

## Rights of judicial proceeding participants must be protected in Tunisia following COVID-19 lockdown

*Briefing paper on the protection of the rights of the judiciary, the accused and other proceeding participants as judicial proceedings resume following COVID-19 lockdown*

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As Tunisia gradually lifts COVID-19 containment measures and judicial proceedings resume, Tunisian authorities must ensure that sufficient guarantees are put in place to protect the accused's rights to liberty and a fair trial, victims' right to an effective remedy and the judiciary and other proceeding participants' rights to life, health and a safe and healthy working environment.

From 17 March 2020, the Tunisian President and executive authorities instituted [exceptional measures](#) to prevent and contain the spread of COVID-19. These included the [suspension of judicial proceedings](#) (and [procedural time limits](#)) except for "urgent" matters – which were defined to include *habeas corpus* applications, judicial review of emergency measures, and criminal proceedings against persons detained on minor offences – and other work on all categories of cases by the prosecution, investigating judges and indictment chambers.

On 27 April 2020, the Prime Minister issued Decree No. 2020-12 [amending article 141 of the Code of Criminal Procedure](#) (CCP) to provide for remote hearings in criminal cases. Article 141 of the CCP ordinarily requires an accused or his or her lawyer to appear in court. Article 141*bis* will now permit an accused in custody to appear from prison through audio-visual means in two circumstances: (a) as a general principle, upon the court's own initiative or after the request of the Prosecutor or accused, and only with the consent of the accused; and (b) in situations of imminent danger or to prevent the contagion of a transmittable disease, upon request of the court but without the consent or right of appeal of the accused. In such cases, the room in the prison reserved for proceedings is classified as an extension of the courtroom and the accused enjoys the same fair trial guarantees as in ordinary proceedings. A [pilot remote hearing](#) took place on May 2 in Tunis.

On 2 May 2020, the Tunisian Prime Minister issued Governmental Decree No. 2020-208 adopting a [national strategy](#) to partially lift containment measures in [three stages](#): from 4 to 24 May, from 24 May to 4 June and from 4 to 14 June. Article 4 of that Decree stated that the Ministry of Justice (MOJ) should set the "stages, conditions and areas relating to the gradual resumption of work in the courts" with the exception of the Administrative Court and Court of Auditors.

Prior to and following national strategy, the High Judicial Council (HJC) and MOJ made conflicting announcements regarding the operation of judicial proceedings. On 3 May, the MOJ [announced a timetable](#) for the progressive resumption of judicial proceedings in accordance with the national strategy.<sup>1</sup> In response, that same day the HJC issued a [communiqué](#) calling for the judiciary to follow

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<sup>1</sup> Under the first stage, the following cases were ordered to resume: cases published by the Court of Cassation; cases reserved for final judgement; criminal cases involving detention of the accused; cases involving violence against women and children; civil commercial, personal and real estate cases in the pleading stage in which the representation of a lawyer is obligatory; alimony cases in their initial stage; and confirmed urgent cases. In the second stage, the following cases must resume: all criminal cases; civil, commercial, personal and real estate cases in which the representation of a lawyer is obligatory; employment and social security cases at the trial stage; and civil status reform demands, petitions

a circular<sup>2</sup> it published on 28 April 2020 defining the urgent cases for which the judiciary should continue to operate.<sup>3</sup>

Against this background, this briefing paper provides recommendations to Tunisian authorities, including the judiciary, on the implementation of measures for the resumption of judicial proceedings to ensure compliance with international human rights law and standards. In particular, Tunisian authorities should determine measures in line with the right to liberty, the right to a fair trial, the right to an effective remedy, the right to life, the right to health and the right to safe and healthy working conditions.

***Tunisian authorities must adopt protective measures to ensure the rights to life, health and a safe and healthy working environment for all proceeding participants***

Tunisian authorities should provide for adequate protective measures for judges and other persons involved in court proceedings, including prosecutors, lawyers, court administrative staff, accused persons, victims and civil parties, to protect their health.

As set out in a recent [ICJ briefing note](#), under article 7 of the International Covenant on Civil and Political Rights (ICCPR), article 12 of the International Covenant on Economic, Social and Cultural Rights and article other sources of international human rights law binding on Tunisia including article 16 of the African Charter on Human and Peoples' Rights (ACHPR), Tunisian authorities have obligations to protect the [right to life](#) and [right to health](#) of their populations, including in the context of judicial proceedings, during a public health emergency such as the COVID-19 pandemic. Under article 7 of ICESCR, Tunisia must also respect, protect and fulfil the right of all workers to safe and healthy working conditions.

To accord with such obligations, Tunisian authorities should:

- Ensure that all persons participating in judicial proceedings have full access to [medical assistance and services, including information and testing](#);
- Provide for COVID-19 screening procedures and exclude persons with symptoms from attending judicial proceedings;
- Ensure that judicial facilities, including police stations, prisons and court rooms, are adapted to enable social distancing, including through the use of video conferencing; and
- Ensure the full sanitation of judicial facilities, including parts of prisons forming part of the court.<sup>4</sup>

***Tunisian authorities must ensure remote hearings only occur where compliant with international law and standards governing criminal trials***

Article 141*bis* of the CCP now permits the accused to participate in criminal proceedings remotely. While [many other States](#) are rapidly introducing various forms of "remote judicial proceedings" in response to the COVID-19 crisis, as a general principle changes in the modalities of hearings should only take place if there are [safeguards](#) in place that guarantee the right to a fair trial under article 14 of the ICCPR and article 7 of the ACHPR. It is inherently inappropriate to carry out certain types of proceedings without an accused or person deprived of liberty physically present, unless they have freely given their consent to such a method of proceeding, including to conduct a criminal trial<sup>5</sup> or proceeding to ensure anyone arrested or detained on a criminal charge is brought promptly before

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and payment orders. In the second and third phase, access to the courts is limited to lawyers, their clerks and judicial assistants, and others granted a special license by the court. Court proceedings resume in full from the beginning of the third phase.

<sup>2</sup> Tunisian judges and lawyers' associations published statements supporting the HJC's approach. See, for example, [Press statement from Association des Magistrats Tunisiens dated 3 May 2020](#).

<sup>3</sup> This included: (i) criminal cases in which the accused is custody; (ii) emergency cases; (iii) protection of children and family cases; (iv) emergency cases before the Administrative Tribunal; and (v) Financial Court cases.

<sup>4</sup> Additional obligations bind Tunisia with respect to the rights to health and life of detainees, including the obligation to release certain categories of detainees. See, for example, OHCHR, [Coronavirus emergency: challenges for the justice system](#); Matt Pollard & Mathilde Laronche (ICJ), [COVID-19 Symposium: The Courts and Coronavirus \(Part II\)](#), (3 April 2020). A detailed examination of such obligations in the context of detention is beyond the scope of this paper.

<sup>5</sup> ICCPR, art. 14(3)(d). See e.g. European Court of Human Rights, Grand Chamber, [Sakhnovskiy v. Russia](#) (2 November 2010), para. 96.

a judge or other judicial officer.<sup>6</sup> For most other types of proceedings, a judge would need to make an individual assessment regarding whether substituting videoconferencing for the physical presence of a party or witness is appropriate.<sup>7</sup>

Accordingly, Tunisian authorities must ensure that:

- The law does not permit, and in practice courts and other authorities do not, proceed with criminal trials without the physical presence of the accused, or fail to bring anyone arrested or detained on a criminal charge physically before the relevant judge or judicial officer, without that person's freely given consent.
- In any other proceedings that would normally require the physical presence of a person, that the proceeding take place without that person's physical presence on the basis of a judicial assessment of the appropriateness of substitute methods of participation in light of the characteristics of the case and the interests of the parties.
- The accused has access to legal counsel before, during and after the hearings and that regular, secure and confidential communications between the lawyer and client are ensured,<sup>8</sup> including by:
  - (i) ensuring that any restrictions on audio or video communications from detention facilities or visits are relaxed to allow accused persons to communicate with their counsel as needed;
  - (ii) equipping courts and detention facilities with rooms and means to enable counsel to confidentially communicate with their clients during the course of remote proceedings, and ensuring authorities fully respect the confidentiality of such communications;
  - (iii) ensuring that such systems are not installed and operated by the State in a manner that could reasonably cause a person to doubt their confidentiality;<sup>9</sup> and
  - (iv) loosening any restrictions on legal aid adversely impacting access to legal counsel during the pandemic.
- The accused has access to the case file including the charges and the evidence against them and sufficient time and facilities to prepare their defence.<sup>10</sup>
- The accused are able to effectively participate in judicial proceedings and provide instructions to counsel where necessary, including by ensuring:
  - (i) the accused can see witnesses providing testimony and respond to them;<sup>11</sup>
  - (ii) the accused can inspect and submit evidence during proceedings;
  - (iii) proceedings are suspended when interruptions in video-communications occur and until they are resolved; and
  - (iv) technical support is available at the court and detention facilities.
- The accused's appearance ensures the maintenance of their right to the presumption of innocence, including by ensuring defendants do not appear in prison clothes.<sup>12</sup>
- The public continues to be able to access proceedings, whether through attendance which meets protective requirements set out above or through live-streaming or other simultaneous or timely public dissemination of the proceedings.

In the conduct of remote hearings, Tunisian courts should also ensure some categories of persons are provided with additional support where needed, including victims of gender-based violence,

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<sup>6</sup> ICCPR, art. 9(3). See e.g. Human Rights Committee General Comment no 35, para 34: "The individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power. The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody and facilitates immediate transfer to a remand detention centre if continued detention is ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment."

<sup>7</sup> See e.g. European Court of Human Rights, [Yevdokimov and Others v. Russia](#) (16 February 2016), para. 52.

<sup>8</sup> ICCPR, art. 14(3)(d); UN Human Rights Committee [General Comment No. 35](#): Article 9 (Liberty and security of person), paras. 35, 46.

<sup>9</sup> See e.g. European Court of Human Rights, [Sakhnovskiy v. Russia](#) (27 November 2018), paras. 45-48.

<sup>10</sup> ICCPR, art. 14(3)(b).

<sup>11</sup> ICCPR, art. 14(3)(b).

<sup>12</sup> ICCPR, art. 14(2).

children and persons with disabilities. To that end, as part of the overall assessment of whether videoconferencing is appropriate to a particular hearing, courts should assess individual needs on a case by case basis so that any issues that affect such persons' ability to participate effectively can be identified and procedural adjustments put in place. Where such measures cannot be implemented, consideration should be given to postponing proceedings provided the rights of the accused, victim/s and/or witness/es can be maintained. With respect to proceedings relating to gender-based violence and violence and other harm against children in particular, the judiciary should ensure victims can access appropriate temporary protection until such time as proceedings can recommence.

Additional concerns arise with respect to the permanent addition of article 141*bis* to the CCP by the Prime Minister through decree and its compliance with the right to a fair trial under article 14 of the ICCPR and article 7 of the ACHPR. The Decree should be amended to ensure that:

- With respect to the first limb of article 141*bis*, remote hearings be held only in clearly defined circumstances justifying extraordinary measures to limit access to the courtroom by the accused.
- Criminal trials may not be conducted by videoconference or otherwise without the physical presence of the accused, without the accused's freely given consent.
- Videoconferencing may not be used as a substitute for bringing anyone arrested or detained on a criminal charge physically before the relevant judge or judicial officer, without that person's freely given consent.
- Whatever circumstances justify a court to conduct remote hearings, the accused is afforded the right to appeal a decision to hold a hearing remotely and to have the decision reviewed when circumstances justifying it change.
- Remote hearings can be held in other detention facilities where accused persons may be detained to reduce the risk of contagion for the accused and other persons they enter in contact with.

Additionally, in accordance with article 70 of the Tunisian 2014 Constitution, the amended decree inserting article 141*bis* into the CCP should be submitted for ratification to the Assembly of Representatives at the end of the period of their authorization to the Prime Minister to issue such decrees.

### ***Courts should remain available for urgent matters pending the adoption of protective measures***

Any general resumption of judicial proceedings should include measures to ensure the participants' rights to life, health and safe and healthy working conditions. Pending a general resumption, the courts must remain available to hear urgent matters, which, as elaborated in the [ICJ's briefing note](#), should at a minimum include the following:

- Judicial review of emergency government measures. Tunisian courts must remain competent and capable to evaluate and if necessary nullify any unlawful imposition or unjustified extension of emergency measures.<sup>13</sup>
- Cases involving alleged violations of human rights and constitutional rights, particularly those involving irreparable harms. Tunisian courts must be available to hear such cases to guarantee the right to an effective remedy as required by article 2(3) of the ICCPR to which Tunisia is a party.<sup>14</sup>
- Cases involving [victims of gender-based violence](#), [children](#), [older persons](#), and [persons with disabilities](#). Tunisian courts should continue to consider urgent applications for protective measures for such persons who do or may face increased risks of violence, abuse or neglect,

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<sup>13</sup> UN Special Rapporteur on the independence of judges and lawyers [Report](#), UN Doc No. A/63/271 (12 August 2008), paras. 16-19, 66.

<sup>14</sup> See the ICJ's [Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis](#), Principle 11 and Commentary, pp. 181-196.

whether as a result of general confinement measures, or who would otherwise be at greater risk if access to other protective orders were suspended or limited.

- Cases involving [persons deprived of their liberty](#), whether in police detention facilities, penitentiary institutions, [immigration detention centres](#), psychiatric hospitals and social care homes or in compulsory quarantine for reasons of public health protection. Procedural guarantees such as the right to have access to a court to challenge any deprivation of liberty<sup>15</sup> and the right of persons deprived of liberty on criminal law grounds to be promptly brought before a judge, are considered non-derogable.<sup>16</sup> Given the particular vulnerability of persons deprived of liberty in the context of the pandemic, Tunisian courts should be always available to hear such cases.

On the other hand, the United Nations Office of the High Commissioner for Human Rights has stated that prosecutions of minor offenses and civil or economic cases “may not be considered a priority in this critical situation” and could be [postponed to reduce demand on justice systems](#). It would also be a particularly opportune time for Tunisian authorities to assess the possibilities for decriminalization of petty offences in line with the relevant [standards](#) adopted by the African Commission on Human and Peoples’ Rights.

***Adjustments to the modalities of conducting trials should ensure the rights of the accused and victims are respected in Specialized Criminal Chambers’ proceedings***

As part of the exceptional measures described above, Tunisia also [suspended judicial proceedings before the Specialized Criminal Chambers](#), which are responsible for [adjudicating gross human rights violations](#) committed by the past regimes. Situations of emergency must not result in impunity of perpetrators or prevent victims from receiving effective remedies for gross human rights violations. As Tunisia now enters in a new phase, Tunisia’s national strategy should ensure that gross human rights violations cases before the SCC are not indefinitely delayed, cancelled or otherwise compromised, so that the victims’ right to an effective remedy is respected in compliance with article 2(3) of the ICCPR.

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<sup>15</sup> ICCPR, art. 9; ACHPR, art. 6.

<sup>16</sup> UN Human Rights Committee [General Comment No. 35](#): Article 9 (Liberty and security of person), para. 67.