

Tunisia: Judicial Conduct and the Development of a Code of Ethics in Light of International Standards

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

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Introduction

The International Commission of Jurists (ICJ) understands that the Tunisian High Judicial Council (HJC) is due to develop a new Code of Ethics, as required by article 42 of organic Law No. 2016-34. This is an important and overdue step towards strengthening the independence and accountability of the Tunisian judiciary, in line with the Tunisian Constitution and international standards.

Under the Tunisian Constitution and article 14 of the International Covenant on Civil and Political Rights (ICCPR), which Tunisia ratified in 1969, Tunisian State authorities have a duty to respect and protect the independence and impartiality of the judiciary. This requires the clear separation of executive, legislative and judicial functions and laws that establish objective criteria to govern the career progression of judges, ensure adequate remuneration, and provide for security of tenure. Beyond the separation of powers, the requirements of independence and impartiality require that both the judiciary as a whole and individual judges ought to maintain the integrity of the profession and that judges should be held accountable for misconduct in the course of their duties.

Judges must perform their duties in an independent and impartial manner in order to guarantee the right to a fair hearing. Guaranteeing judicial integrity, in turn, requires proper and fair judicial accountability mechanisms that respect judicial independence and impartiality and instil public confidence. As stated by the UN Special Rapporteur on the independence of judges and lawyers:

The principle of the independence of the judiciary is not aimed at benefitting judges themselves, but at protecting individuals from abuses of power and ensuring that court users are given a fair and impartial hearing. As a consequence, judges cannot act arbitrarily by deciding cases according to their own personal preferences. Their duty is the fair and impartial application of the law. Judges must therefore be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.¹

Ensuring judicial integrity and preventing abuse of power requires the establishment of a clear set of professional standards for judges, for example, through adopting a code of ethics or code of conduct by the judiciary. This is affirmed by numerous international standards.² For example, the UN Convention against Corruption provides generally that: “[i]n order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system,”³ and “[e]ach State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.”⁴ Article 11 of the Convention more specifically provides as follows:

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its

¹ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability (2014), UN Doc. A/HRC/26/32, para.59.

² See e.g. ICJ, Practitioners’ Guide No. 13: Judicial Accountability (2016), available at: <http://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>, p. 25; Judicial Integrity Group, Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010), paras 1.1-2.2, 15.1-15.8; UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), paras 72, 78, 210; Human Rights Council, Resolution 29/6: Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers (2015), para. 3; UN Office on Drugs and Crime, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011), pp. 127-131, 134. See also UN Basic Principles on the Independence of the Judiciary, Principle 19.

³ UN Convention against Corruption, article 8, para.1

⁴ UN Convention against Corruption, article 8, para.2.

legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

The Code of Ethics should provide clarity as to what standards of conduct are expected from judges and set a benchmark against which judges can be assessed and disciplined if necessary. These standards should be developed by judges and should be consistent with international law and standards. All disciplinary proceedings, in particular those that could result in suspension or removal of a judge, must be determined in accordance with the Code of Ethics and fair procedures.⁵ Grounds for discipline and sanctions for misconduct should be clearly and precisely defined in law to ensure that they cannot be abused as a means of inappropriately interfering with the independence of individual judges.

Adoption, implementation, and enforcement by the judiciary of such rules of professional conduct demonstrates to the public that judges act independently, without improper influence or pressure, threats or other interference and that they will be held accountable if they act improperly when carrying out their judicial functions.⁶ This contributes to public confidence in the judiciary, which is a vital element of the rule of law.

International standards require that the Code of Ethics should be drawn up by the judiciary or in close consultation with the judiciary. In Tunisia, organic Law No. 2016-34 requires the HJC to draft a Code of Ethics. The role of the judiciary in drafting the Code of Ethics in Tunisia is particularly important given that a lack of adequate consultation with the judiciary has hindered such previous efforts. For example, in 2012, the Ministry of Justice presented a draft Code of Ethics to the National Constituent Assembly, but the process failed to gain traction because it was drawn up exclusively by the Ministry of Justice and not by or in consultation with judges.⁷

Drafting a Code of Ethics will remedy the fact that the current law regulating judicial conduct in Tunisia is incomplete. Organic Law No. 67-29 on the Judiciary, the HJC and the Statute for Judges, even as modified by organic Law No. 2013-13, does not provide a comprehensive framework regulating judicial conduct. Only some of its provisions deal with the conduct of judges and those provisions do not fully meet international standards such as the Bangalore Principles of Judicial Conduct (the Bangalore Principles). The current law does not mention the requirement to uphold judicial independence, the circumstances for recusal or disqualification, or the need to avoid use of one's office for private gain. Nor does it state that breaches of its provisions concerning judicial conduct will lead to disciplinary proceedings. Further, the current disciplinary procedure lacks sufficient guarantees to ensure fairness and, given the role of the Minister of Justice in initiating this procedure, can be considered neither independent nor impartial.

The ICJ views the development and adoption of a judicial Code of Ethics in Tunisia as an important opportunity to remedy existing gaps in the law and reinforce the independence of Tunisia's judiciary. The ICJ recommends the adoption of clear, transparent and detailed professional standards of conduct within the Code of Ethics and legal provisions on judicial accountability that comply with international law and standards, as outlined below.

⁵ "In establishing judicial accountability mechanisms, it is important to define the concept of judicial accountability and clearly establish the actions for which justice operators should be held accountable, to whom they should be accountable and through which processes". UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability (2014), UN Doc. A/HRC/26/32, para.55.

⁶ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability (2014), UN Doc. A/HRC/26/32, para.19. See also ICJ, Practitioners' Guide No. 13.

⁷ The Association des Magistrats Tunisiens (AMT) and the Observatoire Tunisien de l'Indépendance de la Magistrature (OTIM) were particularly critical.

I. Standards of Conduct and Judicial Ethics Board

The primary source for standards of judicial conduct at the international level are the Bangalore Principles, which were developed by the Judicial Integrity Group, a group of Chief Justices and Superior Court Judges from around the world, under the auspices of the UN.⁸ These Principles, which have been repeatedly endorsed by United Nations bodies,⁹ provide an internationally recognized overview of key elements of judicial ethics and are designed to “provide guidance to judges and to afford the judiciary with a framework for regulating judicial conduct.”¹⁰

The Bangalore Principles are organized around six core values: **independence, impartiality, integrity, propriety, equality, competence and diligence**. The ICJ also recommends that the Commentary on the Bangalore Principles of Judicial Conduct (hereafter the Commentary on the Bangalore Principles or “the Commentary”) be recognised as a guide for the drafting and interpretation of the Tunisian Judicial Code of Ethics. The Commentary was drafted and adopted by the Judicial Integrity Group and an international inter-governmental group of experts, to serve as an explanatory memorandum to the Bangalore Principles. The Commentary clarifies the rationale for the six core values incorporated in the Bangalore Principles.

Guidance can also be found in the UN Basic Principles on the Independence of the Judiciary, (the UN Basic Principles). Principle 2 reflects the need to preserve both judicial independence and judicial integrity: “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” Principles 17 to 20 address discipline, suspension and removal, and provide, among other thing, that judges shall be subject to suspension or removal only through fair procedures and for reasons of incapacity or behaviour that renders them unfit to discharge their duty, “determined in accordance with established standards of judicial conduct.”¹⁰ The standards of judicial conduct set out in the Bangalore Principles are explicitly aimed at setting out a relevant framework, but should in practice be incorporated and potentially elaborated upon in a Code of Ethics adopted by the judiciary at the national level.

A further useful source of guidance is the *Implementation Guide and Evaluative Framework for article 11 of the United Nations Convention against Corruption*, published by the UN Office on Drugs and Crime in 2014.¹¹

The recommendations below are based principally on these sources and aim to provide a guide, based on internationally recognised principles and standards, for the Tunisian judges who are developing the Judicial Code of Ethics.

⁸ Commission on Human Rights Resolution 2003/43, UN Doc. E/CN.4/2003/L.11/Add.4; UN Economic and Social Council (ECOSOC), Strengthening Basic Principles of Judicial Conduct, UN Doc. E/RES/2006/23. For drafting history see UNODC, Commentary on the Bangalore Principles of Judicial Conduct (September 2007).

⁹ See Commission on Human Rights Resolution 2003/43, UN Doc. C/CN.4/2003/L.11/Add.4, and UN Economic and Social Council (ECOSOC), Strengthening Basic Principles of Judicial Conduct, UN Doc. E/RES/2006/23. For the drafting history of the Bangalore Principles, see UN Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct (2007) [Commentary on the Bangalore Principles]. See also e.g. resolutions of the Human Rights Council: Resolution 29/6 (2015) on the Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, Preamble; Resolution 30/7 (2015) on Human Rights in the administration of justice, including juvenile justice, Preamble; Resolution 31/2 (2016) on Integrity of the judicial system, Preamble.

¹⁰ UN Basic Principles on the Independence of the Judiciary, Principle 19; Singhvi Declaration, Principle 27.

¹¹ Available at

https://www.unodc.org/documents/corruption/Publications/2014/Implementation_Guide_and_Evaluative_Framework_for_Article_11_-_English.pdf

a. Independence

Judicial independence, as a core principle protected by article 102 of the Tunisian Constitution, article 14 of the ICCPR, and elaborated upon in the Basic Principles on the Independence of the Judiciary, must be incorporated into and safeguarded within the Judicial Code of Ethics. Independence is the first core principle outlined in the Bangalore Principles of Judicial Conduct, which emphasize: “[j]udicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.”¹² This means both the individual judge and the judiciary as a whole must be independent with the “the complete liberty [...] to hear and decide the cases that come before the court.”¹³

A judge, therefore, must not be answerable to the government or any other external actor, and neither must he or she be (or be perceived to be) anything but independent.¹⁴ This is in line with the principle of the separation of powers and contributes to public confidence that judicial decision-making is free from inappropriate influence.

Exercising judicial functions in accordance with the principle of independence requires, for example:

- that a judge make decisions that are not improperly influenced by outside opinion and that he or she actively reject direct and indirect attempts to influence his or her decision-making;¹⁸
- that a judge accepts criticism, as freedom of expression and democratic discourse require that criticism of public office and of all exercise of public power be permitted;¹⁹
- that a judge act independently of other judges;²⁰ and
- that a judge exhibit and promote high standards of judicial conduct, in particular by ensuring the minimum guarantees for a fair trial are observed.²¹

Article 3(1) of the Code of Judicial Ethics of the International Criminal Court provides an example of a code of ethics which enshrines independence at the international level. It reads: “[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.”

b. Impartiality

The impartial administration of justice is a cornerstone of the rule of the law and the right to a fair trial, as enshrined in article 14 of the ICCPR and other international and regional standards on judicial ethics. Article 103 of the Tunisian Constitution provides that judges must be impartial. The Bangalore Principles state: “[i]mpartiality is essential to the proper discharge of the judicial office.” Importantly, impartiality does not just apply to judicial decisions but also to the decision-making process.

Important elements of impartiality include the following:

- A judge must act without favour, bias or prejudice;
- A judge’s conduct, both in and out of court, must maintain the confidence of the public, the legal profession and litigants in the impartiality of both the individual judge and the judiciary;

¹² Bangalore Principles of Judicial Conduct, Value 1: Independence. See also, e.g., Canadian Judicial Council, Ethical Principles for Judges, “Judicial Independence”, p. 7; Code of Conduct for United States Judges, Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary; High Judicial Council (France), Compendium of the Judiciary’s Ethical Obligations, A. Independence, p. 1.

¹³ Commentary on the Bangalore Principles, para. 22.

¹⁴ Commentary on the Bangalore Principles, para. 37.

- A judge should not comment in a manner that may influence or impair the fairness of the judicial process;
- A judge should excuse himself where he or she is unable to decide the matter impartially or where a reasonable observer may think they are unable to decide the matter impartially. Examples may include where:
 - the judge has actual bias or prejudice or knowledge of disputed evidence;
 - the judge previously served as a lawyer or was a material witness in the matter; and
 - the judge, or a member of the judge's family has an economic interest in the outcome.¹⁵

The Commentary on the Bangalore Principles contains guidelines on what kind of behaviour could result in either subjective or objective partiality, both inside and outside the courtroom. Such guidelines address, for example:

- the verbal or physical manifestation of bias, e.g. judges should both avoid demeaning expressions, slurs, epithets, etc., and exercise caution with their facial expression when addressing parties, lawyers, jurors or the media;
- contempt powers, which enable a judge to control the courtroom and maintain decorum, but which, when abused and used in retaliation, become a manifestation of bias.

On the other hand, the existence of personal beliefs and opinions on the part of the judge should not, in itself, necessarily constitute bias or prejudice. The Commentary states, "[a] judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from presiding."¹⁶

The Judicial Code of Ethics should define and include provisions on the duty of judges to recognize and to avoid conflicts of interest. Conflicts of interest arise when "the personal interests of the judge (or of those close to him or her) conflict with the judge's duty to adjudicate impartially".¹⁷ The Code should clarify that judges are under an obligation to minimise the risk of conflicts of interest as well as an obligation to withdraw or recuse themselves when faced with actual or potential conflicts of interest.

c. Integrity

The Judicial Code of Ethics must include integrity as an indispensable requirement for judges. Article 103 of the Tunisian Constitution outlines integrity as an essential characteristic of judges. The Commentary on the Bangalore Principles explains the components of integrity as "honesty and judicial morality". Including integrity standards in a Code of Ethics is also important to the fulfilment of the requirement in the UN Convention against Corruption that the judiciary, and individual judges, take measures to prevent and respond to corruption.

To maintain judicial integrity, judges must act "in a manner befitting the judicial office, be free from fraud, deceit and falsehood, and be good and virtuous in behaviour and in character."¹⁸ Judges' conduct in both their public and private life must be above reproach in the eyes of a reasonable observer.¹⁹ Further, "[t]he behaviour and conduct of a judge

¹⁵ Bangalore Principles, Value 2.

¹⁶ Commentary on the Bangalore Principles, paras 58-60.

¹⁷ Commentary on the Bangalore Principles, para 67.

¹⁸ Commentary on the Bangalore Principles, paras 101 and 103.

¹⁹ Bangalore Principles para 3.1. See also, UN Basic Principles on the Independence of the Judiciary, Principle 10; African Fair Trial Principles, Section A.4(i) and (k); and Canadian Judicial Council, Ethical Principles for Judges, "Integrity", Principle 1, p. 13: "Judges should make every effort to ensure their conduct is above reproach in the view of reasonable, fair minded and informed persons".

must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done".²⁰

A judge must respect the law in order to ensure the judicial office is not brought into disrepute, to encourage respect for the law and ensure public confidence. However, this applies not just to national law but also to international law and basic standards of human rights and dignity. Where national law contradicts such fundamental values as the prohibition on discrimination, slavery or torture, a judge may be required to "mollify" the effects of national law or, indeed, to resign from judicial office.²¹

International law and international judicial standards require that judges, as organs of the State, refrain from perpetrating or becoming complicit in human rights violations. The judge, as an organ of the State (and, furthermore, exercising powers of the State), otherwise would cause or contribute to the State's responsibility for a violation of international law. In fact, where judges fail to uphold human rights law and humanitarian law, they may and in some instances must be held personally liable for misconduct through criminal or other proceedings (this is addressed in more detail below).

More generally, the Commentary on the Bangalore Principles recommends the following test be applied when inquiring into the integrity of judicial conduct:

[T]he proper question is not whether an act is moral or immoral according to some religious or ethical beliefs, or whether it is acceptable or unacceptable by community standards (which could lead to arbitrary and capricious imposition of narrow morality), but how the act reflects upon the central components of the judge's ability to do the job for which he or she has been empowered (fairness, independence and respect for the public) and on the public perception of his or her fitness to do the job. Accordingly, it has been suggested that in making a judgment on such a matter, six factors should be considered:

- The public or private nature of the act and specifically whether it is contrary to a law that is actually enforced;
- The extent to which the conduct is protected as an individual right;
- The degree of discretion and prudence exercised by the judge;
- Whether the conduct was specifically harmful to those most closely involved or reasonably offensive to others;
- The degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates; and
- The degree to which the conduct is indicative of bias, prejudice, or improper influence.²²

The Commentary on the Bangalore Principles, taking into account the evolving nature of morals and values, cautions against the adoption of standards for a judge's conduct in his or her private life that are too prescriptive, or those that would allow for censuring or penalizing a judge "for engaging in a non-conformist lifestyle or for privately pursuing interests or activities that might be offensive to segments of the community".²³

More stringent standards however apply to judges' conduct in a courtroom. A judge must not only respect the law, but should also ensure his or her conduct with the parties, witnesses and public is appropriate. Judges should "seek to be courteous, patient, tolerant and punctual and should respect the dignity of all".²⁴ Judges must not discriminate, nor tolerate

²⁰ Bangalore Principles, para 3.2.

²¹ Commentary on Bangalore Principles, para. 108.

²² Commentary on the Bangalore Principles, para. 106.

²³ Commentary on the Bangalore Principles, paras 103-105.

²⁴ Judiciary of England and Wales, "Guide to Judicial Conduct", para. 4.2. This is sometimes considered as a component of the 'Competence and Diligence' standard, see Bangalore Principles of Judicial Conduct, art. 6.6.

discrimination arising from various grounds, including but not limited to “race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes”.²⁵ Standards of judicial conduct should also make clear that judges should not communicate privately with appellate courts or appellate judges about cases the judge has ruled on that are being appealed, during the appeal.²⁶

d. Propriety

Maintaining propriety and the appearance of propriety are essential to the performance of the activities of a judge.²⁷ Judges must “always conduct [themselves] in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”²⁸ As with impartiality, the principle of propriety not only requires that a judge act in a manner that is actually appropriate, but also that his or her behaviour would appear appropriate to a reasonable observer. In fact, the Commentary on the Bangalore Principles emphasizes, “[w]hat matters more is not what a judge does or does not do, but what others think the judge has done or might do”.²⁹ The Commentary recommends that the test for judicial impropriety should be:

[W]hether the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence and competence, or whether it is likely to create in the mind of a reasonable observer, a perception that the judge’s ability to carry out judicial responsibilities in that manner is impaired.³⁰

Given the nature of a judge’s profession and his or her duty to maintain their individual and the judiciary’s independence, impartiality, integrity and propriety, judges must accept that they may be the subject of constant public scrutiny and comment and they may be required to accept certain restrictions on their activities and contacts.³¹ The Bangalore Principles and the Commentary outline numerous examples of such restrictions.³² The common thread is that any restriction must demonstrably serve the real purpose of helping a judge maintain his or her propriety, and must not be used to constrain his or her right to freedom of expression and freedom of association.

e. Equality

Article 21 of the Tunisian Constitution enshrines the right of all citizens to be “equal before the law without any discrimination” and article 108 holds that “[l]itigants are equal before the courts and tribunals.” Judges must ensure that the fundamental principle of equality of all parties is respected, and should avoid manifesting any bias or discrimination.

The Bangalore Principles specify that equality of treatment of all before the courts is essential to the proper performance of judicial office.³³ Further, the right to equality and non-discrimination is a fundamental feature of human rights law. It is entrenched in article 14 of the ICCPR, which provides that, “[a]ll persons shall be equal before the courts and tribunals”. Article 26 holds that, “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and specifies that, “the law shall prohibit any discrimination and guarantee to all persons equal and effective

²⁵ These are called “irrelevant grounds” in the Bangalore Principles of Judicial Conduct and are listed under article 5.1.

²⁶ Commentary on the Bangalore Principles, para. 107.

²⁷ Bangalore Principles, Value 4, Propriety.

²⁸ Bangalore Principles of Judicial Conduct, para. 4.6.

²⁹ Commentary on the Bangalore Principles, para. 111. See also, e.g. Code of Conduct for United States Judges, Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities.

³⁰ Commentary on the Bangalore Principles, para. 112.

³¹ Commentary to the Bangalore Principles paras 113 and 114.

³² Commentary on the Bangalore Principles, paras 111-182.

³³ Bangalore Principles, Value 5, Equality.

protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2 requires States to respect and ensure these and all other rights under the ICCPR "without distinction of any kind", including (but not limited to) the grounds set out in Article 26. The Human Rights Committee has highlighted that the right to equality before courts and tribunals also includes the principles of "equal access and equality of arms", and the judge should ensure that "the parties to the proceedings in question are treated without any discrimination".³⁴

Judges should also endeavour to remain informed on issues and developments related to discrimination.³⁵

The Bangalore Principles outline the following components of the value of equality:

- A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds");
- A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds;
- A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties; and
- A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds.³⁶

The Judicial Code of Ethics should therefore remind judges that they have a duty to respect and protect the rights to equality, including equal access to the courts and equality of arms. They must ensure that the parties to the proceedings are treated without discrimination, including on the grounds mentioned in the ICCPR and in the Bangalore Principles. This requires not only that judges treat each party equally, but also that they be aware of how their behaviour toward each of the parties may be perceived.

The principle of equality also holds significance regarding gender-based discrimination. Judges must avoid any behaviour or speech that could be interpreted as discriminatory towards women or perceived as perpetuating stereotypes.³⁷

f. Competence and Diligence

International standards relating to judicial competence and diligence require that "the judge must diligently and efficiently perform his or her duties without any delay"³⁸ and state that competence and diligence are "prerequisites to the due performance of judicial

³⁴ 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) [Human Rights Committee, General Comment No. 32], para. 8.

³⁵ Commentary on the Bangalore Principles, para. 186: "[Judges] should attempt, by appropriate means, to remain informed about changing attitudes and values in society, and to take advantage of suitable educational opportunities [...]".

³⁶ Bangalore Principles, para 5.5.

³⁷ Commentary on the Bangalore Principles, para. 185. See also Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia, 2016, available at <https://www.icj.org/wp-content/uploads/2018/06/Southeast-Asia-Bangkok-Guidance-Advocacy-2016-ENG.pdf>.

³⁸ Universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999, article 6 (Efficiency).

office”.³⁹ Article 103 of the Tunisian Constitution contains the requirement that “[j]udges must be competent”.

To achieve the appropriate degree of competence and diligence, judges should take reasonable steps to maintain and enhance the knowledge and skills necessary to perform their duties,⁴⁰ keep themselves informed about the latest international law developments, especially in relation to human rights instruments,⁴¹ and take advantage of potential training opportunities.⁴² Moreover, professional competence includes not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court’s operations.⁴³

Judges must give precedence to their judicial duties over all other activities.⁴⁴ This means that they should not “engage in conduct incompatible with the diligent discharge of such duties”.⁴⁵ Cases should be managed within a reasonable time⁴⁶ and judges should ensure the process is not abused.⁴⁷

A judge shall perform all judicial duties efficiently, fairly and with reasonable promptness.⁴⁸ A judge shall maintain order and be patient, dignified and courteous in relation to all with whom the judge deals in an official capacity.⁴⁹ The judge shall require similar conduct of legal representatives, court staff and others subject to the judge’s influence, direction or control.⁵⁰

g. Additional considerations

For each of these principles, the Judicial Code of Ethics should clearly set out standards of conduct and give examples of both good and unacceptable practices to illustrate their proper implementation. This will help to inform the public about the proper functioning of the judiciary, and about what conduct they should expect of independent and impartial judges. A Code of Ethics will also help to guide judges, should they feel that outsiders (whether members of the public or other government officials) are attempting to influence the judge’s decision and therefore compromise the independence of the judiciary. The ICJ recommends that the Tunisian Code of Judicial Conduct include practical guidance as to how judges should behave to maintain their independence and integrity and give examples of proper or improper conduct.

The Tunisian Judicial Code of Ethics need not be an exact copy of the Bangalore Principles. However, the ICJ is of the view that any departure from these principles must be closely scrutinized and formulated in a manner that ensures full compliance with the requirements of judicial independence, impartiality and integrity, as well as the human rights of judges (on the latter, see further below). The ICJ emphasizes that restrictions placed on the conduct of judges in their private capacity, such as standards of behaviour to ensure propriety or integrity, must not go beyond what is demonstrably justified as

³⁹ Bangalore Principles of Judicial Conduct, Value 6: Competence and Diligence. See also, e.g. International Criminal Court, Code of Judicial Ethics, article 7; Canadian Judicial Council, Ethical Principles for Judges, “Diligence”, pp. 17-22.

⁴⁰ Bangalore Principles of Judicial Conduct, para 6.4.

⁴¹ Bangalore Principles of Judicial Conduct, para 6.4.

⁴² Commentary on the Bangalore Principles, para. 199, finding that taking training opportunities is as much a right as a duty.

⁴³ Bangalore Principles of Judicial Conduct, para. 6.2.

⁴⁴ Bangalore Principles of Judicial Conduct, para. 6.1.

⁴⁵ Bangalore Principles of Judicial Conduct, para. 6.7. See also Judiciary of England and Wales, “Guide to Judicial Conduct”, para 6.1.

⁴⁶ Committee of Ministers of the Council of Europe, Recommendation Rec(2010)12 [CoM Recommendation Rec(2010)12], para. 62. Paragraph 6.5 of the Bangalore Principles of Judicial Conduct also recommends that judges be efficient and deliver decisions with “reasonable promptness”.

⁴⁷ Commentary on the Bangalore Principles, para. 193.

⁴⁸ Bangalore Principles, para 6.5.

⁴⁹ Bangalore Principles, para 6.6.

⁵⁰ Bangalore Principles, para 6.7.

necessary and proportionate to achieving these aims, in order to respect the judges' rights to freedom of expression and association. This should be made clear in the Code of Ethics.⁵¹

h. Judicial Ethics Board

It may be that the Tunisian judiciary wish to establish a Judicial Ethics Board with a specific remit to provide guidance to judges on implementation of and respect for the Code of Ethics. This would be separate to a disciplinary body. In this regard, the Consultative Council of European Judges (CCJE), for example, "encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge".⁵² The CCJE recommends that such bodies be "separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions".⁵³

The ICJ considers that such a body could usefully play a consultative and advisory role for judges. As such, the ICJ recommends that a Board is established and that the composition, role and functions of the Board be clearly defined in the Judicial Code of Ethics.

Additional guidance on the process of establishment, structure, and role of judicial accountability mechanisms is set out in the ICJ 2016 Practitioners Guide No. 13: Judicial Accountability.⁵⁴

i. Recommendations

In light of the above, the ICJ calls on the High Judicial Council, the Tunisian judiciary and other relevant actors that are or could be involved in the development of the Judicial Code of Ethics, to:

- I. Ensure that the Judicial Code of Ethics is elaborated by, or in close and meaningful consultation with, a diverse representation of the Tunisian judiciary, including associations of judges;**
- II. Ensure that this Code of Ethics is established in law as the basis on which judges will be held to account professionally;**
- III. Base the content of the Tunisian Judicial Code of Ethics on the UN Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct, and to that end:**
 - a. Ensure that the principles of independence, impartiality, integrity, propriety, equality, and competence and diligence are clearly incorporated in the Judicial Code of Ethics in a manner consistent with international standards, including but not limited to:**
 - How judges must conduct themselves to remain independent from all outside actors, be they members of the executive, legislature, other judges, the public or the media, or other persons or organisations in society;**

⁵¹ UN Basic Principles on the Independence of the Judiciary, Principles 8 and 9. See also International Bar Association, Minimum Standards of Judicial Independence (adopted 1982), art. 41 and 42; Bangalore Principles of Judicial Conduct, para. 4.13; Commentary on the Bangalore Principles, paras 8 and 9; and African Fair Trial Principles, Section A.4(t).

⁵² Consultative Council of European Judges, Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 2002 [CCJE, Opinion No. 3], para. 29.

⁵³ CCJE, Opinion no. 3, para. 29.

⁵⁴ ICJ Practitioners' Guide No. 13, available at: <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

- **How judges must conduct themselves to be both objectively and subjectively impartial, and to avoid situations where a conflict of interest may arise;**
 - **How judges must demonstrate integrity by remaining free from corruption or any other fraudulent, dishonest, or deceitful behaviour, and how they must see their duty to enforce the law;**
 - **How judges must maintain propriety and the appearance of propriety, both in their professional and private lives, while retaining their fundamental rights and freedoms;**
 - **How judges must ensure that the fundamental principle of equality of all participants involved in or affected by proceedings before them is respected, and how they must avoid manifesting bias or discrimination;**
 - **How judges must see to it that the law is properly applied and cases are dealt with fairly and efficiently through proper competence and diligence;**
- IV. Include practical guidance as to how judges should conduct themselves in accordance with these principles;**
- V. Ensure that any differences between the content of the Judicial Code of Ethics and the Bangalore Principles are consistent with international standards on the independence of the judiciary and the rights or role of judges, and in this regard:**
- a. **Ensure that the Judicial Code of Ethics does not infringe upon the independence of judges and their ability to exercise their rights and fulfil their roles;**
 - b. **Ensure that the Judicial Code of Ethics is consistent with and respects judges' rights, including the rights to freedom of expression and association, and that its provisions do not authorize disciplinary sanctions based solely on the exercise of these rights;**
- VI. Establish and clearly define the composition and functions of a Judicial Ethics Board, in particular with regard to its role. In this regard, consider giving the Board a consultative and advisory role for judges whenever they have questions regarding proper conduct or the proper application of the Judicial Code of Ethics.**

II. Types of Judicial Misconduct and Judges' Rights

a. Types of misconduct

The disciplining of judges must be based on established standards of judicial conduct, consistent with established international standards and elaborated upon at the national level in an instrument such as a Judicial Code of Ethics. Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.⁵⁵

It is important to distinguish conduct that should fall within the scope of disciplinary proceedings or other accountability mechanisms, from that which should not. Discipline and civil liability should not be used against judges for the manner in which they interpret the law, assess the facts or weigh the evidence.⁵⁶ Nor should judges be subject

⁵⁵ Committee of Members Recommendation (2010)12, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17, 19 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

⁵⁶ ACHPR Principles and Guidelines, Section A, Principle 4(n) ("Judicial officers shall not be: (i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions").

to disciplinary procedures if their decisions are overruled or modified on appeal.⁵⁷ In fact, judges should be presumptively immune, subject to very limited exceptions, from civil suits related to decisions made in the discharge of their duties.⁵⁸ In addition, judges should never be punished for the legitimate exercise of their fundamental rights.

Judicial immunity, however, should not extend to conduct that has been appropriately criminalised, or to complicity in human rights violations. Indeed, international law requires that judges be held accountable for judicial corruption and judicial violations of human rights and of international humanitarian law. Victims of human rights violations, and of serious violations of international humanitarian law, have rights to effective remedy and reparation, including the right to truth.⁵⁹ This is as applicable to violations perpetrated by or with the complicity of judicial officials, as it is for the acts and omissions committed by other State officials.⁶⁰ The State may be held responsible for all acts and omissions of judicial officials that are carried out in the judge's official capacity, whether the wrongful act exceeded the person's authority or was lawful under the State's domestic law.⁶¹

Judges should also remain criminally liable for committing ordinary crimes, subject to those ordinary crimes themselves being properly defined in accordance with international human rights law and standards. However, ordinary offences should not be interpreted or applied in a way that would interfere with the content of judicial orders and judgments.⁶²

Apart from criminal liability, individual judges should be subject to disciplinary proceedings and penalties, up to and including removal from office, for sufficiently serious misconduct.⁶³ Some latitude is left to national judiciaries to determine the definition and scope of what misconduct would be considered serious enough to be punishable, and what sanctions are appropriate. However, this disciplinary framework must conform to international law and standards and respect the principle of legality. As such, in all circumstances, disciplinary procedures must be fair and timely. The suspension or removal of judges should occur only for reasons of incapacity or behaviour that renders them unfit to discharge their judicial duties, and all disciplinary, suspension or removal proceedings must be conducted in accordance with established standards of judicial conduct.⁶⁴

In Tunisia, the Constitution provides a general framework for the independence and accountability of judges. Article 102 states that "[j]udges are independent with the law being

⁵⁷ CoM Recommendation (2010)12, para. 70; see also ACHPR Principles and Guidelines, Section A, Principle 4(n)(ii); Concluding Observations of the Human Rights Committee on Vietnam, UN Doc. CCPR/CO/75/VNM, para. 10.

⁵⁸ UN Basic Principles on the Independence of the Judiciary, Principle 16.

⁵⁹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, article 22(b).

⁶⁰ UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), paras 97-105, 130. The right to an effective remedy and reparation is provided for in several international instruments, including: Universal Declaration of Human Rights, article 8; ICCPR, article 2(3); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, articles 13 and 14; etc.

⁶¹ Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Resolution 56/83 (2001), articles 1-4 and 7; Human Rights Committee, General Comment No. 31: Nature of the general legal obligation on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 4; UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability, (2014), paras 97-105, 130.

⁶² See, e.g., CoM Recommendation (2010)12, para. 68 (excepting cases of malice); CCJE, Magna Carta of Judges (Fundamental Principles), article 20; CCJE, Opinion No. 3, para. 75(ii); CCJE, Opinion No. 18: The position of the judiciary and its relation to the other powers of state in a modern democracy (2015), para. 37.

⁶³ UN Basic Principles on the Independence of the Judiciary, articles 17-20; African Fair Trial Principles, Sections A.4(p),(q) and (r); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, articles 22-28.

⁶⁴ UN Basic Principles on the Independence of the Judiciary, articles 17-20.

the sole authority over them in discharging their functions." Article 103 states that "[j]udges must be competent, and should be characterized by impartiality and integrity. They shall be held accountable for any shortcomings in their performance."

Article 104 provides that "[j]udges enjoy criminal immunity and may not be prosecuted or arrested unless their immunity is lifted. In the event of being apprehended committing a crime, a judge may be arrested and the Judicial Council he/she is affiliated with shall be notified, and shall decide on lifting the immunity." Finally, article 107 provides that judges "cannot be dismissed or suspended from their functions, nor be subject to disciplinary sanction, except in the cases and the guarantees regulated by the law and in accordance with a reasoned decision by the High Judicial Council." Article 109 also states that "[a]ny interference in the functioning of justice is prohibited."

Article 114 provides that the HJC is granted oversight of disciplinary matters.

It is positive that the Constitution protects the judiciary's independence, provides for both immunity and the lifting of immunity in certain circumstances and that the requirements of impartiality and integrity are enshrined therein. The fact that the Constitution requires disciplinary sanctions to be provided for by law and subject to a reasoned decision by the HJC is an important starting point for a fair and robust disciplinary framework.

It is concerning, however, that article 103 provides that judges should "held accountable for any shortcomings in their performance". This is very broad language and without further clarification could be abused in order to punish judges under arbitrary standards. As stated above, judges should not be disciplined for conduct in the normal course of their duties, such as interpreting the law, assessing the facts or weighing the evidence or if their cases are successfully appealed. As such, the ICJ considers that article 103 of the Constitution must always be read in conjunction with article 107, which requires that sanctions are regulated by law and the law must clearly state that judges will not be subject to disciplinary sanctions for conduct in the normal discharge of their duties.

In Tunisia, Law No. 2016-34, Law No. 67-29, Law No. 2013-13, the Code of Civil Procedure and the Criminal Code contain provisions relating to the conduct and accountability of judges.

Law No. 67-29 outlines some standards that judges are expected to uphold. Upon taking office, judges are required to swear that they will fulfil their duties impartially and honestly, will not disclose the secrecy of deliberations, and will be loyal and honourable.⁶⁵ The law further provides that the exercise of judicial functions is incompatible with the exercise of any public or elected office or any other business or employment.⁶⁶ Judges may undertake scientific, literary or artistic work provided it does not undermine their dignity or independence. For teaching or other functions that do not undermine a judge's dignity and independence, the Minister of Justice may grant individual exemptions. Article 23 of Law No. 67-29 requires judges to render justice impartially and prohibits them from deciding cases on the basis of personal knowledge. The law prohibits judges from defending causes that are beyond the remit of the case before them and judges are required to refrain from any action or behaviour likely to harm the honour of their profession.⁶⁷ The law does not address the requirement to uphold judicial independence, the circumstances for recusal or disqualification, or the prohibition on using one's office for private gain.

⁶⁵ Law No. 67-29, article 11.

⁶⁶ Law No. 67-29, articles 16 and 17.

⁶⁷ Law No. 67-29, article 24.

Article 50 of Law No. 67-29 seeks to define what conduct amounts to a disciplinary offence: "Failure of the duties of the status, honour or dignity of a judge or prosecutor is a disciplinary offence". Article 63 of Law No. 2016-34 provides that where judicial conduct is considered to be an offence affecting 'honour' or a crime, the HRC will forward the file to the public prosecutor's office and disciplinary proceedings will be suspended, pending a final judgment. The ICJ considers that 'failure of the duties of status, honour or dignity' and an offence affecting 'honour' are far too vague and overly broad as to give reasonable notice of what conduct is prohibited. In particular, the terms 'honour' and 'dignity' cannot be applied by the disciplinary decision-maker without an unacceptable degree of subjective interpretation. Where that decision-maker is the executive, or heavily influenced by the executive, this only further undermines judicial independence.

The inappropriate use of such interpretative discretion was demonstrated in the context of the mass dismissal of judges in May 2012.⁶⁸ The ICJ examined the shortcomings inherent both in the law and the mass dismissal in detail in its 2014 report *The Independence and Accountability of the Tunisian Judicial System*.⁶⁹

Both the Code of Civil Procedure and the Criminal Code contain provisions relating to the conduct of judges. Article 199 of the Code of Civil Procedure provides that a claim for damages can be brought against a judge for "wilful misconduct, fraud or corruption", or where the law expressly provides for civil liability.⁷⁰ Such claims must be heard before the Court of Cassation.

Offences in the Criminal Code⁷¹ that expressly apply to judges include various degrees of corruption and the refusal by a judge to "do justice to the parties" despite a warning or injunction from superiors.⁷² Except in cases of *in flagrante delicto*, Law No. 67-29 prohibits the arrest or prosecution of a judge for a crime or misdemeanour without prior approval from the HJC. In cases of *in flagrante delicto*, a judge may be arrested without prior approval, but the HJC is to be informed immediately.

The provision relating to civil liability for 'wilful misconduct' does not in itself make clear what misconduct can give rise to a claim for civil damages and seems inconsistent with international standards. For example, paragraph 16 of the UN Basic Principles provides as follows: "Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."

Accordingly, misconduct should be more precisely defined and covered clearly within the Code of Ethics to be dealt with by a fair disciplinary procedure. Rather than allowing civil claims to be brought against individual judges personally, Tunisia can consider establishing a procedure for persons alleging they have suffered losses due to improper acts or omissions by a judge, to bring a claim for compensation against the State itself.

The Criminal Code defines a refusal to "do justice to parties" as a criminal offence. This is also concerning, considering the imprecision in the term 'doing justice', and the idea of a judge being required to act on the basis of direction from superiors other than through an order or judgment, appears incompatible with the internal independence of the judge.

⁶⁸ See further: ICJ, Executive control over judiciary persists in Tunisia, 6 August 2012, available at <http://www.icj.org/executive-control-over-judiciary-persists-in-tunisia/>.

⁶⁹ ICJ, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 2014, available at <https://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

⁷⁰ Code of Civil Procedure, Law No. 59-130, as amended.

⁷¹ Criminal Code, Decree of 9 July 1913, as amended.

⁷² Criminal Code, articles 88-90 and 108.

It is positive that there is provision in the criminal law to allow judges to be held accountable for corruption. However, provisions concerning accountability of judges in relation to violations of international human rights or humanitarian law and judicial corruption should also be instituted at the disciplinary level.

The ICJ has previously stated that: "the lack of accountability of the judiciary in the past has facilitated corruption and impunity for human rights violations and contributed to a lack of public confidence in the judiciary." When the ICJ conducted research for a report on the independence of the judiciary in 2014, judges told the ICJ that: "rather than being investigated and subjected to disciplinary proceedings, certain judges who have been suspected of being involved in corruption or who have failed to address human rights violations, continue to exercise judicial functions; some have even been promoted."⁷³

The Tunisian legal framework should therefore include clear provisions prescribing the acts and omissions that could engage criminal and disciplinary responsibility for judicial corruption, and judicial perpetration or complicity in human rights violations, war crimes, crimes against humanity and other crimes under international law. In this regard, international human rights law, international humanitarian law and various instruments on corruption outline the types of conduct that should be sanctioned through fair and transparent criminal and disciplinary proceedings.

Globally, violations of human rights for which judges may be responsible (either in criminal or disciplinary proceedings) typically include the following non-exhaustive examples:

- arbitrarily ordering detention or arbitrarily sentencing of persons to imprisonment or death;
- convicting persons following trials that have manifestly failed to satisfy the minimum guarantees of fairness and due process;
- enforcing discriminatory domestic laws or applying laws in a discriminatory manner; or
- exercising or failing to exercise their authority in a manner that conceals or facilitates violations perpetrated by the military or law enforcement agents, such as arbitrary detention, torture, extra-judicial executions, enforced disappearance, or protecting perpetrators from facing punishment or depriving the victims from effective remedy and reparation.⁷⁴

In cases of certain violations of human rights, international law requires that judges be personally held responsible for their actions and that States take measures to ensure that this is so. The Human Rights Committee has stated:

Where the investigations [...] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. [...] These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).⁷⁵

Similarly, "gross" violations can also be understood to include genocide, slavery and slavery-like practices, summary or arbitrary executions, prolonged arbitrary detention,

⁷³ ICJ, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 2014, available at <https://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

⁷⁴ See ICJ, Practitioners' Guide No. 13, pp. 8-11.

⁷⁵ Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on State Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18.

and violations of economic, social and cultural rights of a particularly serious scale or severity of impact.⁷⁶

Judges should also be held responsible for perpetrating or being complicit in other crimes under international law, including international humanitarian law in situations of armed conflict or violations of international criminal law, such as war crimes or crimes against humanity. Such offences could include, for example, “wilfully depriving a protected person of the rights to a fair and regular trial”, which the 1949 Geneva Conventions and 1977 Additional Protocol I expressly list as a “grave breach” giving rise to criminal responsibility.⁷⁷

With regard to corruption, while there is no universally agreed upon comprehensive legal definition, the Special Rapporteur on the independence of judges and lawyers cites the informal definition used by Transparency International, a leading anti-corruption NGO, i.e. “the abuse of entrusted power for private gain”.⁷⁸ Further indications can be found in the UN Convention against Corruption, which requires States to criminalize certain acts that are implicitly considered to be forms of corruption, including bribery⁷⁹ and embezzlement and misappropriation or other diversion of property by a public official.⁸⁰ The Convention also requires States to consider criminalizing additional acts, including abuse of functions or position.⁸¹

The range of sanctions available for each of these acts or omissions should also be clearly provided in the law and in a disciplinary regime, and should include removal from office in serious cases. There should be a requirement that sanctions be proportionate to the misconduct in question. At a minimum, judicial perpetration or complicity in gross human rights violations, war crimes, crimes against humanity and other crimes under international law, or serious judicial corruption, should be considered to meet the threshold for removal from office (on sanctions, see below).

b. Respect for judges’ human rights

The Universal Declaration of Human Rights, as well as the ICCPR and other international standards, guarantee to all people the right to freedom of expression, belief, association and assembly. Respect for and protection of these rights and freedoms is especially important for judges in their role as guarantors of human rights and the rule of law. In fact, the exercise of freedom of association and expression is fundamental to the fulfilment of these roles.

Principle 8 of the UN Basic Principles on the Independence of the Judiciary recognizes that “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of

⁷⁶ See, e.g., Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 30; Geneva Academy of International Humanitarian Law and Human Rights, *What amounts to a ‘serious violation of international human rights law?’*, August 2014.

⁷⁷ See, e.g. 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War, article 130; 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, article 147; 1977 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, article 85(4)(e). This is also considered a “war crime” under article 8(2)(a)(vi) of the Rome Statute of the International Criminal Court.

⁷⁸ UN Special Rapporteur on the independence of judges and lawyers, Report on judicial corruption and combatting corruption through the judicial system, UN Doc. A/67/305 (2012), para. 109.

⁷⁹ UN Convention against Corruption, article 15(b): “[S]olicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

⁸⁰ UN Convention against Corruption, article 17.

⁸¹ UN Convention against Corruption, article 19.

their office and the impartiality and independence of the judiciary”.⁸² Additionally, Principle 9 provides that judges “shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence”.⁸³ The Commentary on the Bangalore Principles makes clear that such language includes the right to join or form a trade union or other association of that nature.⁸⁴ No restrictions to these rights may be imposed other than those permitted by articles 18 to 22 of the ICCPR.⁸⁵ Such limitations must among other things be lawful, proportionate, and demonstrably justified in a free and democratic society.

In Tunisia, under the Ben Ali regime, freedom of expression was significantly curtailed, including in relation to judges and their associations. In particular, the *Association des Magistrats Tunisiens* (AMT) faced harassment and intimidation when judges sought to publicly voice their opinions regarding the judiciary.

Article 31 of the 2014 Tunisian Constitution provides that “freedom of opinion, thought, expression, information and publication shall be guaranteed”. Article 35 protects the right to establish associations and article 36 protects the right to join and form unions. Article 37 protects the “right to assembly and peaceful demonstration”. However, Law No. 67-29 contains no guarantees for the rights of judges to freedom of expression and association. The ICJ recommends that, in line with international standards, both the relevant law and the Judicial Code of Ethics should explicitly provide for these rights and limitations should be consistent with international law and standards.

c. Recommendations

In light of the above, the ICJ calls on the Tunisian authorities and the High Judicial Council to:

- I. Amend the law to ensure that judges in Tunisia enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions; instead, in appropriate cases, persons who suffer losses as a result of such improper acts or omissions should be able to make a claim for compensation against the State itself;**
- II. Ensure that the law and the Judicial Code of Ethics clearly and precisely defines the forms of misconduct that may lead to a judge’s discipline and, in this regard:**
 - a. Ensure that all disciplinary offences are clearly and precisely defined so that judges can know from the wording of the relevant legal provisions what acts and/or omissions could render them liable to disciplinary action;**

⁸² These rights are set out for example in the Universal Declaration of Human Rights, articles 18, 19 and 20, and ICCPR, articles 18, 19, 21 and 22. See further ICJ, *Judges’ and Prosecutors’ Freedoms of Expression, Association and Assembly: overview of international standards*, 2019, available at: <https://www.icj.org/judgesexpression2019/>. See also article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), concerning the right to form trade unions and the right to strike. As with the ICCPR, Morocco has been a party to the ICESCR since 1979.

⁸³ See also CoM Recommendation Rec(2010)12, para. 25; and European Charter on the Statute for Judges, 1998, para. 1.7.

⁸⁴ Commentary on the Bangalore Principles, para. 176. The Commentary also states, “Given the public and constitutional character of the judge’s service, however, restrictions may be placed on the right to strike.”

⁸⁵ See e.g. Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011). This is apart from the exceptional possibility for States to implement certain specific temporary derogating measures, “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed” under article 4 of the ICCPR: see Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

- b. **Ensure that the scope of grounds for disciplinary action are not overly broad as to be open to abuse or other wrongful interference with the independence of individual judges;**
- III. **Provide for the disciplinary liability of judges for perpetration of or complicity in violations of human rights, humanitarian law and for judicial corruption and, in this regard clearly prescribe the offences that could give rise to disciplinary liability for such acts or omissions, in line with international law and standards;**
- IV. **Ensure that judges can be held individually criminally responsible for perpetration, complicity or participation in crimes under international law, as well as corruption offences properly defined in national law in line with international law and standards, while maintaining the appropriate role for the High Judicial Council;**
- V. **Ensure, in defining grounds for disciplinary action, that the fundamental rights and freedoms of judges are upheld and respected.**

III. Disciplinary Procedure and Sanctions

a. *Disciplinary procedure*

International standards make clear that any allegation of judicial misconduct must be both *investigated* independently, impartially, thoroughly and fairly and *adjudicated* in the context of fair proceedings before a competent, independent and impartial body. Under such procedures, due process and fair trial safeguards should apply.⁸⁶ The Human Rights Committee has stated that whenever:

“a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee⁸⁷ [and the law must ensure that judges may be dismissed] “only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law”.⁸⁸

In all cases, the disciplining of judges must be based on established standards of judicial conduct. Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.⁸⁹

The current disciplinary procedure for judges in Tunisia is provided for by Law No. 2016-34 relating to the HJC. The ICJ welcomes the fact that this law goes further to guarantee the fairness of the disciplinary procedure for judges than the previous applicable law.⁹⁰ However, the ICJ remains concerned that the procedure lacks sufficient guarantees to ensure fairness, in particular given the potential role of the Minister of Justice in initiating this procedure.

Under article 59 of Law No. 2016-34, complaints and notifications of conduct that might trigger a judge’s disciplinary liability can be sent by anyone to the HJC President or to the

⁸⁶ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para.61.

⁸⁷ *Pertterer v. Austria*, Human Rights Committee Communication No. 1015/2001, Views of 20 August 2004, UN Doc. CCPR/C/81/D/1015/2001 (2004), para. 9.2.

⁸⁸ General Comment No. 32, para. 20.

⁸⁹ CoM Recommendation (2010)12, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q).

⁹⁰ For an in depth analysis of the previous applicable law see the ICJ Report on the Independence and Accountability of the Tunisian Judiciary: Learning from the Past to Build a Better Future: <https://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>

Minister of Justice. Complaints are then transmitted to the General Inspector for Judicial Affairs (GIJA)⁹¹ with a view to carrying out the necessary administrative investigations. The GIJA can also be seized of a matter of his own volition. The GIJA, upon completion of the investigation, decides to either dismiss the case or send it to the relevant magistrates council, which will then transmit it to the judicial council sitting as the disciplinary council.⁹²

Under article 60, once the disciplinary council receives the file, its President appoints a rapporteur, who is chosen from among the council members. The rapporteur will carry out the investigation and summon the concerned judge. The rapporteur shall then hear the judge, listen to his or her explanations, and receive all the documents that the judge wants to put forward for his or her defence. The rapporteur may also hear from any person he or she deems useful to his investigations.

Article 61 provides that the rapporteur will finish his or her investigations within two months and report to the disciplinary council, which will hold a hearing within one month. The judge concerned will be given 20 days' advance notice of the hearing. He or she may review the documents pertaining to the case, and can, on request, obtain a copy of the relevant documents before the hearing takes place. The judge can also ask for the hearing to be postponed in order to have sufficient time to prepare a defence. The article provides for the right of the concerned judge to be assisted by a lawyer or a judge. The council can still review the case in the absence of the judge if he or she does not appear "without a valid reason". No explanation of what a "valid reason" would be is given.

Article 63 provides that the Judicial Council sitting as the disciplinary council will decide the appropriate sanction where a disciplinary infraction is established. The sanction will be decided in accordance with the Statute for Judges, discussed in more detail below.

Where the conduct is considered to be an offence affecting 'honour' or a crime, the Judicial Council will forward the file to the public prosecutor's office and disciplinary proceedings will be suspended, pending a final judgment.

Article 66 provides for the right to appeal against disciplinary sanctions.

The ICJ believes that the fairness of this procedure could be brought closer in line with international standards in the following ways.

The ICJ is concerned that the law maintains, in article 58, the power of the Minister of Justice to refer complaints to the GIJA for investigation and that this might be the basis for initiating disciplinary proceedings against a judge. Given how this role has been used by Ministers in the past to undermine judicial independence, the ICJ believes that the law should be amended to remove the role of the Minister of Justice in directly referring matters or other requests to the GIJA and provide instead that any complaint or other relevant information received by the Minister of Justice is referred to the HJC, who decides whether to forward it to the GIJA.

The law should provide that all disciplinary proceedings should be based on established standards set out in the Code of Ethics. The ICJ further recommends that the law be

⁹¹ According to article 24 of Decree No. 2010-3152 organizing the Ministry of Justice, the General Inspector for Judicial Affairs is under the authority of the Ministry of Justice. It is responsible for inspecting the functioning of the jurisdictions, services and public institutions attached to the Ministry of Justice, except for the Cassation Court.

⁹² According to article 55 of Law No. 67-29, the disciplinary council is a panel of designated members of the HJC. The members of the disciplinary council are: the first President of the Tunis Court of Appeal (President); the first President of another appellate court; the Prosecutor-General of the Tunis Court of Appeal; the more junior judge of the two elected judges who were of the same grade as the judge being investigated by the disciplinary council; and the more junior judge of the two substitute elected judges who were of the same grade as the judge being investigated by the disciplinary council.

amended to expressly provide that judges cannot be removed or disciplined for bona fide errors or for disagreeing with a particular interpretation of the law.⁹³

The provision in the law for twenty days of notice before a hearing may not be sufficient to prepare a defence and while it is positive that a judge may ask for an extension of time, the ICJ believes that the law should explicitly provide that any judge suspected of misconduct is promptly informed of the allegations against him or her and be guaranteed adequate time and facilities to prepare a defence.

A hearing should only occur in the absence of the judge in exceptional circumstances, which are provided for by law. The law should explicitly specify that the individual is to be given access to all potentially exculpatory material, and that the sanctions that are imposed following a finding of misconduct are proportionate.

b. Disciplinary sanctions

Where judicial misconduct has been alleged and fair and transparent disciplinary proceedings have been held, disciplinary sanctions may be imposed and may range from simple warnings, to suspension and removal from office. It is essential, however, that disciplinary sanctions be applied – in law and in practice – in proportion with the gravity of the offence committed, degree of fault and impact of the misconduct.⁹⁴

It is crucial that disciplinary sanctions are not applied arbitrarily, in particular because this would undermine security of tenure. The principle of security of tenure is an essential component of judicial independence; it requires that judges not be subject to removal from office during their term of appointment except in narrowly defined circumstances.⁹⁵ International standards are clear that the threshold for misconduct justifying removal of a judge from office must be set at a very high level, e.g. “incapacity or behaviour that renders them unfit to discharge their duties”⁹⁶; “serious misconduct or incompetence”⁹⁷; or “gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties”.⁹⁸

Where judges commit gross human rights violations, war crimes, crimes against humanity, other crimes under international law, or serious judicial corruption, this conduct would meet the threshold for removal from office. Complicity or forms of participation in such conduct would generally similarly provide grounds for removal. By

⁹³ See eg the UN Human Rights Committee, Concluding Observations on Uzbekistan: “The possibility, provided by law, of taking disciplinary measures against judges because of ‘incompetent rulings’, exposed them to broad political pressure and endangers their independence and impartiality.” U.N. Doc. CCPR/CO/71/UZB (2001), para 14. See also InterAmerican Commission on Human Rights, Guarantees for the Independence of Justice Operators, OEA/Ser.L/V/II. Doc. 44 (5 December 2013), para 216: “[U]nder international law the grounds for disciplinary investigations and sanctions imposed on a judge should never be a legal opinion or judgment he or she wrote in a decision. It is important to understand that there are, on the one hand, the remedies of appeal, cassation, review, removal of cases to a higher court or the like, which are aimed at verifying that a lower court’s decisions are correct; but on the other, there is disciplinary oversight, which is intended to assess the conduct, suitability, and performance of the judge as a public official. The distinction between these two types of procedure is essential to guaranteeing independence, such that a superior’s disagreement with an interpretation must, under no circumstances, become grounds for seeking disciplinary measures.” See similarly Inter-American Court of Human Rights, Case of Apitz Barbera et al (“First Court of Administrative Disputes”) v Venezuela, Series C no 182, Judgment of 5 August 2008, para 86.

⁹⁴ See, e.g., UN Special Rapporteur on the independence of judges and lawyers, Report on guarantees of judicial independence, UN Doc. A/HRC/11/41 (2009), paras 58, 98; CoM Recommendation Rec(2010)12, para. 69; CCJE Opinion No. 3, paras 73-74; Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators*(2013), para. 249, recommendation 24.

⁹⁵ See e.g. UN Basic Principles on the Independence of the Judiciary, Principle 12; African Fair Trial Principles, Section A.4(I); Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”), article 16(b).

⁹⁶ UN Basic Principles on the Independence of the Judiciary, Principle 18; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), art. IV.

⁹⁷ Human Rights Committee, General Comment No. 32, para. 20.

⁹⁸ African Fair Trial Principles, Section A.4(p).

contrast, as noted above, judges should never be subject to removal or punishment for bona fide errors or for disagreeing with a particular interpretation of the law.⁹⁹

Disciplinary sanctions must also respect the principle of judicial independence. For example, a geographic transfer would generally not be appropriate as punishment given that if a judge is found to have committed misconduct serious enough to warrant a disciplinary sanction, simply transferring the judge to continue his or her duties in another place – where the judge might repeat his or her misconduct – does not fulfil the obligations of a State to ensure transparency, individual responsibility and effective remedy. It should also be noted, that in order not to undermine the independence of judges, international standards require that any such transfer normally be subject to the prior consent of the judge in question.¹⁰⁰

Article 107 of the Tunisian Constitution provides that judges cannot be subject to suspension, dismissal or any other disciplinary sanction except for those cases, and in accordance with those guarantees, set out in law and by a reasoned decision of the HJC. Under article 114, the HJC is granted oversight of disciplinary matters.

Law No. 2016-34 provides that sanctions will be applied following disciplinary proceedings in accordance with sanctions laid out in the law.¹⁰¹ Organic Law No. 67-29¹⁰², article 52, provides that the disciplinary council has authority to issue any of the following sanctions:

1. reprimand recorded in the individual's file;
2. disciplinary transfer;
3. removal from the promotion shortlist;
4. demotion;
5. suspension for a period not exceeding nine months;
6. dismissal.

Sanctions 3 and 4 can also be accompanied by a transfer of office.¹⁰³

There is currently no clear guidance in the law as to the circumstances in which these sanctions may be applied or a requirement that the punishment be proportionate to the offence. However, the council is required to give reasons for its decision.¹⁰⁴

As discussed above, Law No. 2013-13 amended Law No. 67-29 in relation to disciplinary proceedings. However, it is not clear if the Minister of Justices' powers under Law No. 67-29, including the power to issue warnings to judges, and in urgent cases to temporarily suspend a judge from office until a final disciplinary decision has been taken, remain in force.¹⁰⁵ The ICJ is concerned at the lack of clarity around the law on sanctions in Tunisia, particularly in light of the use of inappropriate sanctions on the judiciary in the past.¹⁰⁶

⁹⁹ See e.g. UN Special Rapporteur on the independence of judges and lawyers, Report on Judicial Accountability (2014), paras 84, 87; CoM Recommendation Rec(2010)12, para. 66; Inter-American Commission on Human Rights *Guarantees for the independence of the justice operators*(2013), para. 249 recommendation22.

¹⁰⁰ Draft Declaration on the Independence of Justice ("Singhvi Declaration"), article 15; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, article 30; Statute of the Iberoamerican Judge, article 16; UN Special Rapporteur on the independence of judges and lawyers, Report on Mission to Indonesia, UN Doc. E/CN.4/2003/65/Add.2. para. 84.

¹⁰¹ Law No. 2016-34, article 63.

¹⁰² As modified by Law No. 2005-81

¹⁰³ Law No. 67-29, article53.

¹⁰⁴ Law No. 67-29, article59.

¹⁰⁵ Law No. 67-29, articles 51 and 54. The power to suspend a judge can be accompanied by the withholding of part or all of the judge's salary. Where a judge is not ultimately sanctioned or has been sanctioned with a punishment other than suspension or dismissal, the judge is entitled to receive his/her entitlements.

¹⁰⁶ See an in depth analysis in the ICJ's report: 'The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future', 2014.

The ICJ recommends that the law should be amended in a number of ways. First, clarity is needed as regards to what parts of Law No. 67-29 and Law No. 2013-13 remain in force. Second, the law should be amended to provide explicitly for sanctions to be proportionate to the offence committed and to specify how the sanction should be applied to acts of misconduct according to specified levels of severity and gravity. Third, transfer as a punitive measure should be removed.¹⁰⁷

As noted above, the relevant law and the Code of Ethics should provide that judges may only be suspended or dismissed for reasons of incapacity or behaviour that renders them unfit to discharge their duties, on grounds of serious misconduct or incompetence, and in accordance with fair procedures before an independent body ensuring objectivity and impartiality set out in the constitution or the law.¹⁰⁸

c. Recommendations

In light of the above and in order to ensure the accountability of the Tunisian judiciary in a manner that is consistent with the requirements of its independence and impartiality, the High Judicial Council and the Tunisian authorities should ensure that:

- I. The disciplinary procedure does not undermine the independence and impartiality of the judiciary and, to this end, the powers of the executive, including the Minister of Justice, in relation to the disciplinary procedure, should be rescinded, including the power to initiate disciplinary investigations;**
- II. The Judicial Code of Ethics, once established in law, should be the basis on which judges will be held to account professionally and the law should expressly provide that judges cannot be removed or disciplined for bona fide errors or for disagreeing with a particular interpretation of the law;**
- III. The disciplinary procedure for addressing complaints against judges for alleged breaches of the Code of Ethics affords judges the right to a fair hearing before an independent and impartial body and includes the rights outlined in Law No. 2016-34 and further the rights to:**
 - a. the prompt and fair determination of the complaint before an independent and impartial body;**
 - b. be promptly informed of the complaint;**
 - c. be guaranteed an adequate amount of time to prepare a defence and the mandatory provision of all relevant information relating to the complaint, including information about the basis of the allegations and any exculpatory information;**
 - d. be present at any disciplinary hearing unless there are exceptional circumstances, as outlined in the law;**
 - e. have the complaint or charges be kept confidential until a decision is made, unless the judge concerned decides otherwise;**
 - f. appeal against any disciplinary decision or sanction to a higher independent body or court; and**
 - g. the disciplinary decision to be published upon its determination.**
- IV. Ensure clarity on what provisions of law relating to judicial sanctions are in force;**

¹⁰⁷ Judicial Integrity Group, Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010), article 13.5; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), article 15; Statute of the Ibero American Judge, article 16.

¹⁰⁸ See Human Rights Committee, General Comment No. 32, para. 20; ICJ, Practitioners' Guide No. 13, pp. 22-27.

- V. Ensure that disciplinary sanctions are commensurate to the character and gravity of the offence committed and are consistent with international standards;**
- VI. Remove from the law the geographic transfer of a judge as a possible sanction for judicial misconduct;**
- VII. Ensure that the law is amended to clarify that a judge may only be suspended or removed from office for incapacity or behaviour that renders the judge unfit to discharge his or her duties.**

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Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org