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**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE
UN HUMAN RIGHTS COMMITTEE IN VIEW OF THE COMMITTEE'S
EXAMINATION OF TUNISIA'S SIXTH PERIODIC REPORT
UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**

Submitted on 3 February 2020

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council in 1957, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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I. Introduction

1. During its 128th session from 2 to 27 March 2020, the Human Rights Committee ('the Committee') will examine the Republic of Tunisia's implementation of and compliance with the provisions of the International Covenant on Civil and Political Rights (ICCPR or Covenant), including in light of the State Party's sixth periodic report under article 40 of the Covenant.
2. In the context of this review, the International Commission of Jurists (ICJ) wishes to bring to the Committee's attention some issues pertaining to Tunisia's implementation of the ICCPR, and their consequences for the protection of certain Covenant rights. In particular, this submission addresses: (a) the Constitutional and legal framework, specifically with regard to the failure to establish the Constitutional Court and related legislative gaps; (b) the authorities' implementation of transitional justice, particularly in relation to criminal accountability for gross human rights violations and related legislative gaps and procedural obstacles; and (c) the legal framework on judicial independence and accountability, particularly in relation to the development of the Judicial Code of Ethics.
3. This submission is relevant for the Committee's evaluation of the Republic of Tunisia's implementation of the State's obligations and related Covenant rights under articles 2, 3, 6, 7, 9, 14, 15, 16, 18, 19, 21, 22 and 26 of the ICCPR.

II. Establishment of the Constitutional Court

4. The Tunisian Constitution of 2014 mandates the establishment of the Constitutional Court within a year after legislative elections.¹ Tunisia's first democratic legislative elections were held in October 2014. On 14 March 2018, the Assembly of People's Representatives elected one female judge to the Court.² In subsequent voting sessions before the Assembly of People's Representatives, no other candidate secured the two-thirds majority of Assembly members required for the appointment of Constitutional Court judges; as a result, the Constitutional Court has not yet been established.
5. According to the information available to the ICJ, since then, the Tunisian authorities have initiated discussions on the introduction of amendments to the Organic Law No. 50 necessary to proceed to the establishment of the Constitutional Court.³ The ICJ considers these discussions as an opportunity for Tunisia to reform Organic Law No. 50 with a view to ensuring that it fully complies with international law and standards.
6. The procedure for appointment of judges to the Constitutional Court does not meet the requirements for judicial appointments under article 14 of the ICCPR. Article 118 of the Constitution and article 10 of the *Organic Law No. 50 of 3 December 2015 on the establishment of the Constitutional Court* provide that three bodies are responsible for appointing the 12 members of the Constitutional Court: the Assembly of People's Representatives, the High Judicial Council (HJC), and the President of the Republic; each of these appoints four out of the 12 members.

¹ 2014 Constitution, article 148 (5).

² Parliamentary Electoral Commission Report, April 2019, p. 3, available at http://www.arp.tn/site/main/AR/docs/cour_const/rap_court_const.pdf. See also ICJ, Tunisia: appointment of constitutional court members must meet international standards, Press Release, 12 March 2018, available at <https://www.icj.org/tunisia-appointment-of-constitutional-court-members-must-meet-international-standards/>.

³ ICJ's interview with Ministry of Justice, 26 November 2019.

7. To safeguard the independence of the judiciary, international standards provide that any procedures and criteria for judicial appointment must comply with the international framework governing the independence of the judiciary.⁴ The UN Special Rapporteur on the Independence of Judges and Lawyers has repeatedly expressed concern at the risk of politicization when legislative or executive authorities select and appoint members of the judiciary. Special independent and impartial bodies, whose membership envisages a substantial majority of judges, should be responsible for the appointment of members of the judiciary.⁵ In light of this, the fact that, under Tunisian law,⁶ a majority of the judges of the Constitutional Court are not to be selected by their judicial peers poses a significant risk of undermining judicial independence.⁷
8. The appointment criteria for members of the Court also do not meet international standards. The Constitution and the Organic Law No. 50 provide that only three quarters of members must be legal experts.⁸ Personal integrity is not included as a requirement for the selection and appointment of the Court's members.⁹ Further, Organic Law No. 50 is silent with regard to the prohibition of discrimination in the selection process, and does not require the equal representation of women or representative appointment of members of minorities in the composition of the Court.¹⁰ International standards clearly require judges to be appointed based on clear and transparent criteria, including based on their legal qualifications, competence and personal integrity,¹¹ as well as consistently with the prohibition of discrimination.¹²
9. The ICJ is also concerned about the absence of adequate safeguards for ensuring security of tenure of Constitutional Court judges in line with international standards.¹³ This concern stems from: a) the failure to distinguish among vacancy, removal and dismissal on disciplinary grounds in Organic Law No. 50; b) the lack of specific procedures governing disciplinary proceedings when a breach of judicial obligations has allegedly occurred or safeguards for the fairness of such proceedings, including a right to appeal a removal decision; and c) a vagueness in the

⁴ Principle 10 of the Basic Principles on the Independence of the Judiciary; 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, para. 19.

⁵ Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc. A/HRC/11/41, 24 March 2009, paras. 23-34, 97. A number of regional instruments also provide that the appointment process of the judiciary should be independent from the executive and legislative powers. See European Charter on the Statute for Judges, Principle 1.3; Council of Europe, Recommendation No. R (94) 12, Principle I.2.c.

⁶ 2014 Constitution, article 118; and Organic Law No. 50, article 10.

⁷ ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, Advocacy Brief, 2015, paras. 17-32, available at <https://www.icj.org/wp-content/uploads/2015/11/Tunisia-Draft-Law-Const-Court-Advocacy-Analysis-Brief-2015-ENG.pdf>

⁸ 2014 Constitution, article 118; and Organic Law No. 50, articles 7 and 8.

⁹ Organic Law No. 50, articles 8 and 9.

¹⁰ ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, Advocacy Brief, 2015, paras. 44-49.

¹¹ UN Basic Principles on the Independence of the Judiciary, Principle 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4(i), (h) and (k); Council of Europe, Recommendation No. R (94) 12, Principle I.2.c.

¹² UN Basic Principles on the Independence of the Judiciary, Principle 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4(h)-(j); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, Principle 13. See also Human Rights Committee, Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21; and UN Special Rapporteur on the Independence of Judges and Lawyers, Interim Report, UN Doc. A/66/289, 10 August 2011, para. 23.

¹³ ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, November 2015, paras. 51-68.

provision that permits the “exemption” of a judge “in case a candidacy criterion is no longer met or in case of breach of the obligations prescribed by the current law”.¹⁴

10. Further, under Organic Law No. 50, the HJC is not involved in the preparation of the budget of the Constitutional Court, while international standards emphasize the importance of judicial participation in the elaboration and the implementation of its own budget.¹⁵
11. There are also concerns in relation to the Court’s competencies and their compliance with international law, particularly with regard to: a) vagueness in the provisions on the review of “laws” as the relevant articles do not specify whether the decrees and other regulations issued by the executive fall under such review; b) the absence of a provision that expressly provides for the Court’s review of the lawfulness, necessity, proportionality, non-discriminatory and demonstrably justified character in a democratic society of the declaration of a state of emergency and of the measures adopted pursuant to such declaration, as required by the ICCPR; and c) the absence of a provision that explicitly affirms that the decisions of the Court are final, cannot be subject to any form of review or appeal and are binding on, and must be enforced by, all public authorities, in line with the principle of legal certainty.¹⁶
12. Finally, access to the Constitutional Court falls short of international standards. First, while the ICJ welcomes the mandatory character of the referral of cases to the Constitutional Court by the lower courts,¹⁷ the requirement that lawyers representing the party challenging the constitutionality of a law must be accredited before the Cassation Court is restrictive.¹⁸ Second, despite the fact that, under article 2 of the ICCPR Tunisia has an obligation to provide victims of human rights violations with an effective remedy to redress such violations, as well as to take measures to remove barriers to access to justice, neither the Constitution nor Organic Law No. 50 provides for the possibility for individuals who claim that their rights and freedoms have been violated to directly challenge the constitutionality of a law or draft law that infringes on their rights.¹⁹ Third, contrary to the practice of other constitutional courts, Tunisian laws do not permit individuals and groups, including non-governmental organizations, to join proceedings as a third party or submit *amicus curiae* briefs.²⁰

In light of the above concerns, the Human Rights Committee should recommend that Tunisia:

- **Reform Organic Law No. 50 on the Constitutional Court to:**
 - **Ensure that the selection and appointment process for judges guarantee the independence of the institution and individual judges, in compliance with article 14 of the Covenant;**
 - **Ensure that an independent and competent authority, the majority of whose members are drawn from the judiciary and are chosen by their peers, such as**

¹⁴ Organic Law No. 50, articles 20 and 21. See also ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, Advocacy Brief, 2015, paras. 51-68.

¹⁵ Organic Law No. 50, articles 32-35. See also ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, Advocacy Brief, 2015, paras. 69-76.

¹⁶ Organic Law No. 50, articles 54-61, 72-73. Article 5 limits itself to state that “the decisions and opinions of the Court bind all the powers”. See also ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, November 2015, paras. 77-85.

¹⁷ Organic Law No. 50, article 56.

¹⁸ Organic Law No. 50, article 55. See also ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, Advocacy Brief, 2015, paras. 86-89.

¹⁹ ICJ, The Tunisian Draft Law on the Constitutional Court in light of international law and standards, Advocacy Brief, 2015, paras. 91-93.

²⁰ *Ibid.*, para. 95.

- the HJC, be authorized to screen candidates and select or make binding recommendations on judges to be appointed to the Constitutional Court;
- Provide that members of the Constitutional Court be appointed on the basis of prescribed criteria based on their legal qualifications, competence and personal integrity to ensure that political considerations do not play a role in the selection proceedings;
 - Ensure that the composition of the Constitutional Court reflect the diversity of the community it serves, including by ensuring the equal representation of women in the Court, as well as a significant representation of minority groups;
 - Provide for adequate safeguards for ensuring security of tenure for the judges, and specify the grounds for termination of office, removal, as well as suspension or other disciplinary measures;
 - Provide that the Constitutional Court shall be able to draft and prepare its own budget, in consultation with and agreement of the HJC;
 - Ensure that the Constitutional Court may review decrees promulgated by the executive and other regulations and measures adopted by executive bodies, and include detailed procedures in this regard;
 - Ensure that the scope of the Constitutional Court's review of a state of emergency declaration include review of the lawfulness, necessity, proportionality and non-discriminatory and demonstrably justified character in a democratic society of the declaration and the measures adopted pursuant to it, as required by the Covenant;
 - Affirm that decisions of the Constitutional Court be final, may not be subject to any form of review or appeal and be binding on and must be enforced by all public authorities;
 - Remove the requirement that only lawyers accredited before the Cassation Court can raise an exception of unconstitutionality, and by simplifying the procedure and guaranteeing the right of the concerned parties to a fair hearing;
 - Permit individuals and groups, including non-governmental organizations, to join proceedings as third party and submit *amicus curiae* briefs.

III. Transitional Justice and criminal accountability for gross human rights violations

13. Article 7 of *Organic Law No. 53 of 24 December 2013 on Establishing and Organizing Transitional Justice* provides that accountability is the responsibility of judicial and administrative authorities. Article 8 of Organic Law No. 53 provides for the establishment of Specialized Criminal Chambers (SCC) entrusted with adjudicating “cases related to gross violations of human rights, as defined in international conventions ratified by Tunisia and in the provisions of the Law”, committed between 1 July 1955 and the issuance of the Law.²¹ According to the same article, such violations include, but are not limited to, “murder, rape and other forms of sexual violence, torture, enforced disappearances, and death penalty without fair trial guarantees.”
14. The SCC were formally established by Decree No. 2014-2887 of 8 August 2014 and were set up within the Tribunals of First Instance of 13 Courts of Appeal across Tunisia.²² Under article 42 of the Organic Law No. 53 and article 3 of the *Organic Law No. 17 of 12 June 2014 relating to the provisions related to the period going from 17 December 2010 to 28 February 2011*, the SCC exercise jurisdiction over cases involving “gross human rights violations” referred to them by the Truth and Dignity Commission (“Instance Vérité et Dignité”, IVD).
15. By 31 December 2018, the IVD had referred 200 cases to the SCC.²³ On 29 May 2018, the first hearing before the SCC was held in the Tribunal of First Instance in Gabès. During 2019, hearings took place in all the 13 SCC.
16. While the opening of trials before the SCC constitutes a fundamental step in Tunisia’s path toward accountability, a number of legal obstacles may undermine the SCC’s effective operation, with consequences for the right of victims of gross human rights violations – such as murder (article 6, ICCPR); torture and other cruel, inhuman or degrading treatment or punishment (article 7, ICCPR); arbitrary detentions (article 9, ICCPR) – to effective remedies (article 2, ICCPR) as well as for the right of the accused to a fair trial (article 14, ICCPR).

i. Gaps and inconsistencies in Tunisia’s domestic law in light of the Covenant

17. Tunisia’s failure to adequately penalize crimes under international law – which, in turn, constitute violations of the Covenant – is likely to negatively impact on the SCC’s ability to adjudicate the gross human rights violations cases over which they have jurisdiction. This section highlights the most relevant gaps and inconsistencies in Tunisia’s domestic law vis-à-vis international law in this regard.²⁴
18. With respect to violations of the right to life (article 6 of the ICCPR), Tunisia’s domestic law criminalizes homicide and otherwise regulates the circumstances under which a person may be legitimately deprived of his or her life by State authorities. However, it does not regulate the use of force by State actors in compliance with international standards.²⁵ *Law No. 4 on the use*

²¹ Article 8 (referral of cases by the IVD to the SCC) read in conjunction with article 17 (temporal jurisdiction of IVD) of Organic Law No. 53-2013.

²² See Decree No. 2014-4555 of 29 December 2014 modifying Decree No. 2014-2887 on the creation of the specialized criminal chambers in the field of transitional justice within the tribunals of first instance in the courts of appeals of Tunis, Gafsa, Gabès, Sousse, Le Kef, Bizerte, Kasserine and Sidi Bouzid, further amended by Decree No. 2016-1382 of 19 December 2016 to include additional chambers in Mednine, Monastir, Nabeul and Kairouan.

²³ IVD Final report, Executive Summary, pp. 70-84.

²⁴ ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1*, December 2019, available at <https://www.icj.org/wp-content/uploads/2019/12/Tunisia-Accountability-series-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

²⁵ The use of lethal force by law enforcement officials is regulated by the CC, Law No. 70 of 6 August 1982 and Law No. 4 regulating public meetings, processions, parades, public gatherings and assemblies of 24 January 1969. Article 3 of Law No. 70 states that the use of lethal force is regulated by articles 39, 40 and 42 of the CC.

of firearms of 24 January 1969 permits the use of lethal force in circumstances outside those permitted under international law, including in the defence of property, to “mitigate” a resistance, or stop a vehicle or other form of transport in the context of public meetings, processions, parades, public gatherings, and assemblies,²⁶ or to disperse an unlawful gathering where other means of dispersal have failed.²⁷ The Criminal Code (CC) also does not prohibit the imposition of the death penalty, including in circumstances where an absolute prohibition applies under international law.²⁸ In addition, Tunisia’s domestic law provides for superior orders as a defence for extrajudicial executions.²⁹

19. With respect to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (article 7 of the ICCPR), Tunisia criminalized torture in 1999, however, the definition of the offence in the initial legislation was narrower than required by international law.³⁰ Although the revised 2011 definition of torture broadened its scope to include public officials and others acting in an official capacity, it also narrowed the scope to exclude punishment as a possible purpose of torture and limit the discrimination element to cover only racial discrimination.³¹ The current definition also potentially exempts from prosecution persons who commit acts of torture but subsequently disclose such acts to the administrative or judicial authorities before they are aware of them.³² Further, Tunisian law criminalizes other acts of violence committed by public officials³³ and female genital mutilation,³⁴ but fails to criminalize other forms of cruel, inhuman or degrading treatment or punishment.³⁵
20. In relation to violations of the right to liberty and security of person (article 9 of the ICCPR), Tunisia’s domestic law criminalizes the deprivation of liberty against the will of the person concerned without a lawful basis (judicial order or where caught *in flagrante delicto*), where based on fraud, violence or threats, or where it is without a legitimate basis because of a declaration made or in order to obtain a confession.³⁶ These may be used as the basis for some cases involving arbitrary deprivation of liberty transferred to the SCC. They may, however, not capture all deprivations of liberty by State officials that could constitute crimes under international law (such as deprivations of liberty amounting to torture,³⁷ enforced

²⁶ CC, article 40; Law No. 4, article 20.

²⁷ Law No. 4, article 21.

²⁸ Under Tunisia’s domestic law, the imposition or carrying out of the death penalty following a violation of fair trial rights is not defined as a specific criminal offence. See ICJ, Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1, December 2019, pp. 41-49.

²⁹ CC, article 42; Law No. 70, article 46.

³⁰ See Law No. 99 of 2 August 1999 and former article 101*bis* of the CC.

³¹ CC, article 101*bis*.

³² CC, article 101*quater*.

³³ CC, articles 101 and 103.

³⁴ CC, article 221.

³⁵ CC, article 218.

³⁶ See article 103 of the Code of Criminal Procedure, as amended by Law-Decree No. 2011-106; and articles 237, 250, 251 and 252 of the CC.

³⁷ For instance in the case of incommunicado detention. See Report of the Working Group on Arbitrary Detention, A/HRC/16/47, 19 January 2011, para. 54; Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, para. 60. See also Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 35, 56, 58; *Aboufaied v. Libya*, HRC Communication No. 1782/2008, Views of 21 March 2012, paras. 7.4, 7.6; *Berzig [Djebrouni] v. Algeria*, HRC Communication No. 1781/2008, Views of 31 October 2011, para. 8.5.

disappearance³⁸ or crimes against humanity³⁹), particularly where they might be deemed not to fall within the above provisions of the Tunisian Criminal Code because they were carried out pursuant to domestic laws that applied at the time.

21. Tunisia's domestic law still fails to criminalize enforced disappearance (a violation of multiple Convention rights, in particular articles 7, 9, 16 and frequently, 6 of the ICCPR) as a continuous and autonomous offence involving multiple victims.⁴⁰ Although some elements of enforced disappearance are criminalized, such as the deprivation of liberty against the will of the person concerned, detentions initially lawfully executed by government officials pursuant to judicial orders may be excused. The third element of the crime of enforced disappearance involving the refusal to disclose the whereabouts or the fate of the disappeared person is not criminalized.
22. Further, Tunisia has not criminalized crimes against humanity as such in domestic law. Although a number of underlying acts are, to varying extents, criminalized in domestic law, including arbitrary deprivation of life (in particular murder), arbitrary deprivation of liberty, and torture and cruel, inhumane and degrading treatment or punishment, the Tunisian Criminal Code does not explicitly recognize that particular significance attaches to such crimes when committed in the context of a systematic or widespread attack against any civilian population, as provided for by international law.⁴¹
23. Finally, the ICJ wishes to bring to the Committee's attention the risk that, in light of the above mentioned gaps and inconsistencies in Tunisia's domestic law, the SCC may not give due regard to Tunisia's international law obligations on the prosecution of violations of the Covenant that amount to crimes under international law. In this regard, the ICJ recalls that international human rights law imposes two broad categories of obligations on the State: (i) the obligation to respect human rights and (ii) the obligation to guarantee these rights. The former refers to the duty of the State to abstain from violating human rights by action or omission, as well as the obligation to ensure the effective enjoyment of these rights through the adoption of necessary measures. The latter denotes the States' obligations to prevent human rights violations, investigate them, prosecute and punish the perpetrators and grant reparation to the victims for the damage caused.⁴²
24. In this context, Tunisia must ensure that its domestic legal order is compatible with its obligations to respect and guarantee Covenant rights.⁴³ This obligation is not limited to the formal adoption of legislative, administrative or judicial measures, but it also requires Tunisia to act – in practice – in accordance with this duty. Accordingly, and in particular in relation to the crimes over which the SCC have jurisdiction and, which, in turn, constitute violations of Covenant rights, Tunisia has an obligation to criminalize, investigate and, where there is

³⁸ Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, UN Doc. A/HRC/13/42, 20 May 2010, para. 292(e).

³⁹ Statute of the International Criminal Court, article 7(e). See also Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, UN Doc. A/HRC/13/42, 20 May 2010, para. 30.

⁴⁰ ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1*, December 2019, pp. 66-67.

⁴¹ *Ibid.*, pp. 92-94.

⁴² *Ibid.*, p. 13.

⁴³ Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 13.

sufficient evidence, prosecute these violations, and ultimately guarantee the victims' rights to an effective remedy and reparation (article 2 of the ICCPR).⁴⁴

25. As noted in the sixth report submitted by the Republic of Tunisia, the Constitution is clear on the primacy of international treaties over domestic law,⁴⁵ and there is nothing in the Constitution that precludes Tunisian courts, including the SCC, from applying such international treaties, including the ICCPR, as well as relevant customary international law.
26. Further, Tunisia recognizes the principles of legality and non-retroactivity in its legislation. Article 28 of the 2014 Constitution states that "[p]unishments are individual and are not to be imposed unless by virtue of a legal provision issued prior to the occurrence of the punishable act, except in the case of a provision more favourable to the defendant."⁴⁶ Article 148(9) of the Constitution, however, prohibits reliance on, among other things, the "invocation of the non-retroactivity of laws" to prevent the prosecution of individuals for violations in the context of the "transitional justice system." Accordingly, the ICJ understands Tunisia's law as being in line with the principle of legality and non-retroactivity under article 15 of the ICCPR, thereby allowing the retroactive application of national criminal law to conduct (whether by act or omission) that was not proscribed as an offence under national law at the time it was committed, but constituted a crime under international law at that time.
27. Under the general rules of State responsibility in international law, as well as under human rights treaties, including the ICCPR, the SCC are an organ of the State and their acts and certain forms of inaction can result in Tunisia violating its international legal obligations.⁴⁷ Accordingly, the SCC should seek to ensure that all their decisions and other acts or inaction be fully consistent with the Tunisia's obligations under the ICCPR.⁴⁸

The Human Rights Committee should recommend that Tunisia:

- **Reform the Criminal Code, the Code of Criminal Procedure and other relevant domestic law to guarantee that all perpetrators of violations of the Covenant constituting crimes under international law are held criminally responsible and victims' rights to an effective remedy for violations of their Covenant rights be upheld, and in particular:**
 - **Reform the Criminal Code and other relevant domestic law to criminalize arbitrary deprivations of life under article 6 of the ICCPR, consistently with the definitions of corresponding crimes under international law;**

⁴⁴ Ibid., paras. 15, 16 and 18. See also Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; 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, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/1989/89, 1989, principle 9; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/55/89, 4 December 2000, principle 2.

⁴⁵ Human Rights Committee, Sixth periodic report submitted by Tunisia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2019, UN Doc. CCPR/C/TUN/6, 28 June 2019, para. 19. See also para. 20 noting that this approach was adopted in Organic Law No. 53, which was issued prior to the promulgation of the 2014 Constitution.

⁴⁶ 2014 Constitution, article 28.

⁴⁷ International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 10 August 2001, article 4 (taken note of by and annexed to General Assembly res. 56/83 (2001); General Assembly res. 71/133 (2016) and commentary to article 4, para. 1, Yearbook of the International Law Commission, 2001, vol. II, Part Two. See also Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 4.

⁴⁸ ICJ, Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1, December 2019, pp. 9-32, and 94-97.

- **Reform the Criminal Code and other relevant domestic law to criminalize torture and other cruel, inhuman or degrading treatment or punishment under article 7 of the ICCPR consistently with the definitions of corresponding crimes under international law;**
- **Reform the Criminal Code, the Code of Criminal Procedure and other relevant domestic law to criminalize arbitrary deprivations of liberty under article 9 of the ICCPR consistently with the definitions of corresponding crimes under international law;**
- **Introduce in the Criminal Code enforced disappearance as a criminal offence consistently with the definition of the crime of enforced disappearance under international law;**
- **Introduce in the Criminal Code crimes against humanity as criminal offences consistently with their definitions as crimes under international law;**
- **Ensure that, in the prosecution of violations of the Covenant constituting crimes under international law, Tunisian law be applied in a manner consistent with Tunisia’s international obligations, particularly with respect to the scope of criminal conduct and the principle of legality and non-retroactivity under article 15 of the ICCPR;**
- **Ensure that, in the prosecution of violations of the Covenant constituting crimes under international law, the acts and inactions of Tunisian state organs, including courts such as the SCC, do not result in a violation of the Covenant and otherwise comply with Tunisia’s international obligations.**

ii. Rotation of SCC judges in light of the Covenant

28. As in other national systems, Tunisia provides for regular judicial rotation. According to *Organic Law No. 34 of 28 April 2016 on the High Judicial Council*, the HJC is the competent body with respect to the appointment, promotion, transfer and removal of the members of the judiciary.⁴⁹ Decisions on judges’ careers are to be based on the principles of equal treatment, transparency, efficiency, impartiality and independence.⁵⁰ To that end, the HJC must give due regard to the principles enshrined in the Constitution, international law treaties and the “statutes for judges”.⁵¹ Under Organic Law No. 34, the HJC orders the rotation of judges in all Tunisian Courts, including the SCC, yearly, irrespective of the stage of the case/s reached, unless exceptional circumstances apply.⁵²

29. The ICJ considers that the judicial rotation system is particularly problematic in the context of the SCC. The HJC’s decision on the annual judicial rotation is ordinarily issued by the end of July.⁵³ Consistent with international standards,⁵⁴ *Organic Law No. 34* provides that judges should not be transferred from one jurisdiction, function or location to another without their consent, unless the HJC considers it necessary to do otherwise. However, the ICJ is aware of the following concerns. First, newly appointed judges to the SCC often lack adequate transitional justice training, despite the fact that Organic Law No. 53 requires such training for all SCC members.⁵⁵ Second, judges have been transferred onto cases mid-way through trial; as a result,

⁴⁹ Organic Law No. 34, article 45.

⁵⁰ Ibid.

⁵¹ Ibid. Statutes for judges refer to Law No. 29 of 14 July 1967 on the Judiciary, the HJC and the Statute for Judges, as modified by Organic Law No. 13 of 2 May 2013.

⁵² Organic Law No. 34, article 47.

⁵³ Ibid., article 48.

⁵⁴ See Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, adopted by the Judicial Integrity Group at its Meeting held in Lusaka, Zambia, 20-21 January 2010, para. 13.5. See also Universal Charter of the Judge, adopted by the International Association of Judges, updated in 2017, article 2.2.

⁵⁵ Organic Law No. 53, article 8.

they would not have seen nor heard witnesses giving their testimony first hand; and they may not have been given the opportunity to familiarize themselves with the evidence presented at trial prior to their joining the presiding bench.⁵⁶ Third, due to the judicial rotation, cases are being adjourned because the composition of the chambers is not complete.⁵⁷

30. The ICJ considers that the above-mentioned practices may give rise to violations of the Covenant.
31. The appointment of judges lacking training on transitional justice may affect the right to trial by a competent tribunal (article 14(1) of the ICCPR).
32. Further, changes in the composition of the bench mid-way through trials may impact the right of the accused to a fair trial (article 14(1) of the ICCPR). Indeed, as the European Court of Human Rights has noted, changes in the composition of a court during the course of a criminal trial should only occur when "very clear administrative or procedural factors may arise rendering a judge's continued participation in a case impossible".⁵⁸ Accordingly, to ensure the fairness of criminal proceedings, where changes in the judicial composition of the bench hearing the case occur, safeguards must be put in place to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments.⁵⁹ Such safeguards should include, notably, "making transcripts available ... or ... arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court".⁶⁰ The ICJ is concerned that such safeguards are not implemented adequately or at all in the proceedings.
33. Finally the ICJ wishes to underline that the judicial rotation may risk to detrimentally impact the right to a trial without undue delay considering that, under article 221 of the Code of Criminal Procedure (CCP), trials may only take place before fully composed chambers (one President and four other judges).

In light of the above concerns, the Human Rights Committee should recommend that Tunisia:

- **Ensure that the annual judicial rotation, as regulated by Organic Law No. 34 on the High Judicial Council, be consistent with the right of the accused to a fair trial under article 14 of the ICCPR, and other relevant international standards;**
- **In the context of the SCC, in particular, ensure that the annual judicial rotation be applied consistently with the rights to:**
 - **a trial without undue delay (article 14(3)(c) of the ICCPR);**
 - **a trial by a competent tribunal (article 14(1) of the ICCPR);**
- **Ensure that newly appointed SCC judges receive timely and adequate training in transitional justice as provided for by Organic Law No. 53 on Establishing and Organizing Transitional Justice, with a view to guarantee the right to a trial by a competent, independent and impartial tribunal under article 14 (1) of the ICCPR.**
- **Ensure that, if the annual judicial rotation occurs mid-way through trials, safeguards implemented with the view to ensuring that newly appointed judges hearing the case have the appropriate understanding of the evidence and arguments.**

⁵⁶ ICJ interviews with Tunisian judges, 26-27 October 2019.

⁵⁷ Ibid.

⁵⁸ See *Cutean v. Romania*, ECtHR, Application No. 53150/12, Judgment of 2 December 2014, para. 61.

⁵⁹ Ibid., see also paras. 62-73.

⁶⁰ Ibid., para. 61. See also *Beraru v. Romania*, ECtHR, Application No. 40107/04, Judgment of 18 March 2014, paras. 64-67.

iii. Challenges related to the investigation and prosecution of cases before the SCC

34. The SCC's work may also be hindered by a number of procedural obstacles related to the investigation and prosecution of the gross human rights violations cases over which the SCC have jurisdiction. This section highlights the most relevant challenges in Tunisia's domestic law vis-à-vis international law in this regard.
35. Organic Law No. 53 of 2013 and Organic Law No. 17 of 2014 set up a special regime in which the operation of the SCC differs in several respects from the existing criminal procedure under the Tunisian Code of Criminal Procedure (CCP).⁶¹
36. Organic Law No. 53 granted to the IVD investigatory (including evidence collection)⁶² and indictment drafting powers ordinarily within the remit of the Office of the Public Prosecutor (OPP), investigating judges and the Indictment Chamber, notably the power to investigate crimes, determine which cases ought to be transferred to the SCC for prosecution and prepare the indictment. The law does not provide for specific provisions on whether or how general criminal procedure laws apply. Accordingly, the applicable laws have, in practice, been widely assumed to grant the IVD almost exclusive competence to conduct investigations of complaints referred to it pursuant to the transitional justice process.
37. Further, the OPP – which, ordinarily, is responsible for instigating the commencement of an investigation by an investigating judge and commencing and participating in the prosecution of a case after referral by the indictment chamber – in practice, has played little to no role in cases transferred to it by the IVD to date. Accordingly, the OTP has automatically transferred cases to the SCC pursuant to article 3 of the Organic Law No. 17, and it has played little to no part in the conduct of trials to date.⁶³
38. The application of this special regime poses problems both with regard to the pre-trial and trial phases, with consequences for the right of the accused to a fair trial (article 14 of the ICCPR) in particular.
39. With respect to the pre-trial phase, the ICJ is concerned that the application of this procedure resulting in the exclusion of the CCP risks hampering the implementation of Tunisia's international obligation to thoroughly and effectively investigate violations of the Covenant and, while doing so, to ensure that the fair trial rights of the accused (article 14 of the ICCPR) and victims' right to an effective remedy (article 2 of the ICCPR) are upheld.⁶⁴
40. According to the information available to the ICJ, the IVD's ability to exhaustively collect evidence has been detrimentally affected by the following: a lack of clarity regarding the procedures and standards applying to evidence collection procedures; resource constraints; limits on access to the exculpatory and inculpatory evidence as well as witnesses' testimonies; the lapse of time since the commission of the crimes; and lack of cooperation from some State authorities.⁶⁵ Despite these problems, there was little recourse to enforcement powers that may

⁶¹ ICJ interviews with Tunisian judges, 16 June 2017. The obligation to investigate and prosecute, the conduct of investigations, and the law and standards governing the right to a fair trial and the rights of victims to participate in criminal proceedings will be discussed in ICJ Practical Guide No. 3 on the investigation, prosecution and adjudication of gross human rights violations (forthcoming).

⁶² Organic Law No. 53, articles 39-40. Articles 51 and 52 imposed obligations on organisations and individuals to cooperate with the IVD, including in relation to the collection of evidence.

⁶³ ICJ's interviews with Tunisian judges, 6-7 July 2019.

⁶⁴ The standards on the collection, admission, exclusion, and evaluation of evidence and their application before the SCC will be discussed in ICJ Practical Guide 4 on principles and best practices in the collection, admission and assessment of evidence during the investigation, prosecution and adjudication of gross human rights violations (forthcoming).

⁶⁵ ICJ's interviews with Tunisian judges, 27-28 October 2019.

be exercised by investigative authorities, including the IVD, to ensure compliance with the obligations on State authorities and other institutions to cooperate with the IVD and to compel the attendance of persons or disclosure of information, documents and other evidence.⁶⁶ Parliament's decision not to renew the IVD's mandate despite the fact that investigations were still ongoing compounded this problem. Accordingly, investigations in some cases transferred to the OPP for referral to the SCC appear incomplete, including cases where indictments have been prepared.⁶⁷ Noticeable gaps in evidence include a lack of exculpatory evidence, official documents, forensic evidence such exhumation and autopsy records, and expert reports.

41. Among the cases that the OPP automatically referred to SCC for trial, there were some in which no adequate assessment of the evidence was conducted as it is, instead, the case in ordinary criminal proceedings in Tunisia before proceeding to trial. The ICJ considers that in such instances the presumption of innocence (article 14(2) of the ICCPR) may have been undermined. Other cases could also fail at the trial phase for lack of evidence in situations where the OPP might have been able to collect sufficient evidence if further investigation had been conducted. Such a scenario would be inconsistent with Tunisia's obligations under international law, including the ICCPR, to ensure thorough and effective investigations.⁶⁸
42. If on the other hand, the OPP were seen to have a more active role in ensuring more efficient and thorough investigations, with the checks and balances afforded at the pre-trial stage by the CCP, this could in principle reduce the risk of such difficulties arising, so long as the OPP were to properly exercise its discretion and authority.
43. Further, pursuant to this special regime, the accused has had limited engagement in the investigative and indictment confirmation process compared with what would generally happen in the context of the investigation and prosecution of comparable offences within the ordinary criminal justice system. As a result, the ability of the accused to evaluate, participate in or challenge investigations and judicial-decision making, and to benefit from some safeguards inherent to the CCP has been undermined, giving rise potential breaches of their rights to a fair trial. In addition, while the accused's involvement in the investigation by the IVD may have been sufficient in cases in which the investigation was effective and thorough, in other cases, those in which the investigation has been incomplete, the accused's role will effectively have been restricted, such that the rights of the accused to equality of arms vis-à-vis the OPP and victim or civil party and to defend themselves (article 14(1) and (3)(b) of the ICCPR) may have been violated. The risk of such violations will be high particularly where a thorough search for exculpatory evidence that may prove the innocence of the accused has not been undertaken.

⁶⁶ Ibid.

⁶⁷ ICJ's interviews with Tunisian judges, 6-7 July 2019.

⁶⁸ Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-16. See also 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, para. 22; Report of the UN Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, para. 1814; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005, principle III; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, principles 22 and 23; UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/55/89, 4 December 2000, principle 2; Nydia Erika Bautista v. Colombia, HRC, Communication No. 563/1993, Views of 13 November 1995, para. 8.6; José Vicente and Amado Villafañe Chaparro and others v. Colombia, HRC, Communication No. 612/1995, Views of 29 July 1997, para. 8.8; Judgment of 22 November 2005, IACTHR, Gómez Palomino v. Peru, para. 79; and Judgment of 27 August 2014, IACTHR, Landaeta Mejías Brothers and others v. Venezuela, para. 254; AComHPR, Amnesty International and others v. Sudan, Application Nos. 48/90-50/91-52/91-89/93, 15 November 1999, para. 51; AComHPR, General Comment No. 3 on the Right to Life (Article 4), para. 7; and International Convention on the Protection of all Persons from Enforced Disappearance, article. 12(1).

44. In cases where thorough and effective investigations may not have been completed, and in the absence of an OPP referral of the case to an investigating judge pursuant to the CCP, the SCC would likely need to order additional complementary investigative measures at trial to a greater extent than would ordinarily be necessary under the CCP.
45. The extension of time associated with such further investigations may enable authorities to remedy a lack of specificity in the indictment or an dearth of evidence to adduce at trial; on the other hand, in each case consideration may need to be given to the question of whether shortcomings in the investigation at the pre-trial stage have given rise to violations of the accused's right to be informed of the nature of the charges against them (article 14(3)(a) of the ICCPR) and the right to adequate time and facilities to prepare a defence (article 14(3)(b) of the ICCPR), to an extent that requires a remedy.
46. Consideration would also need to be given to the question of to what extent any consequent suspension in trial proceedings would detrimentally impact the right to trial without undue delay (article 14(3)(c) of the ICCPR) in a manner requiring a remedy. Further, deciding on whether to proceed with further investigation would need to consider the extent to which direct investigation by an SCC trial judges may violate the requirement of an impartial tribunal if they were required to make decisions relating to the culpability of the accused, and to the extent to which adequate measures to forestall any such potential violations may be put in place (article 14(1) of the ICCPR).
47. Similar concerns arise in cases in which indictments that have already been drafted will need to be amended following further investigation and cases for which an indictment has not been drafted at all. A failure to amend the indictment in such circumstances may be inconsistent with the accused's right to be informed of the nature of the charges against them (article 14(3)(a) of the ICCPR) and their right to adequate time and facilities to prepare a defence (article 14(3)(b) of the ICCPR). Accordingly, any amendment of the indictment at the trial stage would need to be closely scrutinized with a view to avoiding prejudice to the accused's right to a fair trial; depending on the circumstances, consideration may need to be given to the possibility of adjourning the case so that the accused may have sufficient time to prepare so as to avoid fair trial violations.
48. With respect to cases in which indictments have not been drafted at all, it is unclear how the case could proceed to trial without being referred to the Indictment Chamber.
49. With regard to the trial phase, international standards prescribe that prosecutors should have an active role in the criminal proceedings.⁶⁹ The CCP provides for the OPP to play an active role at trial, in particular through: (i) submitting the relevant evidence to the Tribunal of First Instance; (ii) identifying witnesses and submitting witness lists; (iii) examining and cross-examining witnesses; and (iv) making submissions, including with respect to sentencing.⁷⁰
50. Organic Law No. 53 of 2013, however, is silent on the OPP's role at trial. Some justice sectors actors in Tunisia interpret this lack of reference to the OPP's role at trial as an indication the OPP does not have an active role to play during the prosecution of cases before the SCC. However, the ICJ considers that such an interpretation would leave a considerable gap in the adjudication process, which, in turn, would be prejudicial to judges, who must act as independent and impartial arbiters, consistent with article 14(1) of the ICCPR. Further, this may negatively impact on the principle of equality of arms considering that, under this principle, the prosecution plays an essential role by presenting the case and seeking to discharge the burden of proof to secure the accused's conviction.

⁶⁹ UN Guidelines on the Role of Prosecutors, guideline 11; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(g).

⁷⁰ CCP, articles 111, 143, 144, 193, and 194.

51. Within Tunisian law, the CCP provides the only codified and legally-binding set of criminal trial procedural rules currently available to the SCC. Organic Law No. 53 of 2013 does not explicitly authorize the SCC to adopt its own rules of procedure, and to date the SCC has not sought to do so.
52. In the event the CCP is applied at trial, the SCC will still need to ensure that is applied in a manner consistent with Tunisia's obligation to ensure the accused's right to a fair trial (article 14 of the ICCPR).
53. In relation to the right to a public hearing (article 14(1) of the ICCPR), while the CCP provides in principle for hearings to be public, the circumstances under which hearings may be closed *proprio motu* by the court or upon request of the prosecutors are vague and not restricted to the grounds recognized by international law.⁷¹ According to the information available to the ICJ, some trial hearings have been closed to the public without a clear reason, potentially in violation of both the CCP and the ICCPR.
54. In relation to the right to be present at trial (article 14(3)(d) of the ICCPR), the CCP, and indeed the SCC in practice, permits trials *in absentia*, in circumstances and applying procedures inconsistent with the ICCPR. Where trials in absentia are held, the CCP also does not contain sufficient safeguards to protect the accused's rights, namely ensuring they have been sufficiently informed of the charges, timing and location of the proceedings, and ensuring counsel be appointed to represent their interests, and ensuring that the matter be automatically set for retrial if the person is eventually apprehended.⁷²
55. With regard to the right to adequate time and facilities to prepare a defence (article 14(3)(b) of the ICCPR), the requirement that the accused's lawyer be granted access to the investigation file only one hour prior to the accused's interrogation, and the fact that they cannot take copies of the investigation file are both inconsistent with international law and standards.⁷³
56. With regard to the right to defend oneself in person or through legal counsel (Article 14(3)(d) of the ICCPR), significant gaps in Tunisian law on legal aid continue to undermine effective access to a legal counsel. Indeed, the current legal aid system is ineffective, and there are limited resources to meet the demand.⁷⁴ Additionally, the limit on the right to communicate with one's legal counsel of choice only once during police custody prior to interrogation⁷⁵ is inconsistent with the ICCPR, which require that an accused have unimpeded access to their lawyer.
57. The practice followed in some of the trials that have already commenced before the SCC has given rise to concern in respect of the right to be tried without undue delay (article 14(3)(c) of the ICCPR). For example, there are significant gaps between scheduled hearings, sometimes for as long as six months. Such delays may be due to the failure of an accused or witness to appear on a summons or warrant, placing the SCC chamber in a difficult position when trying to balance the accused's rights. However, all efforts should be made to ensure adjournments do not affect an accused's right to trial without delay.

⁷¹ CCP, article 143.

⁷² CCP, articles 141, 142, 175, 176, 177, 182 and 183.

⁷³ CCP, article 13*quinquies*.

⁷⁴ See Law No. 2002-52 of 3 June 2002 on the granting of legal aid, articles 1, 3, 4, 13 and 14. According to a recent study, the Legal Aid Bureau which should take responsibility for examining the requests both to cover legal costs and lawyers' fees, in reality does not discharge this function and the decisions are in fact taken by deputy prosecutors designated by the public prosecutor. Avocats Sans Frontières and ATL MST/SIDA, *L'état de l'aide légale en Tunisie*, 29 April 2014, p. 60.

⁷⁵ CCP, article 13*quater*.

In light of the above concerns, the Human Rights Committee should recommend that Tunisia:

- **Ensure that all allegations of human rights violations (including violations of Covenant rights) disclosing evidence of criminal offences be promptly, independently, effectively and thoroughly investigated, with a view to bringing the perpetrators to justice in a manner that ensures their right to a fair trial under article 14 of the ICCPR, and that upholds the victims' right to an effective remedy, consistent with article 2 of the ICCPR, in particular by:**
 - **Ensuring that, in the investigation and prosecution of violations of the Covenant constituting crimes, the OPP and other investigative authorities carry out their mandate as defined the Code of Criminal Procedure and in line with international standards;**
 - **Ensuring that, in the investigation and prosecution of violations of the Covenant constituting crimes, the collection and assessment of evidence be carried out in line with the presumption of innocence under article 14(2) of the ICCPR and other international standards;**
 - **Ensuring that, in the investigation and prosecution of violations of the Covenant constituting crimes, the rights of the accused to equality of arms vis-à-vis the OPP and victim or civil party, and their right to defend themselves be guaranteed, consistent with article 14(1) and (3)(b) of the ICCPR;**
 - **Ensuring that, in the investigation and prosecution of violations of the Covenant constituting crimes, the rights of the accused to be informed of the nature of the charges against them (article 14(3)(a) of the ICCPR), to adequate time and facilities to prepare a defence (article 14(3)(b) of the ICCPR), and to a trial without undue delay (article 14(3)(c) of the ICCPR) be upheld;**
 - **Ensuring that trials be conducted in public, consistent with the accused's right to a public hearing under article 14(1) of the ICCPR;**
 - **Ensuring that trials in absentia may only take place in compliance with and in the circumstances provided for under international law, consistent with the right of the accused to be present at trial under article 14(3)(d) of the ICCPR.**
- **Reform the Code of Criminal Procedure and other relevant domestic laws to guarantee the right to a fair trial, consistent with article 14 of the ICCPR, and in particular guarantee:**
 - **the right to assistance of a competent and qualified lawyer during pre-trial proceedings (including when the accused is in during detention), questioning and preliminary investigations, as well as at trial;**
 - **The right to adequate time and facilities to prepare a defence;**
 - **The right defend oneself in person or through legal counsel;**
 - **The right to be tried without undue delay;**
 - **The right to a re-trial following a trial in absentia, particularly if the person eventually apprehended, 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.**

IV. Judicial independence and accountability

58. Under article 102 of the Constitution and article 14 of the ICCPR, Tunisia has a duty to respect and protect the independence and impartiality of the judiciary. This requires, among other

things, 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.

59. However, the current law regulating judicial conduct in Tunisia is incomplete. Law No. 29 of 14 July 1967 on the Judiciary, the HJC and the Statutes for Judges, even as modified by Organic Law No. 13 of 2 May 2013, do not provide a comprehensive framework regulating judicial conduct. Only some provisions of Law No. 29 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).⁷⁶ 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, as provided for by Organic Law No. 34 on the High Judicial Council, lacks sufficient guarantees to ensure fairness and, given the role of the Minister of Justice in initiating this procedure, is neither independent or impartial, and rather allows for the executive to continue exercising control on the judiciary. The mass dismissal of judges in May 2012 was an illustration of the inadequacy of the current legal framework.⁷⁷
60. The ICJ understands that the HJC is developing a Code of Ethics, as required by article 42 of Organic Law No. 34 of 28 April 2016. This is an important and overdue step towards strengthening the independence and accountability of the judiciary, in line with the Constitution and Tunisia's international obligations under the ICCPR. In this context, this section highlights the most relevant reforms that the Tunisian authorities and the HJC should adopt to reinforce judicial independence and accountability, and ensure compliance with the Covenant.⁷⁸
61. The Judicial 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, particularly the Bangalore Principles.⁷⁹
62. International standards also provide that all disciplinary proceedings, in particular those that could result in suspension or removal of a judge, 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.⁸⁰

⁷⁶ 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).

⁷⁷For more details, see ICJ, Executive control over judiciary persists in Tunisia, 6 August 2012, available at <http://www.icj.org/executive-control-over-judiciary-persists-in-tunisia/>; 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>

⁷⁸ ICJ, Tunisia: Judicial Conduct and the Development of a Code of Ethics in Light of International Standards, Briefing Paper, November 2019, available <https://www.icj.org/wp-content/uploads/2019/11/Tunisia-Code-of-Ethics-Advocacy-Analysis-Brief-2016-ENG.pdf>

⁷⁹ The Bangalore Principles, which have been repeatedly endorsed by United Nations bodies, 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". See UN Basic Principles on the Independence of the Judiciary, Principle 19; Singhvi Declaration, Principle 27. For more information on current gaps see ICJ, Tunisia: Judicial Conduct and the Development of a Code of Ethics in Light of International Standards, Briefing Paper, November 2019, pp. 4-12.

⁸⁰ 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). For further details, see ICJ, Tunisia: Judicial Conduct and the Development of a Code of Ethics in Light of International Standards, Briefing Paper, November 2019, pp. 12-24.

63. While Tunisia's efforts in strengthening the independence of the judiciary as outlined in the sixth report submitted by the Republic of Tunisia are welcome,⁸¹ the ICJ considers that Tunisia should take further steps in relation to judicial accountability to comply with its international obligations under article 2 of the ICCPR. To that end, the Code of Ethics should provide, in a manner consistent with independence of the judiciary, for individual judges to be held responsible, through disciplinary or criminal proceedings or both, as appropriate, for their involvement in violations of Covenant's rights, notably summary and arbitrary executions (article 6 of the ICCPR), torture and similar cruel, inhuman and degrading treatment (article 7 of the ICCPR), arbitrary deprivation of liberty (article 9 of the ICCPR) and enforced disappearance (articles 7 and 9 and, frequently, 6 of the ICCPR).⁸²
64. Finally, the ICJ recommends that, in defining grounds for disciplinary action in the Judicial Code of Ethics, the fundamental rights and freedoms of judges are upheld and respected. These include, notably, the right to freedom of expression, belief, association and assembly under articles 18, 19, 21 and 22 of the ICCPR.⁸³

The Human Rights Committee should recommend that Tunisia:

- **Ensure that the Judicial Code of Ethics is established in law as the basis on which judges will be held to account professionally;**
- **Ensure that the principles of independence, impartiality, integrity, propriety, equality, competence and diligence are clearly incorporated in the Judicial Code of Ethics in accordance with article 14 of the ICCPR and other relevant standards, notably the Bangalore Principles;**
- **Ensure that the law and the Judicial Code clearly and precisely define the forms of misconduct that may lead to a judge's discipline and related sanctions;**
- **Provide, in a manner consistent with independence of the judiciary, for individual judges to be held responsible, through disciplinary or criminal proceedings or both as appropriate, for their involvement in violations of the Covenant in compliance with Tunisia's international obligations under article 2 of the Covenant; and**
- **Ensure, in defining grounds for disciplinary action, that the fundamental rights and freedoms of judges under article 18, 19, 21, and 22 of the ICCPR are upheld and respected.**

⁸¹ Human Rights Committee, Sixth periodic report submitted by Tunisia under article 40 of the Covenant pursuant to the optional reporting procedure, UN Doc. CCPR/C/TUN/6, 28 June 2019, paras. 227-239.

⁸² See HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

⁸³ ICJ, Tunisia: Judicial Conduct and the Development of a Code of Ethics in Light of International Standards, Briefing Paper, November 2019, pp. 17-19.