the public prosecutor in criminal proceedings. To that effect, both parties must be allowed equal opportunities to prepare and present their case, present evidence and witnesses, and contest arguments and evidence put before the court on an equal footing. The parties should be treated equally in all procedural matters.⁶⁹

⁶⁶ Military courts for instance, do not comply with the requirements of competence, impartiality and independence set out in international law and standards, since the military judges are appointed and promoted by the executive power. Their jurisdiction should be limited to offences of a military nature and all other offences should be subject to the jurisdiction of ordinary courts. See for example HRC, General comment no. 32, *Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 (hereinafter General comment no. 32), para. 15, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff, Mission Tunisia 11-16 November 2012), the Council of Human Rights, 24th Session 30 July 2013, A / HRC / 24/42 / Add.1, para. 48.

⁶⁷ See also article 3 of the ACHPR; article 24 of the ACHR; article 14 of the ECHR and Protocol No.12; and article 7 of the UDHR.

⁶⁸ HRC, General Comment No. 32, para. 13.

⁶⁹ Principles on Fair Trial in Africa, Section N(6)(a).

Several provisions of the CCP illustrate the need to amend this code, or to ensure that any distinct procedures adopted for the SCC provide differently, if the procedures before the SCC are to fully respect the right to a fair trial.

For instance, provisions in the CCP allowing for trials *in absentia* (article 141), raise issues in relation to the right to be present, to be defended by a counsel of the person's choice, and to cross-examine witnesses. Fair trial guarantees include the right of anyone charged with a criminal offence to be tried in his or her own presence and to an oral hearing.⁷⁰ Trials *in absentia* may only be permissible in accordance with the ICCPR in strictly limited cases, following the refusal of the accused to be present, despite having being informed sufficiently in advance of the charges, date and place of the proceedings.⁷¹ While there are limits to the efforts that can be reasonably expected of the competent authority to establish contact with the accused and notify them of the charges against them and of the details of the hearing, sufficient efforts must have been made to conclude that the accused's rights have been respected,⁷² and the authorities must provide the court with evidence of the efforts made - rather than assuming the accused had knowledge of the proceedings.⁷³ Even in the very narrow circumstances where trials *in absentia* are justified under international human rights standards, the basic requirements and rights of a fair trial must be respected, including the accused's right to counsel and the right to defend against the charges; thus if the person has chosen a lawyer that lawyer must be able to participate fully in the trial, or if the person has not chosen a lawyer the court may need to appoint an independent lawyer to represent the person's interests.⁷⁴ If a person convicted *in absentia* is eventually apprehended by the authorities, the original verdict should be quashed and he or she should receive a new trial in person, particularly if the person was not in fact duly notified of the trial or the failure of the person to appear was in fact for reasons beyond their control.⁷⁵ Article 141 of the CCP does not include sufficient safeguards for when the trial can be carried out without the accused being present as it merely refers to the case of the accused not appearing before the court while having been "lawfully summoned to appear".

The right to a fair trial also includes the principle of *ne bis in idem*, that 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."⁷⁶ There is however an exception to this principle in relation to cases of crimes under international law, 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

⁷⁰ In addition Article 14(3)(d) of the ICCPR, this right is also enshrined in among others, the following standards, the Arab Charter on Human Rights, Article 16(3); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section N(6)(c); Rome Statute of the International Criminal Court, Articles 63(1) and 67(1)(d); Statute of the International Criminal Tribunal for Rwanda, Article 20(4)(d); Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 21(4)(d).

⁷¹ HRC, *Mbenge v. Zaire*, Communication No. 16/1977, UN Doc. CCPR/C/OP/2, 25 March 1983, para. 14.1; HRC General Comment No. 32, para. 36. In the same vein, while the European Convention does not expressly provide for the right of the accused to be present, the European Court of Human Rights (ECtHR) has concluded that, the combination of article 6(1) and 6(3)(c), (d) and (e), show that a person charged with a criminal offence is entitled to take part in the hearing. See ECtHR, *Colozza v. Italy*, Application no. 9024/80, 12 February 1985, para. 27.

⁷² HRC, *Salikh v. Uzbekistan*, UN Doc. CCPR/C/95/D/1382/2005, 22 April 2009, Para. 9.5.

⁷³ HRC, *Maleki v. Italy*, Communication No. 699/1996, UN Doc. CCPR/C/66/D/699/1996, 27 July 1999.

⁷⁴ See also HRC General Comment No. 32, para. 37; HRC, *Salikh v. Uzbekistan*, UN Doc. CCPR/C/95/D/1382/2005, 22 April 2009, para. 9.5; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle N(6)(f)(iv).

⁷⁵ See for instance Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle N(6)(c)(ii).

⁷⁶ ICCPR, article 14(7).

conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”.⁷⁷

Article 132bis of the CCP reaffirms the principle *ne bis in idem*. However, the CCP also greatly limits the basis on which a case can be re-opened (only if new evidence is found) and only permits the re-opening if it would benefit the accused⁷⁸, not the victim of the crime and does not contain the exception provided for under international standards.

In that regard the ICJ welcomes the provisions in the Tunisian Constitution that create an exception to this principle in the context of the “transitional justice system”,⁷⁹ and in the 2013 Law which provides that cases referred to the SCC by the IVD cannot be challenged by reliance on the principle of *res judicata* which includes the principle of *ne bis in idem*. These broadly worded provisions should in principle allow the SCC to ensure that, in line with the international standards mentioned above, the *ne bis in idem* principle does not serve as a source of impunity for gross human rights violations. However, to guard against any risk that the SCC may adopt a restrictive interpretation of these provisions, measures should be taken to further affirm that the principle of *ne bis in idem* should not be applied in cases of human rights violations that constitute crimes under international law, in the circumstances described in Principle 26(b) of the UN Impunity Principles and under other international standards. To any extent that relevant cases may still be adjudicated by the ordinary courts, the application of the exception in the ordinary courts along these lines should also be affirmed. This could include amending the CCP in line with international standards to ensure that, for example, the flaws in the trials carried out before military courts in Tunisia in the past with regard to cases of gross human rights violations, be they a gross breach of fair trial guarantees, an unjust conviction or acquittal due to lack of independence and impartiality of the judge, or the bad-faith conviction of the accused for a lesser offence when conviction of the more serious offence was clearly called for, are duly considered under the exception to the principle *ne bis in idem*.

Furthermore, with regard to the “transitional justice” framework, the lack of clarity as to the exact role of the OPP and of the investigating judges and the corresponding prevailing investigative function of the IVD at the pre-trial phase also risk undermining the equality of arms at the trial phase. For example, if the IVD were to replace the OPP at the investigation stage, and no procedure is ultimately adopted to guarantee the right of the accused to examine witnesses interviewed by the IVD and his or her right to information and to access all documents and evidence collected by the IVD in order to prepare his or her defence (similar to what already exists in relation to the OPP under the CCP), this would be inconsistent with international standards on the right to a fair trial.

In light of the above, the Tunisian authorities should ensure that the procedures applicable before the SCC are amended, including through the reform of both the “transitional justice” framework and the existing criminal procedures when necessary in a way that ensures full respect for the right to a fair trial, including by:

- i. Amending article 141 of the CCP and any correlating provision of any other procedures adopted for the SCC) that allow for the court in the case where the defendant is not present, to take its decision *in absentia*, to: clarify that all due steps must have been taken to inform the accused of the charges and to notify him or her of the proceedings and the place, date and time of the hearings; that the person’s counsel of choice should be able fully to participate in the trial, and that where the person refuses to choose a lawyer, the court should consider whether appointment of an independent counsel to represent the person’s

⁷⁷ UN Principles on Impunity, Principle 26(b); See also Principle 22.

⁷⁸ Tunisian Code of Criminal Procedure, article 277.

⁷⁹ The Tunisian 2014 Constitution, article 148(9).

- interests is necessary; and that if the person is eventually apprehended he or she should in principle receive a new trial;
- ii. Amending articles 132bis and 277 of the CCP (and any correlating provision of any other procedures adopted for the SCC) to expressly affirm that the principle of *ne bis in idem* should not be applied in cases of human rights violations that constitute crimes under international law, in the circumstances described in Principle 26(b) of the UN Impunity Principles and under other international standards;
 - iii. Ensuring that no provision of the “transitional justice” framework results in a violation of the various requirements under the right to a fair trial before the SCC; and
 - iv. Amending the 2013 Law to provide for detailed rules of procedures with regard to the way the IVD’s work will be used at the trial phase, in particular with regard to witness testimonies and access to documents and evidence collected by the IVD, in full compliance with the right to a fair trial.

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