

# Tunisia: Strengthening Accountability Through the Specialized Criminal Chambers

October 2020

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# **Tunisia: Strengthening Accountability Through the Specialized Criminal Chambers**

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## Introduction

Under international law, Tunisia has an obligation to criminalize, investigate and, where there is sufficient evidence, prosecute gross human rights violations, and ultimately guarantee the victims' rights to an effective remedy.

Article 7 of Organic Law No. 53 of 24 December 2013 on *Establishing and Organizing Transitional Justice* provides that accountability for past gross human rights violations 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.<sup>1</sup>

Decree No. 2014-2887 of 8 August 2014 formally established the SCC and located them within the Tribunals of First Instance of 13 Courts of Appeal across Tunisia. Under article 42 of the Organic Law No. 53<sup>2</sup> and article 3 of the Organic Law No. 17 of 12 June 2014 *Relating to the Provisions Relating to the Transitional Justice and Affairs*,<sup>3</sup> 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).

On 29 May 2018, the first hearing before the SCC was held in the Tribunal of First Instance in Gabès. By 31 December 2018, the IVD had referred 200 cases to the SCC. Over the past year and half, hearings took place in all the 13 SCC.

While the opening of trials before the SCC constitutes a fundamental step in Tunisia's path toward justice and accountability, a number of legal obstacles may undermine their effective operation, and ultimately the right of victims to judicial remedies, which, in turn, would constitute a violation of international law and standards. In this context, the International Commission of Jurists (ICJ) is particularly concerned at: (i) Tunisia's failure to adequately criminalize crimes under international law falling under the jurisdiction of the SCC; (ii) Tunisia's application of a special procedure under the transitional justice framework for the investigation and prosecution of gross human rights violations, which has the potential to adversely impact the fair trial rights of the accused and the victims' right to an effective remedy; and (iii) Tunisia's application of a special regime in which the procedures for the collection, admissibility, exclusion and assessment of evidence during investigation and trial differ in several respects from the existing criminal procedure under the Code of Criminal Procedure (CCP) and, as a result, may have a detrimental impact on the rights of the accused and the rights of the victims in criminal proceedings.

In this context, legislative, institutional and policy reforms are needed to ensure that Tunisia comply with its obligations to criminalize, investigate, prosecute gross human rights violations and provide victims with an effective remedy.

In this briefing paper, the ICJ formulates concrete recommendations on the most relevant reforms necessary to enhance the effectiveness of the SCC and their compliance with international law. These recommendations address the three main areas of outstanding concerns mentioned above, namely:

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<sup>1</sup> 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."

<sup>2</sup> Article 42 of Law No. 53-2013 of 24 December 2013 on the establishment of transitional justice and its organization states that the IVD "shall refer to the Public Prosecution the cases in which commitment of gross human rights violations is proven and shall be notified of all the measures which are subsequently taken by the judiciary."

<sup>3</sup> Article 3 of Law No. 2014-17 of 12 June 2014 on the provisions relating to the transitional justice and affairs related to the period going from 17 December 2010 to 28 February 2011 provides that "[i]n the event of transmission of the file to the public prosecutor by the authority of truth and dignity, in accordance with article 42 of the organic law n° 2013-53 dated 24 December 2013 relating to the establishment of transitional justice and its organization, the public prosecutor shall automatically send them to the specialized jurisdictional chambers mentioned in article 8 of the same organic law. Upon their sending to the specialized chambers by the public prosecutor, these files have priority regardless of the stage of the procedure."

- Adequate criminalization of crimes under international law and applicability of the principle of legality and non-retroactivity;
- Investigation and prosecution of gross human rights violations; and
- Collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations.

#### **A. Adequate criminalization of crimes under international law and applicability of the principle of legality and non-retroactivity**

The Tunisian legal framework does not adequately criminalize crimes under international law.<sup>4</sup> This section highlights the most relevant gaps and inconsistencies in the Tunisian legal framework vis-à-vis international law in this regard.

##### **i. Arbitrary deprivation of life**

Tunisia's domestic law criminalizes homicide,<sup>5</sup> and regulates the circumstances under which a person may be legitimately deprived of his or her life by State authorities.<sup>6</sup> However, it does not regulate the use of force by State actors in compliance with international standards.<sup>7</sup> As the United Nations Human Rights Committee (HRC) has recently noted,<sup>8</sup> the Tunisian Criminal Code (CC) also does not prohibit the imposition of the death penalty, including in circumstances where international law prohibits the imposition of capital punishment in absolute terms.<sup>9</sup> In addition, Tunisia's domestic law provides for superior orders as a defence to homicide charges arising from extrajudicial executions.<sup>10</sup>

##### **ii. Torture and other cruel, inhuman or degrading treatment or punishment**

Despite the fact that Tunisia criminalized torture in 1999, the definition of the offence of torture in the initial legislation was narrower than required by international law.<sup>11</sup> As the HRC has noted,<sup>12</sup> the revised 2011 definition of torture, on the one hand, broadened the scope of the offence by criminalizing the involvement in torture of public officials and others acting in an official capacity, and, on the other, narrowed it by omitting "punishment" as a possible purpose of torture, and by limiting the discrimination element to cover only racial discrimination.<sup>13</sup> 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 the latter become aware of them.<sup>14</sup> Further, Tunisian law criminalizes other acts of violence committed by public officials<sup>15</sup> and female

<sup>4</sup> 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>.

<sup>5</sup> See CC, articles 201, 202, 204, 205, 208, and 217, available at <http://www.legislation.tn/sites/default/files/codes/Penal.pdf>.

<sup>6</sup> ICJ, Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1, December 2019, pp. 49-50.

<sup>7</sup> 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. See also ICJ, Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1, December 2019, pp. 50-51.

<sup>8</sup> HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 27, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5).

<sup>9</sup> 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.

<sup>10</sup> CC, article 42; Law No. 70, article 46. See also ICJ, Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1, December 2019, p. 50.

<sup>11</sup> See Law No. 99 of 2 August 1999 and former article 101*bis* of the CC.

<sup>12</sup> HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 33.

<sup>13</sup> CC, article 101*bis*.

<sup>14</sup> CC, article 101*quater*.

<sup>15</sup> CC, articles 101 and 103.

genital mutilation,<sup>16</sup> but fails to criminalize other forms of cruel, inhuman or degrading treatment or punishment.<sup>17</sup>

### **iii. Arbitrary deprivation of liberty**

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.<sup>18</sup> These may be used as the bases for some cases involving arbitrary deprivation of liberty transferred to the SCC. They may, however, not capture all arbitrary deprivations of liberty by State officials that may constitute crimes under international law, such as deprivations of liberty amounting to torture,<sup>19</sup> enforced disappearance or crimes against humanity, particularly where they might be deemed not to fall within the above provisions of the Tunisian CC<sup>20</sup> because they were carried out pursuant to domestic laws that applied at the time.

### **iv. Enforced disappearance**

Tunisia's domestic law still fails to criminalize enforced disappearance as a continuous and autonomous offence involving multiple victims and violations of human rights.<sup>21</sup> Although some elements of the offence of enforced disappearance are criminalized, such as the arbitrary deprivation of liberty against the will of the person concerned, detentions initially lawfully executed by government officials pursuant to judicial orders may be excused even in circumstances when, despite their initial lawfulness, they are subsequently carried out in such a way as to amount to enforced disappearances. Moreover, 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.

### **v. Rape and sexual assault**

Tunisia's domestic law criminalizes rape and "indecent assault."<sup>22</sup> However, the definitions of rape and "indecent assault" under domestic law, which are applicable to the period over which the SCC has temporal jurisdiction, are not in line with the definitions of the offences of rape and other forms of sexual assault under international law.<sup>23</sup> Further, as the HRC has noted, the current definition of rape under the Criminal Code is not fully in line with international law.<sup>24</sup> The ICJ considers that, in the context of cases before the SCC, there is nevertheless scope to interpret and apply the domestic law provisions in accordance with international law so as to capture all conduct constituting rape and sexual assault.

### **vi. Crimes against humanity**

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 other cruel, inhuman or degrading treatment or punishment, the Tunisian CC does not explicitly recognize that

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<sup>16</sup> CC, article 221.

<sup>17</sup> CC, article 218.

<sup>18</sup> See article 103, as amended by Law-Decree No. 2011-106, and articles 237, 250, 251 and 252 of the CC.

<sup>19</sup> For instance, in the case of incommunicado detention.

<sup>20</sup> See above fn. 16.

<sup>21</sup> ICJ, Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1, December 2019, pp. 66-67.

<sup>22</sup> CC, articles 226, 227 and 228. The CC was amended in 2017 by Law No. 58 of 2017 on Eliminating Violence Against Women to bring some of these crimes, in particular the definition of rape, in line with international law.

<sup>23</sup> ICJ, Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1, December 2019, pp. 68-76, 78.

<sup>24</sup> HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 23.

particular significance attached to such crimes when committed in the context of a systematic or widespread attack against any civilian population, as prescribed by international law.<sup>25</sup>

#### **vii. Principle of legality and non-retroactivity**

Given 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 gross human rights violations.

In this regard, the ICJ wishes to recall that Tunisia recognizes the principle 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." 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 gross human rights violations in the context of the "transitional justice system." Accordingly, the ICJ considers Tunisia's legal framework to be in line with the principle of legality and non-retroactivity under international law, 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.

#### **Recommendations**

**Tunisia should ensure that Tunisian law is applied in SCC proceedings in a manner consistent with Tunisia's international obligations, particularly with respect to the scope of criminal conduct amounting to crimes under international law and the principle of legality and non-retroactivity as prescribed by Tunisia's domestic law and international law.**

**Tunisia should also reform the Criminal Code, the Code of Criminal Procedure and other relevant domestic law to guarantee that all perpetrators of gross human rights violations constituting crimes under international law be held criminally responsible and victims' rights to an effective remedy for violations of their rights be upheld in SCC proceedings. In particular, Tunisia should:**

- **Reform the Criminal Code and other relevant domestic law to criminalize arbitrary deprivations of life and ensure compliance with the definitions of corresponding crimes under international law;<sup>26</sup>**
- **Reform the Criminal Code and other relevant domestic law to criminalize torture and other cruel, inhuman or degrading treatment or punishment ensuring compliance with the definitions of corresponding crimes under international law;<sup>27</sup>**
- **Reform the Criminal Code, the Code of Criminal Procedure and other relevant domestic law to criminalize arbitrary deprivations of liberty ensuring compliance with the definitions of corresponding crimes under international law;**
- **Reform the Criminal Code and other relevant domestic law to criminalize rape ensuring compliance with the definitions of corresponding crimes under international law;<sup>28</sup>**
- **Introduce in the Criminal Code enforced disappearance as a criminal offence ensuring compliance with the definition of the crime of enforced disappearance under international law; and**

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<sup>25</sup> Ibid., pp. 92-94.

<sup>26</sup> In relation to death penalty see also HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 28.

<sup>27</sup> Ibid., para. 34.

<sup>28</sup> Ibid., para. 24(b).

- **Introduce in the Criminal Code crimes against humanity as criminal offences ensuring compliance with their definitions as crimes under international law.**

## **B. Investigation and prosecution of gross human rights violations**

The Tunisian legal framework on the investigation and prosecution of gross human rights violations does not adequately comply with international law and standards.<sup>29</sup> This section highlights the most problematic aspects of Tunisia's domestic law vis-à-vis international law in this regard.

### **i. Procedural challenges related to the investigation and prosecution of cases before the SCC**

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 CCP.<sup>30</sup>

Organic Law No. 53 granted the IVD the power to investigate crimes (including evidence collection),<sup>31</sup> determine which cases ought to be transferred to the SCC for prosecution, and indictment-drafting powers. Ordinarily, those powers would fall within the remit of the Office of the Public Prosecutor (OPP), investigating judges and the Indictment Chamber. However, Organic Law No. 53 does not contain any specific provisions on whether or how general criminal procedure laws apply. As a result, 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. Further, the OPP in practice, has played little to no role in cases transferred to it by the IVD to date. Accordingly, the OPP 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.<sup>32</sup> In addition, as the UN HRC has noted, only a limited number of cases have eventually been transferred by the IVD to the SCC.<sup>33</sup>

The application of this special regime poses two main problems. First, there is no clarity yet as to whether the OPP and other investigative authorities would exercise their powers regarding the remaining complaints that were not transferred by or submitted to the IVD. Second, with respect to cases that were transferred to the SCC, this practice raises concern both with regard to the pre-trial and trial phases, with consequences for the right of the accused to a fair trial.

With respect to the pre-trial phase, the application of this special regime effectively excludes the ordinary criminal procedure under the CCP and, therefore, risks hampering the implementation of Tunisia's international obligation to, on the one hand, thoroughly and effectively investigate gross human rights violations, while simultaneously ensuring the fair trial rights of the accused and the victims' right to an effective remedy,<sup>34</sup> on the other. According to the information available to the ICJ, the IVD's ability to exhaustively collect evidence has been detrimentally affected by numerous challenges.<sup>35</sup> As a result, investigations in some cases transferred to the OPP for referral to the SCC appear incomplete, including cases where indictments have been prepared.<sup>36</sup> Noticeable gaps in

<sup>29</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2* (forthcoming).

<sup>30</sup> *Ibid.*

<sup>31</sup> 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.

<sup>32</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2* (forthcoming).

<sup>33</sup> HRC, *Concluding Observations on the sixth periodic report of Tunisia*, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 11(c).

<sup>34</sup> *Ibid.*

<sup>35</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2* (forthcoming).

<sup>36</sup> *Ibid.*

evidence include the omission of a thorough search for any potentially exculpatory evidence, official documents, forensic evidence, such exhumation and autopsy records, and expert reports.

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 the case, instead, in ordinary criminal proceedings in Tunisia. The ICJ considers that in such instances the presumption of innocence 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 to ensure thorough and effective investigations.<sup>37</sup> 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.

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 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 enjoy some safeguards inherent to the CCP has been undermined, giving rise to potential breaches of their rights to a fair trial. In addition, while the accused's involvement in the IVD's investigation may have been sufficient in those cases in which the investigation was effective and thorough, in other cases, those in which the investigation has been incomplete, the accused's role would effectively have been restricted, such that the rights of the accused to equality of arms vis-à-vis the OPP, the victim or civil party, and to defend themselves 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.

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. This situation raises 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 and of their right to adequate time and facilities to prepare a defence, to an extent that requires a remedy. 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 and, if so, whether to such an extent as to require a remedy. Further, deciding on whether or not to proceed with further investigation would, in turn, require considering the extent to which direct investigation by SCC trial judges may violate the requirement of an impartial tribunal if they were called upon to make decisions relating to the culpability of the accused, and the extent to which it may be possible to put in place adequate measures to forestall any such potential violations.

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 and their right to adequate time and facilities to prepare a defence. 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.

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<sup>37</sup> Ibid.

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.

With regard to the trial phase, international standards prescribe that prosecutors should have an active role in the criminal proceedings.<sup>38</sup> 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 trial phase of prosecution of cases before the SCC. As a result, there may be a negative 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. Furthermore, the ICJ considers that a failure on the part of the OPP to play an active role during the trial phase would not only leave a considerable gap in the adjudication process, but it may also prompt judges to seek to fulfil the OPP's role at trial, thereby, in turn, prejudicing their primary function as independent and impartial arbiters, consistent with the right to an independent and competent tribunal in international law.

## **Recommendations**

**Tunisia should ensure that all allegations of gross human rights violations as defined in Organic Law No. 53 of 2013, and disclosing evidence of criminal offences be promptly, independently, effectively and thoroughly investigated and prosecuted, with a view to bringing the perpetrators to justice in a manner that ensures their right to a fair trial and upholds the victims' right to an effective remedy, consistently with international law.<sup>39</sup> In particular, Tunisia should:**

- **Ensure that the OPP and other investigative authorities carry out their mandate as defined by the Code of Criminal Procedure and in compliance with international law;**
- **Ensure that the OPP and other investigative authorities carry out the collection and assessment of evidence in such a way as to ensure the presumption of innocence as prescribed by international law;**
- **Ensure that, where additional investigations are undertaken, the accused are provided with full information regarding the applicable procedure throughout the investigation and prosecution process, their rights in relation to the investigation and trial, and any time-limits on the exercise of these rights;**
- **Ensure that, where additional investigations are undertaken, the accused have the opportunity to a) examine and cross-examine any additional witnesses, b) request that certain investigate steps be taken, and c) introduce independent expert evidence, in full compliance with their rights under international law to equality of arms, to defend themselves and to examine witnesses;**
- **Ensure that, where the case is temporarily suspended, the accused be informed of the nature of the charges against them and may exercise their right to adequate time and facilities to prepare a defence;**
- **Ensure that, where the case is temporarily suspended, the accused may exercise their rights to be tried without undue delay and to a remedy in cases of averred undue delay, consistent with international law;**
- **Ensure that all gross human rights violations as defined in Organic Law No. 53 of 2013 that were not transferred by or submitted to the IVD, be investigated in a thorough, effective, prompt and impartial manner and that when such violations**

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<sup>38</sup> Ibid.

<sup>39</sup> See also HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 12(a).

**amount to crimes under international law or domestic law alleged perpetrators be prosecuted in fair trials;<sup>40</sup> and**

- **Ensure that victims of gross human rights violations as defined in Organic Law No. 53 of 2013 can lodge a complaint before the OPP in order to access the SCC and that the OPP be required to give reasons for any decision to dismiss a case without proceeding to an investigation.**

**ii. Gaps and inconsistencies in Tunisia's domestic law with regard to the accused's right to a fair trial**

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. 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 under international law.

With regard to the right to adequate time and facilities to prepare a defence, 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.<sup>41</sup>

With regard to the right to defend oneself in person or through legal counsel, significant gaps in Tunisian law on legal aid continue to undermine effective access to legal counsel. Indeed, the current legal aid system is ineffective, and there are limited resources to meet the demand.<sup>42</sup> Additionally, the limit on the right to communicate with one's legal counsel of choice only once during police custody prior to interrogation<sup>43</sup> is inconsistent with international law, which, as the HRC has noted,<sup>44</sup> requires that the accused have unimpeded access to their lawyer.<sup>45</sup>

In relation to the right to a public hearing, while the CCP provides in principle for trial hearings to be public, the circumstances under which the court may direct *proprio motu* that such hearings be closed or upon the prosecutors' request are vague and not restricted to the permissible exceptions to a public hearing recognized by international law.<sup>46</sup> According to the information available to the ICJ, some SCC trial hearings have been closed to the public without a clear reason, potentially in violation of both the CCP and international law.

In relation to the right to be present at trial, while international law may permit trials *in absentia* in very limited circumstances and then only where certain procedures have been followed, the scope and procedures for *in absentia* trials under the CCP, and indeed the SCC in practice, appear to exceed what is permissible under international law. Where trials *in absentia* are held, the CCP also does not contain sufficient safeguards to protect the accused's rights,<sup>47</sup> namely ensuring they have been sufficiently informed of the charges, timing and location of the proceedings, and ensuring counsel is appointed to represent their interests; further the CCP fails to mention that, in principle, where a

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<sup>40</sup> HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 12(c).

<sup>41</sup> See article 13*quinquies* of the CCP, available at <http://www.legislation.tn/sites/default/files/codes/Procedurepenale.pdf>.

<sup>42</sup> See Law No. 2002-52 of 3 June 2002 on the granting of legal aid, articles 1, 3, 4, 13 and 14. See also ICJ, Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2 (forthcoming).

<sup>43</sup> CCP, article 13*quater*.

<sup>44</sup> HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 42.

<sup>45</sup> ICJ, Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2 (forthcoming).

<sup>46</sup> CCP, article 143. See also ICJ, Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2 (forthcoming).

<sup>47</sup> CCP, articles 141, 142, 175, 176, 177, 182 and 183.

person convicted *in absentia* is eventually apprehended, the matter should automatically be set for retrial.<sup>48</sup>

The practice followed in some of the trials that have already commenced before the SCC has also given rise to concern in respect of the right to be tried without undue delay.<sup>49</sup> 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 in a difficult position when trying to balance the rights of the accused to appear before the court and the rights of victims. All efforts should be made to ensure adjournments do not affect an accused's right to trial without undue delay and victims' right to effective remedy, including by ensuring that all parties are duly notified about the proceedings.

## **Recommendations**

**Tunisia should ensure that the accused's right to a fair trial be upheld in SCC proceedings, consistently with international law.**

**Tunisia should also reform the Code of Criminal Procedure and other relevant domestic law to guarantee the accused's rights to a fair trial in legal proceedings. In particular, Tunisia should Reform the Code of Criminal Procedure:**

- **to ensure that the accused have access to information regarding the charges and evidence in sufficient time to participate during an investigation and any supplementary interrogation that may be undertaken, and to prepare a defence at both the investigation and trial stages consistent with the right to adequate time and facilities to prepare a defence under international law;**
- **and other relevant domestic law to ensure that the accused have unimpeded access to an independent and competent legal counsel during pre-trial proceedings (particularly, when the accused are in detention), questioning and preliminary investigations, as well as at trial, consistent with international law;<sup>50</sup>**
- **to ensure that legal proceedings be conducted in public, consistent with the accused's right to a public hearing under international law;**
- **to ensure that the accused exercise their right to a re-trial following a trial *in absentia* consistent with international law, particularly if the persons eventually apprehended were not duly notified of the trial or their failure to appear was for reasons beyond their control; and**
- **to ensure that accused's right to be tried without undue delay be guaranteed, consistent with international law.**

### **iii. Gaps and inconsistencies in Tunisia's domestic law with regard to the rights of the victims and their families**

Under the CCP, civil parties have the right to apply to participate in criminal proceedings or to institute a civil action for the harm they have suffered as a result of the offence.<sup>51</sup> They may exercise such rights during both the pre-trial and trial phases of the proceedings, including by obtaining information about the case, providing information to relevant authorities, submitting their

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<sup>48</sup> ICJ, Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2 (forthcoming).

<sup>49</sup> Ibid.

<sup>50</sup> See also HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 42.

<sup>51</sup> CCP, article 7. Since September 2011, civil society organizations can also apply to become a civil party. See Law decree 88 of 24 September 2011, article 14. See also CCP, articles 38 and 39 with the respect to the application procedure to become a civil party.

conclusions on the case to the First Instance Tribunal and filing appeals in relation to some (but not all) decisions.<sup>52</sup> For such purposes, they may access legal aid<sup>53</sup> and be represented by a lawyer.<sup>54</sup> Restrictions in law and practice, however, impair the effectiveness of these rights in numerous ways.<sup>55</sup>

The transitional justice framework granted victims the right to file complaints about gross human rights violations to the IVD and to provide testimony in confidential hearings before the IVD.<sup>56</sup> It does not, otherwise, address the rights of victims and their family members at trial or in the run up to it. This lack of guidance poses problems both with regard to the pre-trial and trial stage in SCC proceedings.

At the pre-trial stage, the application of the transitional justice framework to the exclusion of the CCP risks hampering the fulfilment of international law obligations upholding the rights of the victims. Accordingly, victims' rights to participate in SCC proceedings, in particular to present and request evidence and access evidence in sufficient time to make submissions on it at trial may be negatively affected.

At the trial stage, the CCP provides the only current source within Tunisian law of a set of codified rules for victims' participation. Adopting an *ad hoc* process may constitute discrimination in access to justice, particularly if victims were not to enjoy the same rights in SCC proceedings as they would enjoy in other proceedings under the CCP, with respect to, for instance, presenting and requesting evidence, including witness testimony, examining and cross-examining witnesses, questioning or challenging the evidence and witnesses presented by the defence, involving expert witnesses, and appealing SCC decisions and judgments.

## **Recommendations**

**Tunisia should ensure that the rights of the victims, including their families,<sup>57</sup> to an effective remedy and reparation,<sup>58</sup> and to have broad procedural standing in the proceedings be guaranteed in SCC proceedings, consistently with international law.**

**Tunisia should also reform the Code of Criminal Procedure and other relevant domestic law to guarantee the rights of victims, including their families, in legal proceedings. In particular, Tunisia should Reform the Code of Criminal Procedure to ensure that:**

- **victims be provided with full information regarding a) the applicable procedure throughout the investigation and prosecution process, b) their rights in relation to the investigation and trial, and c) any time-limits for exercising these rights;**
- **victims have the right to examine and cross-examine witnesses, directly or indirectly, where appropriate, and that victims and their family be provided with reasons where their requests to do so are refused;**
- **victims may call expert witnesses, challenge and appeal decisions, including judgments or final decisions; and**
- **where additional investigations are undertaken, victims have the opportunity to participate in such investigations, including by considering granting their requests**

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<sup>52</sup> CCP, articles 38, 75, 101, 109, 114, 143, 144, 160 and 193.

<sup>53</sup> Law No. 2002-52 of 3 June 2002 on the granting of legal aid, article 1.

<sup>54</sup> CCP, article 141.

<sup>55</sup> ICJ, Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2 (forthcoming).

<sup>56</sup> *Ibid.*, section 2.b.ii.

<sup>57</sup> Under international law and standards, victims of crimes have rights throughout the criminal justice process. Such rights extend, when appropriate, to family members, dependents and individuals who have suffered harm when intervening to assist victims. See ICJ, Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2 (forthcoming).

<sup>58</sup> See also HRC, Concluding Observations on the sixth periodic report of Tunisia, UN Doc. CCPR/C/TUN/CO/6, 2 April 2020, para. 12(c) and (f).

**to introduce independent expert evidence, such as that of medical examiners, as well as the opportunity to attend any hearings conducted in pursuit of such further investigations and to make relevant submissions.**

**iv. Gaps and inconsistencies in Tunisia’s domestic law with regard to the protection of victims and witnesses**

Tunisian law includes provisions for the protection of law enforcement officers, judicial officers, victims, witnesses and others in terrorism-related<sup>59</sup> and human trafficking<sup>60</sup> cases, however these would not apply to cases not involving terrorism or human trafficking, such as those before the SCC.

Tunisian law also protects victims and witnesses of sexual violence crimes. Organic Law No. 58 of 11 August 2017 *on the elimination of violence against women* provides for protective measures for victims of gender-based violence,<sup>61</sup> including by providing that “confrontation with the accused can only take place with the consent of the victim of the violent offense, unless the confrontation is the only means that guarantees the right to be exonerated.”<sup>62</sup> It also protects child victims and witnesses through “safeguarding” their voice and image during the recording of their testimony and prohibiting confrontation with the accused.<sup>63</sup> These protective measures may apply in SCC cases involving sexual violence crimes, but only to the extent that the SCC applies the principles of legality and non-retroactivity so as to rely on these laws to find the accused liable for such crimes.<sup>64</sup>

Article 40 of Organic Law No. 53 of 2013 tasked the IVD, in collaboration with the competent services and entities, with the mandate to protect a broad category of persons coming into contact with the IVD, including victims, witnesses, experts, and all persons interviewed, regardless of their role in any violations.<sup>65</sup> The protective mandate was broad, and included protection in terms of security and against incrimination and aggression, and preservation of confidentiality.<sup>66</sup> The transitional justice framework is otherwise silent with respect to the protection of victims and witnesses at trial.

The lack of clear guidance on the application of protective measures in SCC proceedings poses problems with regard to the need to protect the security of the victim, witness or other person, the need to ensure the right of the accused to a fair trial, and the right of victims to an effective remedy under international law.<sup>67</sup> Moreover, to the extent that Law No. 58 of 2017 are applied in SCC cases involving sexual violence crimes, they provide little guidance to judges to ensure that the rights of the accused are maintained when protective measures are applied.

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<sup>59</sup> Articles 46 and 71 to 78 of Organic Law No. 26-2015 of 7 August 2015 *on the fight against terrorism and the suppression of money laundering*, as amended by Law No. 9-2019 of 23 January 2019, include provision for the protection of a victim or witness’s identity, the holding of hearings *ex officio* and restrictions on the accused’s right to confront the witness (provided their evidence is not the only or most important element to prove the crime charged), as well as measures to protect the rights of the accused.

<sup>60</sup> Articles 50-58 of Law No. 61-2016 of 3 August 2016 relating to the prevention and fight against trafficking in persons provide that victims and witnesses of trafficking, as well as their family members where appropriate, may request the application of protective measures during criminal proceedings, including the provision of testimony by audiovisual means, anonymity and the delayed disclosure of their identity to the accused.

<sup>61</sup> Law No. 58-2017 of 11 August 2017 amends or adds articles 208, 218-219, 221-224, 224*bis*, 227, 227*bis*, 228 of the Penal Code to criminalize or increase the penalties for acts of violence against women and children. It also inserts article 226*ter* to criminalize sexual harassment. Additionally, it penalizes “voluntarily hinder[ing] a woman in a public place, by any act, word or gesture likely to undermine their dignity, their consideration or their modesty” (article 17), “political violence” (article 18), “economic violence of discrimination” (article 19), the employment of children as domestic workers (article 20) and discrimination against women (article 21, read in conjunction with article 3).

<sup>62</sup> Law No. 58-2017 of 11 August 2017, article 28. The victim of sexual offenses may also request to be interviewed in the presence of a psychologist or social worker.

<sup>63</sup> Law No. 58-2017 of 11 August 2017, article 29.

<sup>64</sup> For a discussion of the application of these laws in the context of the SCC, including their compliance with international law and standards governing the definitions of such crimes, see ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law - Practical Guide 1*, December 2019, pp. 17-25, 68-76, 78, 93. See also section A(v)-(vii) above.

<sup>65</sup> Law No. 53-2013 of 24 December 2013, article 40(5).

<sup>66</sup> Law No. 53-2013 of 24 December 2013, article 40(5).

<sup>67</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law - Practical Guide 2* (forthcoming).

**Tunisia should ensure the protection of victims, witnesses and other persons in SCC proceedings, and provide special protection and assistance measures for victims, witnesses and other persons to ensure their safety and respect for their rights to life and personal security, and to freedom from torture and other cruel, inhuman or degrading treatment or punishment, in a manner consistent with the fair trial rights of the accused and other provisions of international law.**

**Tunisia should also reform the Code of Criminal Procedure and other relevant domestic law to guarantee the protection of victims, witnesses and other persons during, and following, legal proceedings. In particular, Tunisia should:**

- **Introduce provisions in the Code of Criminal Procedure and other relevant domestic law allowing for appropriate protective measures, including with a view to protecting identities, minimizing trauma and mitigating security risks, where demonstrably justified, in a manner compatible with the right to fair trial of the accused;**
- **Ensure that any decisions to adopt protective measures that alter normal court procedures be made by judges based on clearly defined criteria and on a case-by-case basis, considering the evidence for the need to protect the security of the victim, witness or other person, while ensuring the right of the accused to a fair trial and taking into account the general requirement of publicity of hearings and the rights of victims to an effective remedy; and**
- **Ensure the protection of the privacy, identity and dignity of victims of sexual and gender-based violence, and ensure their safety, including during and following legal proceedings, and avoid re-traumatization, thereby adopting a victim-centred approach that takes into account the preferences of the victim, in a manner compatible with the right to a fair trial of the accused.**

### **C. The collection, admissibility and assessment of evidence**

The Tunisian legal framework on the collection, admissibility and assessment of evidence does not adequately reflect international law and standards. This section highlights the most relevant challenges in Tunisia's domestic law vis-à-vis international law in this regard.

#### **i. Collection of evidence**

The CCP prescribes the authorities mandated to conduct an investigation,<sup>68</sup> and provides limited rules with respect to the collection of exculpatory,<sup>69</sup> expert and forensic evidence.<sup>70</sup> It also sets out enforcement powers necessary to compel cooperation during an investigation or penalize non-cooperation.<sup>71</sup> Tunisia's legal framework does not contain explicit rules governing chain of custody or the management of crime scenes.<sup>72</sup>

The transitional justice framework sets up a special regime in which the procedures for the collection of evidence during investigations and trial differ in several respects from the existing criminal

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<sup>68</sup> CCP, articles 9, 15, 26, 50 and 53. See also ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations* – Practical Guide 3 (forthcoming).

<sup>69</sup> CCP, articles 53, 69 and 72.

<sup>70</sup> CCP, articles 53 and 101. See also Law No. 93-61 of 23 June 1993 on judicial experts, article 4; and Law No. 97-12 of 25 February 1997 on Cemeteries and Places of Burial (Exhumation Law), article 17.

<sup>71</sup> CCP, articles 59-61, 78. See also CC, articles 32(4) and 241.

<sup>72</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations* – Practical Guide 3 (forthcoming).

procedure under the CCP.<sup>73</sup> While the transitional justice framework entrusted the IVD with a broad investigative mandate, it provided limited guidance on their evidence collection procedures.<sup>74</sup>

In the absence of specific procedural rules in the transitional justice framework, investigations and the collection of evidence were carried out in accordance with the standards and procedures set out in the CCP. The ICJ was informed that the Investigation Committee collected witness statements, official records, government records, expert and medical reports, exhumation reports (from previous cases), foreign official documents and official registers of organizations, such as morgue registers and that, although suspects had the right to participate in IVD investigations, not all persons accused of committing crimes appeared before the IVD.<sup>75</sup> Although the IVD had enforcement powers to facilitate access to evidence, and under Organic Law No. 53 of 2013, there were circumstances in which sanctions would have been warranted, these provisions were not applied.<sup>76</sup>

Gaps or lack of clarity in Tunisia's domestic law create challenges for SCC proceedings, with potential consequences for the right of the accused to a fair trial and victims' right to effective remedy.

Under international law, Tunisian authorities, including the IVD and SCC, are under an obligation to conduct effective and thorough investigations of gross human rights violations, and to collect exculpatory evidence as well as all relevant non-witness evidence, including biological, documentary, digital and physical evidence.<sup>77</sup> Tunisia is also under an obligation to ensure that the IVD and SCC have the resources and powers required to carry out an effective investigation, and the IVD and SCC have a duty to use such resources and powers to such ends.<sup>78</sup> In light of this, the SCC will need to examine each case file to make a determination regarding whether each investigation was exhaustive, as defined by international standards. If not, the SCC will need to take steps to identify additional evidence to collect, to collect such evidence, and to exercise enforcement powers where information, evidence or other forms of cooperation are not provided. Particular regard should be had to typical areas of evidentiary gaps, including exculpatory evidence, linkage evidence and forensics (for example, the search for bodies, exhumations and autopsies). With respect to the appointment of experts, such review will need to establish whether the investigations required the appointment of experts and where necessary, due either to the subject matter or the potential lack of independence of state-experts, appoint an independent expert.

## **ii. The admission and exclusion of evidence**

The Transitional Justice Framework did not set out distinct rules for the admission and exclusion of evidence in cases referred to the SCC.<sup>79</sup> As is often the case in civil law jurisdictions where the principle of freedom of evidence applies,<sup>80</sup> the CCP contains few rules governing the admissibility<sup>81</sup> and exclusion of evidence.<sup>82</sup>

Under international law, the principle of legality requires Tunisian authorities to ensure all evidence, including expert reports, are validly and legally produced. Before proceeding to trial, the designated authority should review the investigation case file to ensure the evidence collected meets international law and standards as well as domestic requirements and can be used at trial. In

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3* (forthcoming).

<sup>80</sup> CCP, article 150: "Hors les cas où la loi dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction. Si la preuve n'est pas rapportée, le juge renvoie le prévenu des fins de la poursuite". See also ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3* (forthcoming).

<sup>81</sup> CCP, Section III titled: "On the administration of evidence." See also articles 151 and 152.

<sup>82</sup> CCP, Section X, Chapter II, Book II of the CCP, titled "Nullities." See also articles 13*bis*, 155, 165, 199, and 218.

particular, under international law, any and all confessions or statements Tunisian authorities know or believe on reasonable grounds were obtained through torture or other cruel, inhuman or degrading treatment or other coercive means should be inadmissible as evidence in judicial proceedings,<sup>83</sup> except against a person accused of having used such means as evidence that the statement was made.<sup>84</sup>

To the extent that the IVD applied the principle of freedom of evidence during its investigations and in transferring case files to the SCC, without review of compliance with CCP procedures or the requirement to exclude confessions or statements obtained by torture or other such abuse, there is a possibility that some evidence transferred to the SCC may not have been gathered and transferred in compliance with domestic or international legal requirements. This may require the SCC to consider whether the provisions on nullity,<sup>85</sup> which render evidence null and void and effectively inadmissible, necessitate the exclusion of evidence from consideration or other forms of remedial action.

### iii. The assessment of evidence

The Transitional Justice Framework is silent as to the standards to be applied to the assessment of evidence. Article 42 of the Organic Law No. 53 of 2013 simply states that the IVD shall refer cases in which gross human rights violations “are proven” to the OPP.

Under the general criminal procedure, the CCP provides that the Indictment Chamber should issue an indictment if there is a “sufficient presumption of guilt.”<sup>86</sup> A final determination of the guilt or innocence of an accused is based on a judge’s personal conviction (otherwise known as “intime conviction”).<sup>87</sup> The CCP states that witness statements or reports taken by officers of the judicial police or public officers who can charge infractions are taken as evidence until proof to the contrary is presented and that witness statements or reports only have probative value if their form is regular and the author is acting within the exercise of his functions and reporting on matters within the competence of what he has personally seen or heard.<sup>88</sup> It otherwise does not set out specific guidance regarding the factors that judicial authorities must take into account when assessing the evidence.<sup>89</sup> For instance, as there is no criteria in the CCP as to how this appraisal should be exercised, the OPP has significant discretion over whether to dismiss a complaint or report an offence to an investigative judge.<sup>90</sup> Further, the CCP does not provide more specificity as to the standard applied by the investigative judges other than their consideration of the facts.<sup>91</sup>

Under international law, the right to a fair and public hearing requires the presumption of innocence, which in turn requires that the accused is only convicted when the prosecution has proven their

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<sup>83</sup> ICJ, Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3 (forthcoming).

<sup>84</sup> See article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1), available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

<sup>85</sup> Like in many civil law jurisdictions, under Tunisia’s CCP evidence is excluded through the procedural concept of nullity. Section X, Chapter II, Book II of the CCP, titled “Nullities,” provides that all “acts or decisions contrary to the dispositions of public order, to the fundamental rules of procedure and to the legitimate interest of the defence are nullified.” See also Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3 (forthcoming).

<sup>86</sup> CCP, articles 116 and 119. See also ICJ, Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3 (forthcoming).

<sup>87</sup> CCP, article 150.

<sup>88</sup> CCP, articles 154 and 155.

<sup>89</sup> ICJ, Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3 (forthcoming).

<sup>90</sup> CCP, article 30. See also ICJ, Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3 (forthcoming).

<sup>91</sup> CCP, articles 106 and 107.

culpability “beyond reasonable doubt with respect to all the elements of the offences and modes of liability.”<sup>92</sup> The right to a fair trial also requires that judicial authorities issue a reasoned opinion, which includes “essential findings, evidence, legal reasoning and conclusions.”<sup>93</sup> While the *intime conviction* standard is not a violation of the presumption of innocence per se, its application in SCC proceedings requires the issuance of a reasoned opinion to ensure the factual and legal findings and assessment of the evidence are well-founded, and to ensure the accused may avail themselves of their right to appeal. The standard should be applied to the facts necessary to prove each element of the crime and mode of liability charged. Reversal of the burden of proof (statutory presumption) is, at most, permitted by international standards only in very limited circumstances and subject to strict safeguards; if any such reverse burdens are contemplated in SCC proceedings they must be stringently scrutinized for their consistency with international law, including in terms of their justification, legal definition and the realistic possibility of rebuttal.<sup>94</sup>

## **Recommendations**

**Tunisia should ensure that the collection, admissibility and assessment of evidence in SCC proceedings guarantee the right of the accused to a fair trial and the victims’ right to an effective remedy, consistently with international law. In particular, Tunisia should:**

- **With respect to the collection of evidence:**
  - **Ensure that each case file before the SCC be examined to determine whether each investigation was exhaustive, as defined by international standards.**
  - **Where the investigation was not exhaustive, ensure that measures be taken to identify additional evidence to collect, to collect such evidence and to exercise enforcement powers where information, evidence or other forms of cooperation are not provided. Particular regard should be had to typical areas of evidentiary gaps, including exculpatory evidence, linkage evidence and forensics (for example, the search for bodies, exhumations and autopsies). With respect to the appointment of experts, such review will need to establish whether the investigations required the appointment of experts and where necessary, due either to the subject matter or the potential lack of independence of State-experts, appoint an independent expert.**
- **With respect to the admission and exclusion of evidence:**
  - **Ensure that, with respect to cases transferred by the IVD, and to which the IVD applied the principle of freedom of evidence during its investigations, without review of compliance with CCP procedures or the requirement to exclude confessions or statements obtained by torture or other such abuse, evidence has not been gathered and transferred in violation of domestic or international legal requirements. If so, ensure the application of the provisions on nullity, which render evidence null and void and effectively inadmissible, and exclude such evidence from consideration or other forms of remedial action;**
- **With respect to the assessment of evidence:**
  - **Ensure that, in the application of the *intime conviction* standard in SCC proceedings, particular regard be made to the requirement to issue a reasoned opinion to ensure the factual and legal findings and assessment of the evidence be well-founded, and to ensure the accused may avail themselves of their right to appeal;**

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<sup>92</sup> ICJ, Accountability Through the Specialized Criminal Chambers: Principles and best practices in the collection, admissibility and assessment of evidence in the investigation, prosecution and adjudication of gross human rights violations – Practical Guide 3 (forthcoming).

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

- Ensure that the *intime conviction* standard be applied to the facts necessary to prove each element of the crime and mode of liability charged.

Tunisia should also reform the Code of Criminal Procedure and other relevant domestic law to ensure that the collection, admissibility and assessment of evidence in legal proceedings guarantee the right of the accused to a fair trial and the victims' right to an effective remedy, consistently with international law. In particular, Tunisia should:

- **With respect to the collection of evidence:**
  - Reform the Code of Criminal Procedure to set out the powers of the *juge rapporteur* on the collection of evidence where they are appointed to conduct complementary investigations;
  - Introduce in the Code of Criminal Procedure specific provisions guiding the collection of exculpatory, expert and forensic evidence as provided under international law, with a view to protecting the rights of the accused and the victims' right to effective remedy, including by:
    - Establishing the right of appeal if the prosecution, civil parties or the accused object to the appointment of an expert;
    - Establishing procedures with respect to conducting exhumations;
  - Introduce in the Code of Criminal Procedure specific rules governing the chain of custody or the management of crime scenes;
- **With respect to the admission and exclusion of evidence:**
  - Introduce in the Code of Criminal Procedure specific provisions governing the admissibility and exclusion of evidence with a view to protecting the rights of the accused and the victims' right to an effective remedy, including by:
    - Establishing the stage at which exclusion or nullification decisions must or can be made in addition to the circumstances which can lead to nullification of improperly-collected evidence;
    - Establishing the criteria under which judges should explain and justify their evidence exclusion – or nullification – decisions (including decisions not to exclude or nullify evidence that has been the subject of an objection);
    - Establishing that where an accused alleges – or evidence indicates – that a confession, statement or other material was obtained through torture or other ill-treatment or other coercive means, the judges should conduct an investigation in which the burden of proof is on State authorities to prove, beyond reasonable doubt, the evidence was obtained lawfully (except where the statement is presented against a person accused of torture as evidence that that the statement was made, and not for the truth of its contents);<sup>95</sup>
    - Establishing that any evidence collected through torture or other ill-treatment or other coercive means, or other similar violations of internationally recognised human rights, is nullified, and that evidence obtained in any other unlawful manner is excluded, nullified or subject to other effective remedial action, and ensure that in such cases judges provide a reasoned opinion regarding their decision in the trial judgment or in a separate decision (including explaining any decision not to nullify, exclude or otherwise provide remedial action in relation to evidence that has been challenged on such grounds);

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<sup>95</sup> See above footnote 84.

- Establishing that where evidence that does not conform to the requirements of the Code of Criminal Procedure, including witness statements, should be nullified, excluded or subjected to other remedial action, taking into account whether the prejudice to the accused is outweighed by the interests of justice and whether witness statements may be used solely for witness credibility assessments;
- With respect to the assessment of evidence:
  - Introduce in the Code of Criminal Procedure specific provisions guiding the assessment of evidence with a view to protecting the rights of the accused and the victims' right to effective remedy, including by:
    - Establishing that the OPP's decision to dismiss a complaint is supported by reasons, and provides explicitly for judicial review;
    - Establishing the standard applied by the investigative judge other than his or her consideration of the facts while deciding on the referral or dismissal of a case;
    - Establish that the burden of proof remains on the Prosecution to prove the charges beyond reasonable doubt, and any reversal of the burden must be scrutinized for its consistency with international law, including as to justification, legal basis, and rebuttal, and particularly whether it is limited to (i) elements of the offence where objective facts make out the offence, any defence is solely within the defendant's knowledge and the presumptions are justified in the public interest, or (ii) an assertion of a defence by the accused that is within their knowledge. In both cases, the burden on the accused should be limited to adducing evidence capable of raising doubt about the presumption, not a burden to disprove the offence;
    - Establishing that judges should provide a reasoned decision clearly defining the *intime conviction* standard before applying it, applying it in a manner consistent with international law and standards that refer to proof "beyond reasonable doubt", and motivating their judgment and ensuring an assessment of evidence is clearly set out in relation to the factual and legal findings applicable to each element of the crimes and modes of liability charged.



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