

# Accountability Through the Specialized Criminal Chambers

The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law

## Practical Guide 2



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® **Accountability Through the Specialized Criminal Chambers**

The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law -  
Practical Guide 2

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# **Accountability Through the Specialized Criminal Chambers**

The Investigation and Prosecution of Gross Human  
Rights Violations Under Tunisian and International Law

Practical Guide No. 2

December 2020



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## Table of abbreviations

|         |                                                                                        |
|---------|----------------------------------------------------------------------------------------|
| ACHPR   | African Charter on Human and Peoples' Rights                                           |
| ACHR    | American Convention on Human Rights                                                    |
| AComHPR | African Commission on Human and Peoples' Rights                                        |
| CAT     | Committee against Torture                                                              |
| CCP     | Code of Criminal Procedure                                                             |
| CED     | Committee on Enforced Disappearances                                                   |
| CEDAW   | Committee on the Elimination of Discrimination Against Women                           |
| ECHR    | European Convention on Human Rights                                                    |
| ECtHR   | European Court of Human Rights                                                         |
| HRC     | Human Rights Committee                                                                 |
| IAComHR | Inter-American Commission on Human Rights                                              |
| IACtHR  | Inter-American Court of Human Rights                                                   |
| ICC     | International Criminal Court                                                           |
| ICCPR   | International Covenant on Civil and Political Rights                                   |
| ICPPED  | International Convention for the Protection of all Persons from Enforced Disappearance |
| ICTR    | International Criminal Tribunal for Rwanda                                             |
| ICTY    | International Criminal Tribunal for the former Yugoslavia                              |
| IVD     | Instance Vérité et Dignité                                                             |
| OPP     | Office of the Public Prosecutor                                                        |
| SCC     | Specialized Criminal Chambers                                                          |
| UDHR    | Universal Declaration of Human Rights                                                  |
| WGAD    | Working Group on Arbitrary Detention                                                   |



## Table of standards and guidance<sup>1</sup>

*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005.

*Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 29 November 1985.

*Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985), and endorsed by General Assembly resolutions 40/32 and 40/146 (1985).

*Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990.

*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988.

*Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

*Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol), UN Doc. HR/P/PT/8/Rev.1, 2004.

*Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Office of the High Commissioner for Human Rights, New York/Geneva, 2017.

*Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, UN Doc. A/RES/67/187, 20 December 2012.

*Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/1989/89, 1989.

*Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000.

*Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), UN Doc. A/RES/70/175, 17 December 2015.

*Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, adopted by the International Association of Prosecutors Standards on 23 April 1999.

*Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

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<sup>1</sup> The list includes the instruments that are most cited throughout the Practical Guide.



**Human Rights Committee**

*General Comment No. 6 on Article 6 (Right to Life)*, UN Doc. HRI/GEN/1/Rev.9 (Vol I) 30 April 1982.

*General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984.

*General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc. HRI/GEN/1/Rev.9, 10 March 1992.

*General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

*General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, UN Doc. CCPR/C/GC/32, 23 August 2007.

*General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018.

**Committee against Torture**

*General Comment No. 2, Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008.

*General Comment No. 3, Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, 19 November 2012.

**African Commission on Human and Peoples' Rights**

*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, AComHPR Doc. OS(XXX)247, 2003.

*General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 57th Ordinary Session, 4–18 November 2015.

**International Criminal Court**

*Rome Statute of the International Criminal Court*, A/CONF.183/9, 17 July 1998 (corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002).

## 1. Introduction

The present Guide is the second volume in a series of International Commission of Jurists' (ICJ) Practical Guides that aim to assist practitioners to ensure accountability through the Specialized Criminal Chambers (SCC) in Tunisia.

The SCC were formally established by Decree No. 2014-2887 of 8 August 2014 (the 2014 Decree) and were set up within the Tribunals of First Instance of thirteen Courts of Appeal across Tunisia.<sup>2</sup> Under article 42 of the 2013 *Organic Law on Establishing and Organizing Transitional Justice* (the 2013 Law)<sup>3</sup> and article 3 of the 2014 *Organic Law Relating to the Provisions Relating to the Transitional Justice and Affairs* (the 2014 Law),<sup>4</sup> the SCC exercise jurisdiction over cases involving "gross human rights violations" referred by the Truth and Dignity Commission ("Instance Vérité et Dignité", IVD). The IVD referred 200 cases to the SCC by 31 December 2018.<sup>5</sup> On 29 May 2018, the first hearing before the SCC was held in the Tribunal of First Instance in Gabès. 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.<sup>6</sup>

Through an analysis of both the Tunisian legal framework and the relevant international law and standards, the ICJ Practical Guide series on "Accountability Through The Specialized Criminal Chambers" primarily aims to serve as a reference to assist SCC judges to effectively adjudicate cases involving gross human rights violations that constitute crimes under international law and prosecutors and lawyers involved in proceedings before the SCC to ensure respect for the rights to a fair trial and remedy in line with international law and standards. Civil society organizations may also find this series useful for raising awareness of how to implement the existing legal framework on the criminalization, investigation, prosecution, sanctioning of, and redress for serious human rights violations in accordance with international law and standards and, where necessary, advocate for its reform.

In this second Practical Guide, the ICJ addresses the principles and best practices for the effective investigation, prosecution and adjudication of gross human rights violations. It aims, in particular, to provide guidance to SCC practitioners on international law and standards governing the conduct of investigations and prosecutions which should be applied to cases before the SCC, including by reviewing the procedures contained in the transitional justice laws establishing the IVD and the SCC, namely the 2013 Law, the 2014 Law and the 2014 Decree, as well as in the Internal Rules and

<sup>2</sup> See Decree No. 2014-4555 of 29 December 2014 modifying Decree No. 2014-2887 on the creation of the specialized criminal chambers in the field of transitional justice within the tribunals of first instance in the courts of appeals of Tunis, Gafsa, Gabès, Sousse, Le Kef, Bizerte, Kasserine and Sidi Bouzid, further amended by Decree No. 2016-1382 of 19 December 2016 to include additional chambers in Mednine, Monastir, Nabeul and Kairouan.

<sup>3</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>4</sup> Article 3 of Law No. 17-2014 of 12 June 2014 relating to 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."

<sup>5</sup> IVD, Final report, Executive Summary, pp. 68-84 (Arabic version) and pp. 85-107 (English version).

<sup>6</sup> In previous publications, the ICJ addressed the substantive and procedural legal challenges that might impede the SCC work and ability to adequately address the legacy of gross human rights violations in Tunisia. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, May 2016; *Tunisia: The Specialized Criminal Chambers in Light of International Standards*, November 2016; and *Tunisia: Procedures of the Specialized Criminal Chambers in Light of International Standards*, July 2017.

Procedures Manual ("IVD Internal Rules"),<sup>7</sup> the IVD's Procedures Guide (IVD Procedures Guide)<sup>8</sup> and the IVD Investigation Committee's Procedures Guide (IC Procedures Guide),<sup>9</sup> adopted by the IVD to regulate its operations (together the "Transitional Justice Framework").

The Transitional Justice Framework establishes a special regime in which the operation of the IVD and SCC differs in several respects from the general criminal procedure under the Code of Criminal Procedure (CCP). This difference is apparent from both the text of the 2013 Law, which grants the IVD investigatory and indictment drafting powers ordinarily within the remit of the Office of the Public Prosecutor (OPP), investigative judges and the indictment Chamber, from the IVD Procedures Guide<sup>10</sup> and the IC Procedures Guide,<sup>11</sup> and from the IVD and SCC's practice to date. Despite these differences, the Transitional Justice Framework does not itself explicitly stipulate a distinct set of comprehensive and detailed rules of procedure for the investigative and trial stages of SCC cases, resulting in procedural gaps which must be filled. Further, according to the information available to the ICJ, some of the cases referred by the IVD to the SCC via the OPP may require additional investigation or were transferred without an indictment.<sup>12</sup>

Each section of this Guide first describes the international law and standards governing the obligation to investigate and prosecute criminal cases, the accused's right to a fair trial, and the rights of victims and their families to participate in proceedings and to an effective remedy, which serve as guidance to SCC practitioners including judges, prosecutors and lawyers in fulfilling their roles in cases before the SCC. The Guide then discusses the general criminal procedure under Tunisian law and variations under the Transitional Justice Framework.<sup>13</sup> This Guide does not undertake a full analysis of the compliance of Tunisian general criminal procedure with international law and standards, but rather serves to identify gaps in the Transitional Justice Framework and areas of non-compliance which are particularly problematic in the investigation, prosecution and adjudication of SCC cases. It concludes with recommendations for SCC practitioners to consider when investigating, prosecuting and adjudicating SCC cases. To inform the content and analysis contained in this Guide, the ICJ gathered information from former IVD staff and SCC judges and information in the public domain.

This Guide is preceded by Practical Guide No. 1 on *The Adjudication of Crimes Under Tunisian and International Law*,<sup>14</sup> which addresses the penalization of crimes over which the SCC have jurisdiction. It examines the principles of legality and non-retroactivity under international law and their application in the domestic system, and conducts an analysis of the definition of crimes under domestic law vis-à-vis international law for arbitrary deprivations of life, arbitrary deprivations of

<sup>7</sup> IVD, Internal Rules and Procedures Guide, adopted by the IVD on 22 November 2014, available at <http://www.ivd.tn/e-bibliotheque/textes-juridiques/http-ivdtnawcys-cluster023-hosting-ovh-net-wp-content-uploads-2018-01-%d8%a7%d9%84%d9%86%d8%b8%d8%a7%d9%85-%d8%a7%d9%84%d8%af%d8%a7%d8%ae%d9%84%d9%8a-2-pdf/>.

<sup>8</sup> IVD, Procedures Guide, adopted by the IVD on 19 September 2014, available at <http://www.ivd.tn/ar/wp-content/uploads/2015/12/%D8%AF%D9%84%D9%8A%D9%84-%D8%A7%D9%84%D8%A5%D8%AC%D8%B1%D8%A7%D8%A1%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%A7%D9%85%D9%91.pdf>.

<sup>9</sup> IVD, Investigation Committee Procedures Guide, adopted by IVD Decision No. 6 of 20 January 2016, available at <https://www.docdroid.net/gShNixt/-pdf.html>.

<sup>10</sup> IVD Internal Rules and Procedures Manual ("IVD Internal Rules"), issued based on IVD's decision of 19 September 2014 and published in January 2016, available at: <http://www.ivd.tn/ar/wp-content/uploads/2015/12/%D8%AF%D9%84%D9%8A%D9%84-%D8%A7%D9%84%D8%A5%D8%AC%D8%B1%D8%A7%D8%A1%D8%A7%D8%AA-%D8%A7%D9%84%D8%B9%D8%A7%D9%85%D9%91.pdf>.

<sup>11</sup> IVD Investigation Committee Procedures Guide, issued on the basis of IVD's Decision No. 6 of 20 January 2016, available at: <https://www.docdroid.net/gShNixt/-pdf.html>.

<sup>12</sup> IVD, Final report, Executive Summary, pp. 68-84 (Arabic version) and pp. 85-107 (English version).

<sup>13</sup> The Tunisian laws quoted throughout the report are translations of the French or Arabic texts undertaken by the ICJ.

<sup>14</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* - Practical Guide 1 (2019), available at <https://www.icj.org/tunisia-the-role-of-international-law-and-standards-in-proceedings-before-the-specialized-criminal-chambers/>.

liberty, torture and other ill-treatment, enforced disappearance, rape and sexual assault and crimes against humanity.

The Guide will also be followed by two additional guides. Practical Guide No. 3 will discuss the principles and best practices in the collection, admissibility and assessment of evidence during the investigation, prosecution and adjudication of gross human rights violations. Practical Guide No. 4 will discuss modes of liability under international law and their application before the SCC.

Each guide should be applied in the context of international law and standards governing the rights of the accused and the rights of victims in criminal proceedings. This guide, in particular, should be read in conjunction with Practical Guide No. 3, which discusses evidentiary standards impacting the accused's rights, including the right to equality of arms, the right to adequate time and facilities to defend oneself, the right to call and examine witnesses and the presumption of innocence.

## 2. The duty to investigate and prosecute gross human rights violations

Under Tunisia's general criminal procedure, the authority to investigate, prepare indictments for and prosecute gross human rights violations is accorded to investigative judges, the indictment chamber and the OPP. However, under the Transitional Justice Framework, the IVD had exclusive responsibility for conducting investigations and preparing indictments and the OPP was required to "automatically" transfer any cases referred to it by the IVD to the SCC. The conduct of investigations and the preparation of indictments were guided by IVD Procedures Guide and IC Procedures Guide that supplemented the 2013 Law and 2014 Law, which contained few provisions on such matters.

Under international law, States have the duty to investigate, prosecute, punish and remedy gross human rights violations. As organs of the State, the obligations of the State under international law apply to investigators, prosecutors and judges. International law and standards require that criminal investigations are prompt, exhaustive, independent and impartial and transparent, and that they comply with the right to liberty and fair trial rights of the accused. They also require prosecutors to perform an active role in criminal proceedings, exercising their functions in an independent and impartial manner, ensuring effective investigations and upholding the rights of both the accused and the victims. Prosecutors are ordinarily accorded significant discretion in criminal proceedings to ensure such due process requirements and standards are not violated. Judges, to the extent that they are involved in investigations, must also be independent and impartial and conduct investigations in a manner consistent with international law. This chapter describes the international law and standards regulating the duty to investigate and prosecute gross human rights violations.

### a. International law and standards

#### i. The duty to investigate and prosecute gross human rights violations

Under international law, States have an obligation to investigate, prosecute, punish and provide effective remedy and reparations for human rights violations that constitute crimes under international law. The obligation arises under numerous international treaties,<sup>15</sup> customary international law<sup>16</sup> and standards.<sup>17</sup>

<sup>15</sup> International Convention on the Protection of all Persons from Enforced Disappearance (ICPPED), arts. 3, 10, 12, and 13; International Covenant on Civil and Political Rights, art. 2(3) (as interpreted by the HRC in General Comment No. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.15); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 12; Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, 2515 UNTS 3, art. 16. See also Preamble, Rome Statute of the International Criminal Court (ICC) ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").

<sup>16</sup> The obligation to investigate, prosecute, punish and provide an effective remedy and reparations for human rights violations that constitute crimes under international law has been extensively upheld in international jurisprudence. See e.g. *Judgment of 27 February 2002*, IACtHR, Trujillo Oroza v. Bolivia, Series C No. 92, para. 99; *Judgment of 22 September 2006*, IACtHR, Goiburú and others v. Paraguay, Series C No. 153, para. 128; *Judgment of 26 September 2006*, IACtHR, Almonacid Arellano and others v. Chile, Series C No. 154, para. 100. International and regional authorities have also underlined that this duty is imposed on States because of the *jus cogens* prohibition on committing such gross human rights violations. See e.g. *Judgment of 22 September 2009*, Anzualdo Castro v. Peru, Series C No. 202, para. 59; *Judgment of 26 September 2006*, IACtHR, Almonacid Arellano and others v. Chile, Series C No. 154, para. 100. The ICRC has also held that this obligation is a customary international law norm applicable in both international and non-international armed conflicts. See ICRC Customary International Humanitarian Law Database, rule 158. See also ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7 (2015).

<sup>17</sup> Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, principle 19; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III, para. 4; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary*

International and regional authorities, including the African Commission on Human and Peoples' Rights (ACoMHRP), have confirmed that States have a duty to investigate alleged gross human rights violations and punish the perpetrators.<sup>18</sup> The authoritative body on the interpretation of the International Covenant on Civil and Political Rights (ICCPR), UN Human Rights Committee (HRC), has repeatedly affirmed this duty and observed that mere administrative proceedings are not sufficient in cases of gross human rights violations, which require the establishment of criminal proceedings.<sup>19</sup> It stated that "a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the [ICCPR]."<sup>20</sup> The Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) have made similar findings with respect to the same obligation under the American Convention on Human Rights (ACHR)<sup>21</sup> and the European Convention on Human Rights (ECHR).<sup>22</sup>

## ii. The conduct of investigations

The duty to investigate is a duty of conduct and not a duty of result.<sup>23</sup> This means that the duty can potentially be fulfilled if the investigation was capable of leading to the identification and, if appropriate, the punishment of the perpetrator(s) of the violations, and the authorities carry out the

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*Executions*, UN Doc. E/1989/89, January 1991 ("UN Principles on Extra-Legal Executions"), principle 9; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000 ("UN Principles on Investigation and Documentation of Torture and other Ill-treatment"), principle 2; Geneva C (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 146(1-2); *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, UN General Assembly resolution 43/173 of 9 December 1988 ("Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment"), principles 33 and 34; The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/10034 (1975), art. 9. See also HRC, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18; Eradicating impunity for serious human rights violations, Guidelines adopted by the Committee of Ministers of the Council of Europe on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, Guidelines VIII.1.

<sup>18</sup> ACoMHRP, *Malawi African Association et al v. Mauritania*, Communications No. 54/91 et al, recommendations, lit.1. For further support, see ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Practitioners' Guide No. 2, (Revised Edition, 2018), pp 88-96.

<sup>19</sup> HRC, *General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 27; HRC, *General Comment No. 6 on Article 6 (Right to Life)*, UN Doc. HRI/GEN/1/Rev.9 (Vol I) 30 April 1982, p.176, para. 4; HRC, *General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc. HRI/GEN/1/Rev.9, 10 March 1992, paras. 13-14; HRC, *General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-18. See also *Bautista de Arellana v. Colombia*, HRC, Communication No. 563/1993, Views of 27 October 1995, paras. 8.2 and 10; and *Coronel et al v. Colombia*, HRC, Communication No. 778/1997, Views of 24 October 2002, paras. 6.2 and 10; *Rodriguez v. Uruguay*, HRC, Communication No. 322/1988, Views of 19 July 1994, para. 12(3) (in relation to torture and other ill-treatment); HRC, Concluding Observations on Peru, 25 July 1996, UN Doc. CCPR/C/79/Add.67, para. 22 (in relation to excessive use of force by police); *Nydia Erika Bautista v. Colombia*, HRC, Communication No. 563/1993, Views of 13 November 1995, para. 8.6. *José Vicente and Amado Villafañe Chaparro and others v. Colombia*, HRC, Communication No. 612/1995, Views of 29 July 1997, para. 8.8.

<sup>20</sup> HRC, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15.

<sup>21</sup> *Judgment of 29 July 1988*, IACtHR, *Velasquez-Rodriguez v. Honduras*, Series C No. 4, para. 166 (article 1 of the ACHR contains the obligation to "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible to attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation"). This view was confirmed in numerous other judgments of the Court: see *Judgment of 26 September 2006*, IACtHR, *Almonacid-Arellano et al v. Chile*, Series C No. 154, paras. 110, 111, 114; *Judgment of 22 September 2006*, IACtHR, *Goiburú et al. v. Paraguay*, Series C No. 153, paras. 84, 93, 128; ICTY, *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Trial Chamber Judgment, 29 November 1996, para. 28.

<sup>22</sup> See e.g., *McCann and others v. United Kingdom*, ECtHR (Grand Chamber), Application no. 18984/91, Judgment of 27 September 1995, para. 161; *El-Masri v. the former Yugoslav Republic of Macedonia*, ECtHR (Grand Chamber), Application No. 39630/09, Judgment of 13 December 2012, para. 182; *Marguš v. Croatia*, ECtHR (Grand Chamber), Application No. 4455/10, Judgment of 27 May 2014, paras. 125 and 127; and *Ceesay v. Austria*, ECtHR, Application No. 72126/14, Judgment of 16 November 2017, paras. 88-91.

<sup>23</sup> *Judgment of 29 July 1988*, IACtHR, *Velásquez Rodríguez v. Honduras*, Series C No. 4, paras. 166 and 174; *Finucane v. the United Kingdom*, ECtHR, Application No. 29178/95, Judgment of 1 July 2003, para. 69.



investigation according to international standards, even if the investigation does not ultimately lead to the prosecution and punishment of the perpetrator(s). A State may establish special mechanisms of investigation, including some with specialized competencies, provided they are based in law and comply with international standards governing the conduct of investigations.<sup>24</sup>

International law requires that investigations be: (i) prompt; (ii) effective and thorough; (iii) independent and impartial; and (iv) transparent.<sup>25</sup> Detailed criteria for ensuring an investigation meets these requirements are set out in, for example, the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (UN Principles on Extra-legal Executions),<sup>26</sup> the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Principles on Investigation and Documentation of Torture and other Ill-treatment),<sup>27</sup> the Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol),<sup>28</sup> and the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).<sup>29</sup>

If there is an indication that a crime occurred, an investigation should be initiated even in the absence of a formal complaint. The UN Principles on Investigation and Documentation of Torture and other Ill-Treatment for instance state that “[e]ven in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred.”<sup>30</sup> The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) similarly states that, “[w]here there are reasonable grounds for believing

<sup>24</sup> UN Principles on Extra-Legal Executions, principle 11 (In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure); *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016): *the Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2017 (“Minnesota Protocol”), paras. 38-40 (The duty to investigate does not necessarily call for one particular investigative mechanism in preference to another. States may use a wide range of mechanisms consistent with domestic law and practice, provided those mechanisms meet the international law requirements of the duty to investigate. Whether a police investigation, a coronial inquest, an investigation by an independent police oversight body, an investigation by a judge, special prosecutor or national human rights institution, or any other investigation, complies with the duty to investigate, is a matter to be determined in the light of the international legal obligations and commitments of the State. In specific circumstances a State may establish a special mechanism such as a commission of inquiry or another transitional justice mechanism).

<sup>25</sup> UN Principles on Extra-Legal Executions, principles 1-6.

<sup>26</sup> Minnesota Protocol, para. 22 et seq; HRC, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-16; Report of the UN Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, para. 1814; see also *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, principle III; UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, principles 22 and 23; UN *Principles on the Effective Investigation and Documentation of Torture and Other Ill-treatment*, principle 2; *Nydia Erika Bautista v. Colombia*, HRC, Communication No. 563/1993, Views of 13 November 1995, para. 8.6; *José Vicente and Amado Villafañe Chaparro and others v. Colombia*, HRC, Communication No. 612/1995, Views of 29 July 1997, para. 8.8; *Judgment of 22 November 2005*, IACtHR, *Gómez Palomino v. Peru*, para. 79; and *Judgment of 27 August 2014*, IACtHR, *Landaeta Mejías Brothers and others v. Venezuela*, para. 254; AComHPR, *Amnesty International and others v. Sudan*, Application Nos. 48/90-50/91-52/91-89/93, 15 November 1999, para. 51; AComHPR, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, 57th Ordinary Session, 4–18 November 2015, para. 7; and ICPPED, art. 12(1).

<sup>26</sup> UN Principles on Extra-Legal Executions, principles 9 – 17.

<sup>27</sup> UN Principles on Investigation and Documentation of Torture and other Ill-treatment, principles 1-6.

<sup>28</sup> Minnesota Protocol, paras. 19, 22 et seq.

<sup>29</sup> Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), Professional Training Series No.8/Rev.1 of UN OHCHR, 2004.

<sup>30</sup> UN Principles on Investigation and Documentation of Torture and Other Ill-Treatment, principle 2.



that a person has been subjected to enforced disappearance, the [competent] authorities ... shall undertake an investigation, even if there has been no formal complaint.”<sup>31</sup>

#### *a) Prompt*

Investigations must be conducted as soon as possible and without unreasonable delay. The Minnesota Protocol states that the rights to life and to an effective remedy are violated when investigations into potentially unlawful death are not conducted promptly.<sup>32</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has recommended that “investigations about torture should be dealt with immediately.”<sup>33</sup>

In cases where the victim has died and a body has been recovered, an autopsy of the deceased’s body will form a vital part of any investigation. The UN Principles on Extra-Legal Executions affirm the need for an “adequate autopsy” to be “conducted by a physician, who shall, if possible, be an expert in forensic pathology” and who shall have “the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred.”<sup>34</sup> Furthermore, it is imperative for those conducting the autopsy “to function impartially and independently of any potentially implicated persons or organizations or entities.”<sup>35</sup>

The duty of promptness, however, does not justify a rushed or unduly hurried investigation.<sup>36</sup> The failure of the State to investigate promptly does not relieve it of its duty to investigate at a later time: the duty does not cease with the passing of significant time.

#### *b) Effective and thorough*

Investigations must be exhaustive, which requires that they are thorough and effective.<sup>37</sup> Investigations must establish the material facts and the circumstances in which the crime was committed, as well as identify every implicated individual and their level of participation in and responsibility for the crimes (e.g. perpetrators, accomplices, superiors). The UN Principles on Extra-Legal Executions and the UN Principles on Investigation and Documentation of Torture and other Ill-treatment set out the purposes of and information that should be ascertained by an investigation, including details of the violation and circumstances surrounding it, as well as responsibility for it.<sup>38</sup>

<sup>31</sup> ICPPED, art. 12(1).

<sup>32</sup> Minnesota Protocol, para. 23.

<sup>33</sup> Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/1995/34, 12 January 1995, para. 926(g). A similar requirement can be found in article 8 of the Inter-American Convention to Prevent and Punish Torture, adopted by the Organization of American States on 9 December 1985 and which entered into force on 28 February 1987.

<sup>34</sup> UN Principles on Extra-Legal Executions, principle 12. See also principle 13 on the facts that the autopsy should discover. At the same time, the fact that a body has not been located in a case of potentially wrongful death should not, in itself, automatically result in an end to the investigation. As the 2016 Minnesota Protocol mentions (footnote 87, p. 13), “If investigators are unable to locate a body or remains they should continue to gather other direct and circumstantial evidence which may suffice for identifying the perpetrator(s).”

<sup>35</sup> UN Principles on Extra-Legal Executions, principle 14.

<sup>36</sup> See, e.g., *Pomilyayko v. Ukraine*, ECtHR, Application No. 60426/11, Judgment of 11 February 2016, para. 53.

<sup>37</sup> ICPPED, art. 12(1); Declaration on the Protection of All Persons from Enforced Disappearance, art. 13(1); UN Principles on Extra-Legal Executions, principle 9; and UN Principles on Investigation and Documentation of Torture and other Ill-treatment, principle 2.

<sup>38</sup> UN Principles on Investigation and Documentation of Torture and Other Ill-Treatment, principle 1 states: “(a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families; (b) Identification of measures needed to prevent recurrence; (c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.” UN Principles on Extra-Legal Executions, principle 9 states: “The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.”

The Minnesota Protocol requires that an investigators take all reasonable steps to, at a minimum: identify the victim(s); recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death; identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; determine the cause, manner, place and time of death, and all of the surrounding circumstances (distinguishing between natural death, accidental death, suicide and homicide) and determine who was involved in the death and their individual responsibility for the death.<sup>39</sup> The UN Committee against Torture (CAT) has held that the investigation must pay “particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.”<sup>40</sup>

Exhaustiveness requires investigators to search for and collect all direct and circumstantial evidence. The IACtHR has established that there are certain “guiding principles that must be observed in criminal investigations into human rights violations, which include, *inter alia*: the recovery and preservation of evidence in order to assist in a potential criminal investigation of the perpetrators; identification of possible witnesses, obtaining their statements and determination of the cause, manner, place and time of the act investigated. In addition, there should be a thorough examination of the crime scene and a rigorous analysis of the evidence by competent professionals using the most appropriate procedures.”<sup>41</sup> The search for and collection of all the direct and circumstantial evidence, as well as contextual elements, allows investigators to elaborate logical hypotheses and lines of inquiry that are genuinely oriented toward revealing the material facts, and identifying the responsible parties and their level of responsibility. Frequently, crimes under international law are committed through formal or informal networks or organizations involving an intricate web of participants using clandestine methods, who can intimidate witnesses and victims’ family members. In those cases, the evidence and direct witnesses may be scarce, if not non-existent, or have been eliminated. In contexts such as these, circumstantial evidence and indicia acquire greater relevance.

Exhaustive investigations must also include a search for exculpatory evidence (or “éléments à décharge”). Article 14 (3) (b) of the ICCPR provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing, which is fundamental to the guarantee of a fair trial and respect for the principle of equality of arms.<sup>42</sup> “Adequate facilities” must include access to documents and other evidence, including all materials that will be used in court against an accused person or that are exculpatory. Exculpatory material includes not only material establishing innocence but also other evidence that could assist the defence case, such as information affecting the weight of prosecution evidence (e.g. indications that a confession was not voluntary or information that undermines the credibility or reliability of a prosecution witness).<sup>43</sup> In a civil law system, in which investigative judges enjoy broad investigative discretion as to the conduct of the investigation, a thorough and exhaustive investigation necessitates an impartial investigation seeking all inculpatory and exculpatory evidence conducive to ascertaining the truth.

<sup>39</sup> Minnesota Protocol, para. 25.

<sup>40</sup> CAT, *General Comment No. 2: Implementation of Article 2 by States parties*, CAT/C/GC/2 of 24 January 2008, para. 7.

<sup>41</sup> *Judgment of 31 August 2010*, IACtHR, Rosendo Cantú et al v. Mexico, Series C No. 216, para. 178. See also *Judgment of 7 June 2003*, IACtHR, Juan Humberto Sánchez v. Honduras, Series C No. 99, para. 128; *Judgment of 23 September 2009*, IACtHR, Garibaldi v. Brazil, Series C No. 203, para. 115; and *Judgment of 16 November 2009*, Gonzalez, Monreal and Monarrez (“Cotton Field”) v. Mexico, Series C No. 205, para. 300.

<sup>42</sup> HRC, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 32.

<sup>43</sup> HRC, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 33.

### c) *Impartial and independent*

The investigation of crimes under international law should be conducted independently and impartially.<sup>44</sup> The requirements of independence and impartiality extend to both judicial and non-judicial bodies involved in an investigation prior to judicial proceedings,<sup>45</sup> and require the State to adapt its system and procedures to ensure that investigations meet these requirements.<sup>46</sup>

For an investigation to be independent, the investigating body and investigators must not be involved in the crime and must be independent of the alleged perpetrators and the institutions or agencies to which they belong. This means they cannot be hierarchically or functionally subordinate to or dependent on the alleged author(s) of the crime, or the organisation(s) to which they belong.<sup>47</sup>

The requirement of impartiality demands the absence of preconceptions and prejudices on the part of those carrying out the investigations. Likewise, it implies that the people in charge of the investigation do not have an interest in the particular case and do not act in ways that promote the interests of the parties involved in the matter under investigation.<sup>48</sup>

Such requirements limit the role that a judge with investigative responsibilities can have during trial. The ECtHR has repeatedly held that the requirement of impartiality prevents a judge conducting an investigation or issuing an indictment from subsequently serving as a trial judge on the same case. In *De Cubber v. Belgium*, the ECtHR considered that the successive exercise of the duties of investigative judge and trial judge by the same person can raise legitimate doubts about the impartiality of the court and constitute a violation of the right to be tried by an impartial tribunal.<sup>49</sup> Although the Court found no reason to doubt the actual impartiality of the member of the judiciary who had conducted the preliminary investigation, it acknowledged that his presence on the bench provided grounds for legitimate misgivings on the applicant's part. In *Castillo Algar v. Spain*, the ECtHR found that when a judge who confirmed an indictment on the grounds that there is sufficient evidence against the accused sits on the tribunal that will determine the merits of a case, legitimate

<sup>44</sup> See, e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 12; ICCPR, art. 12(1); and Inter-American Convention to Prevent and Punish Torture, art. 8. See also UN Principles on Extra-Legal Executions, principle 9; Declaration on the Protection of All Persons from Enforced Disappearance, art.13(1); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 9; and UN Principles on Investigation and Documentation of Torture and Other Ill-Treatment, principle 2.

<sup>45</sup> *Judgment of 10 July 2000*, IACtHR, Cantoral Huamani and Garia Santa Cruz v. Peru, Series C No. 167, para 133.

<sup>46</sup> See, e.g. *Judgment of 22 September 2009*, IACtHR, Anzualdo Castro v. Peru, Series C No. 202, para. 125.

<sup>47</sup> The HRC, for example, has stated that States parties to the ICCPR must establish independent bodies and procedures apart from the armed forces and police bodies to promptly and impartially investigate human rights violations and cases of excessive use of force attributable to members of the State security forces. See HRC Concluding observations: Peru, CCPR/C/79/Add.67 of 25 July 1995, para. 22; HRC Concluding observations: Venezuela, CCPR/CO/71/VEN of 26 April 2001, para. 8; HRC Concluding observations: Kyrgyzstan, CCPR/CO/69/KGZ of 24 July 2000, para. 7; HRC Concluding observations: Chile, CCPR/C/79/Add.104 of 30 March 1999, para. 10; HRC Concluding observations: Belarus, CCPR/C/79/add.86 of 19 November 1997, para. 9; HRC Concluding observations: Former Yugoslav Republic of Macedonia, CCPR/C/79/Add.96 of 18 August 1998, para. 10; HRC Concluding observations: Cameroon, CCPR/C/79/Add.116 of 4 November 1999, para. 20; Sudan, CCPR/C/79/Add.85 of 19 November 1997, para. 12; HRC Concluding observations: Mauritius, CCPR/C/79/Add.60 of 4 June 1996, E; Brazil, CCPR/C/79/Add.66 of 24 July 1996, para. 22; HRC Concluding observations: Germany, CCPR/C/79/Add.73 of 18 November 1996, para. 11; HRC Concluding observations: Bolivia, CCPR/C/79/Add.74 of 1 May 1997, para. 28; HRC Concluding observations: Kuwait, CCPR/CO/KWT of 27 July 2000, para. 13; HRC Concluding observations: Sri Lanka, CCPR/C/79/Add.56 of 23 July 1995, para. 30; HRC Concluding observations: Yemen, A/50/40 of 3 October 1995; HRC Concluding observations: Guyana, CCPR/C/79/Add.121 of 25 April 2000, para. 10; and HRC Concluding observations: Algeria, CCPR/C/79/Add.95 of 18 August 1998, paras. 6, 7 and 9.

<sup>48</sup> See Committee on Enforced Disappearances (CED), Concluding Observations on the Report submitted by Paraguay under article 29, para. 1, of the Convention, CED/C/PRY/CO/1, 24 September 2014, para. 16. See also: Concluding Observations on the Report submitted by France under article 29, para. 1, of the Convention, approved by the Committee in its fourth period of sessions (8 to 19 April 2013), CED/C/FRA/CO/1, 8 May 2013, para. 25.

<sup>49</sup> *De Cubber v. Belgium*, ECtHR, Application No. 9186/80, Judgment of 26 October 1984, paras. 27 *et seq.*

doubts can be raised about the impartiality of that tribunal, thereby constituting a violation of the right to be tried by an impartial tribunal.<sup>50</sup> In the *Hauschildt v. Denmark* case, the ECtHR distinguished between decisions taken by a judge pre-trial in which they “summarily assess ... the available data in order to ascertain whether *prima facie* the police have grounds for their suspicion” and issuing a “judgment at the conclusion of the trial [where] he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and a formal finding of guilt are not to be treated as being the same.”<sup>51</sup> In that case, the Court found a judge who had to “be satisfied that there is a ‘particularly confirmed suspicion’ that the accused has committed the crime(s) with which he is charged,” which meant “the judge has to be convinced that there is ‘a very high degree of clarity’ as to the question of guilt,” was not objectively impartial because the difference between that test and the test applied when ultimately determining guilt at trial was “tenuous.”<sup>52</sup>

However, in other cases, the ECtHR found the trial judge remained impartial even where they had a role at the pre-trial stage. In *Nortier v. the Netherlands*, the ECtHR found the trial judge was objectively impartial where he had issued a decision that the accused should be held in pre-trial custody which required him to determine whether “the prosecution had *prima facie* grounds for the charge against [the accused],” and had determined following the prosecution’s request that the accused should be sent for psychiatric evaluation, which the accused did not object to.<sup>53</sup> Applying the *Hauschildt* reasoning, the Court stated: “The mere fact that Juvenile Judge Meulenbroek also made pre-trial decisions, including decisions relating to detention on remand, cannot be taken as in itself justifying fears as to his impartiality; what matters is the scope and nature of these decisions.”<sup>54</sup> In *Saraiva de Carvalho v. Portugal*, the ECtHR reached the same conclusion when the trial judge had, at the pre-trial stage, determined “whether the file, including the prosecution’s charges, amounted to a *prima facie* case such as to justify making an individual go through the ordeal of a trial;” a decision which did not amount to committal for trial. The Judge did not take any “steps in the investigation or prosecution,” nor could his “preliminary assessment of the available evidence be regarded as a formal finding of guilt.”<sup>55</sup> Furthermore, the judge’s decision to detain the accused pre-trial did not constitute “any fresh assessment capable of having a decisive influence on his opinion of the merits; he did no more than make a cursory examination, which disclosed no factors telling in favour of Mr Saraiva de Carvalho’s release.”<sup>56</sup>

Prosecutors also play a fundamental role in investigations and must do so impartially and fairly. Indeed, according to most national legislation, prosecutors have a duty to investigate crimes or have a supervisory role in investigations. The UN Guidelines on the Role of Prosecutors were formulated to assist States “in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings.”<sup>57</sup> The Guidelines set forth principles that are applicable to all jurisdictions irrespective of the nature of their prosecuting authority. The Guidelines require that prosecutors “[c]arry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination,”<sup>58</sup> and “perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”<sup>59</sup>

<sup>50</sup> *Case of Castillo Algar v. Spain*, ECtHR, Application Nos. 79/1997/863/1074, Judgment of 28 October 1998, paras. 47 to 51.

<sup>51</sup> *Hauschildt v. Denmark*, ECtHR, Application No. 10486/83, Judgment of 24 May 1989, para. 50.

<sup>52</sup> *Hauschildt v. Denmark*, ECtHR, Application No. 10486/83, Judgment of 24 May 1989, para. 52.

<sup>53</sup> *Nortier v. the Netherlands*, ECtHR, Application No. 13924/88, Judgment of 24 August 1993, paras. 34-35.

<sup>54</sup> *Nortier v. the Netherlands*, ECtHR, Application No. 13924/88, Judgment of 24 August 1993, para. 33.

<sup>55</sup> *Saraiva de Carvalho v. Portugal*, ECtHR, Application No. 15651/89, Judgment of 22 April 1994, para. 38.

<sup>56</sup> *Saraiva de Carvalho v. Portugal*, ECtHR, Application No. 15651/89, Judgment of 22 April 1994, para. 39.

<sup>57</sup> UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (“UN Guidelines on the Role of Prosecutors”), preamble.

<sup>58</sup> UN Guidelines on the Role of Prosecutors, guideline 13 (a).

<sup>59</sup> UN Guidelines on the Role of Prosecutors, guideline 12.

#### d) *Transparent*

International law requires that investigations be conducted transparently to ensure the public can monitor their efficacy and victims can participate in them.<sup>60</sup> Transparency should extend to the existence of investigations, their procedures, and their findings, including factual and legal bases.<sup>61</sup> The only limitations on transparency must be strictly necessary for a legitimate purpose. These can potentially include protecting the privacy and safety of affected individuals,<sup>62</sup> ensuring the integrity of ongoing investigations, or securing sensitive details about intelligence sources or military or police operations.<sup>63</sup> Transparency cannot be restricted in a way that is intended to conceal violations of human rights or other such unlawful activities by the authorities, or would conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or would result in impunity for those responsible.<sup>64</sup>

The Minnesota Protocol provides detailed guidance to investigators and/or prosecutors when reviewing the case file to determine whether the investigation met international law and standards, including whether:

- The investigation was carried out independently and impartially (para 28);
- The victim family was informed of the progress of the investigation, during all its phases, in a timely manner (para 35);
- Investigative processes and outcomes were transparent, including through openness to the scrutiny of the general public and of victims' families (para 32);
- Every stage of evidence recovery, storage, transportation and forensic analysis, from crime scene to court and through to the end of the judicial processes, was effectively recorded to ensure the integrity of the evidence (para 65);
- All significant witnesses – including those who saw or heard the crime being committed, people with relevant knowledge of the victim(s) and/or suspected perpetrator(s), and people in the same organization or chain of command as the suspected perpetrator – have been interviewed (para 72);
- Any technical gaps in the investigation have been identified and, where appropriate, international assistance has been sought (para 77);
- A "living chronology" was created and reviewed each time new evidence was collected or obtained (para 83); and
- An autopsy was performed (paras 25, and 148ff and detailed guidelines).<sup>65</sup>

In some circumstances, the prosecutor may advise that the prosecution be stayed or discontinued if the charge is unfounded. In the event evidence obtained though grave violations of the suspects human rights are contained on the case file, the prosecutor should refuse to use the evidence, inform the court, and take all necessary steps to ensure the perpetrators are brought to justice.

<sup>60</sup> Minnesota Protocol, para. 22. See ICPPED, arts. 12, 24. A victim's immediate family "must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests". UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Interim Report, UN doc. A/65/321, 23 August 2010; *Hugh Jordan v. UK*, ECtHR, Application no. 24746/94, Judgment of 4 May 2001, para. 109. See also AComHPR, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 57th Ordinary Session, 4–18 November 2015, para. 7.

<sup>61</sup> Minnesota Protocol, para. 32.

<sup>62</sup> Under Art. 137 of 1949 Geneva Convention IV, information concerning a protected person, including about his/her death, may be withheld by the Information Bureau if transmission is "detrimental" to the relatives.

<sup>63</sup> Minnesota Protocol, para. 33.

<sup>64</sup> Minnesota Protocol, para. 33. See also The Global Principles on National Security and the Right to Information (The Tshwane Principles), Principle 10, available at <https://www.justiceinitiative.org/uploads/bd50b729-d427-4fbb-8da2-1943ef2a3423/global-principles-national-security-10232013.pdf>.

<sup>65</sup> For more guidance on applying these steps in practice, see ICJ, *The Investigation and Prosecution of Potentially Unlawful Death*, Practitioner's Guide No. 14 (2019), pp. 126-129.

### iii. The role of the Prosecutor

Numerous international standards address the role of a prosecutor in criminal proceedings, including the UN Guidelines on the Role of Prosecutors, adopted in 1990,<sup>66</sup> the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the AComHPR in 2003,<sup>67</sup> and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of the Prosecutor ("IAP Standards"), adopted by the International Association of Prosecutors (IAP) in 1999 and endorsed by the UN in 2008.<sup>68</sup>

Prosecutors are key to ensuring access to justice for victims of human rights violations and combating impunity.<sup>69</sup> Under international standards, prosecutors must perform an active role in the criminal process. The United Nations Guidelines on the Role of Prosecutors and the AComHPR's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa both state:

Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.<sup>70</sup>

The UN Guidelines on the Role of Prosecutors recognize that prosecutors are "essential agents of the administration of justice,"<sup>71</sup> necessary for ensuring due process and upholding the rights of suspects throughout the investigation and prosecution process.<sup>72</sup> They must make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.<sup>73</sup> They have a duty to refuse to use evidence known or believed to have been obtained by recourse to unlawful means, including torture and other ill-treatment, and must take steps to ensure that persons responsible for the use of such unlawful means are brought to justice.<sup>74</sup>

Prosecutors also have a particular role with respect to victims. In addition to taking into account the position of the victim, the UN Guidelines and IAP Standards require prosecutors to "consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and similarly seek to ensure" that victims and witnesses are "informed of their rights."<sup>75</sup>

<sup>66</sup> See above footnote 57.

<sup>67</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AComHPR Doc. OS(XXX)247, 2003, principle F(2)(f) ("AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa"). See also Council of Europe, Committee of Ministers, Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000 ("CoM Recommendation (2000)19").

<sup>68</sup> UN Commission on Crime Prevention and Criminal Justice, Resolution 17/2: Strengthening the rule of law through improved integrity and capacity of prosecution services (2008).

<sup>69</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, 7 June 2012, para. 35.

<sup>70</sup> UN Guidelines on the Role of Prosecutors, guideline 11; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(g).

<sup>71</sup> UN Guidelines on the Role of Prosecutors, guideline 3.

<sup>72</sup> UN Guidelines on the Role of Prosecutors, guidelines 12 and 14. IAP Standards, paragraphs 1(h) and 4.3(c),(d). See also AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(h),(j); and CoM Recommendation (2000)19, para. 27.

<sup>73</sup> UN Guidelines on the Role of Prosecutors, guideline 13(a), (b) and 14; see also AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(i) and (j); CoM Recommendation (2000)19, paras. 24 and 27. See also IAP Standards, paragraph 1(h).

<sup>74</sup> UN Guidelines on the Role of Prosecutors, guideline 16; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. F(l). See also IAP Standards, paragraph 1(f).

<sup>75</sup> IAP Standards, paragraph 4.3(b). See also UN Guidelines on the Role of Prosecutors, guideline 13(d); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(i)(4); and see CoM Recommendation (2000)19, para.33; Basic Principles of Justice for Victims of Crime and Abuse of Power.

In the exercise of these functions, prosecutors must be independent, impartial, and accountable, and provided with appropriate resources.<sup>76</sup> Even where a prosecutor is a part of the executive or subordinate to executive power,<sup>77</sup> international standards require that lines of authority are transparent and that prosecutors are independent and impartial in carrying out their duties. International standards require prosecutors to give due attention to “corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.”<sup>78</sup>

Any general or specific instructions to prosecutors by non-prosecutorial authorities should be: (i) transparent; (ii) consistent with lawful authority; and (iii) subject to established guidelines to safeguard actual prosecutorial independence and the perception of it. Under the IAP Standards, “any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.”<sup>79</sup> Under the UN Guidelines on the Role of Prosecutors and IAP Standards, States must ensure that prosecutors “are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal or other liability”<sup>80</sup> and “should be protected against action by governments.”<sup>81</sup> The Special Rapporteur on the independence of judges and lawyers recommends that prosecutors have the right to challenge instructions received, especially when they deem the instructions unlawful or contrary to professional standards or ethics.<sup>82</sup>

Under the UN Guidelines on the Role of Prosecutors, prosecutors are also required to “carry out their functions impartially,” and to “protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.”<sup>83</sup> These requirements are also reflected in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and IAP Standards.<sup>84</sup>

<sup>76</sup> International standards on these issues and an assessment of the law and practice in Tunisia in light of these standards can be found in the ICJ’s May 2014 report on the independence and accountability of the judiciary in Tunisia. See ICJ, *The independence and accountability of the Tunisian judicial system: learning from the past to build a better future*, 13 May 2014.

<sup>77</sup> The Special Rapporteur on the independence of judges and lawyers has noted a “growing tendency to move towards a more independent prosecution service model, in terms of its relationship with other authorities, notably the executive.” See Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 27.

<sup>78</sup> UN Guidelines on the Role of Prosecutors, guideline 15. See also AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(k); CoM Recommendation (2000)19, para. 16.

<sup>79</sup> IAP Standards, paras. 2(2) and 2(3).

<sup>80</sup> UN Guidelines on the Role of Prosecutors, guideline 4; IAP Standards, para. 6(a). See also AComHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(a)(2); CoM Recommendation (2000)19, para. 11.

<sup>81</sup> IAP Standards, para. 6(a). To this end, the international standards refer to a number of guarantees, for instance in relation to conditions of service and remuneration, tenure, career progression, and protection against arbitrary reprisal or removal from office; and the right to form and join professional associations. See UN Guidelines on the Role of Prosecutors, paras. 1-7, 21-22; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(b) and (c); IAP Standards, para. 6.

<sup>82</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, 7 June 2012, para. 116. The Special Rapporteur has noted that a prosecution service that is autonomous and viewed by the public as such will increase confidence in its ability to investigate and prosecute crimes. See Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/65/274, 10 August 2010, para. 16.

<sup>83</sup> UN Guidelines on the Role of Prosecutors, guideline 13(a), (b) and 14. The UN Guidelines on the Role of Prosecutors state that “[i]n countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.” UN Guidelines on the Role of Prosecutors, guideline 17.

<sup>84</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle F(i)(2); IAP Standards, para. 4. See also CoM Recommendation (2000)19, paras. 24, 27, 36(a) (in order to promote “fair, consistent and efficient activity of public prosecutors” States should, among other things, “define general guidelines for the implementation of criminal policy”, and “define general principles and criteria to be used by way of references against which decisions in individual cases should be taken,” which should be made public).



As public officials who are key players in the administration of justice, prosecutors should also be accountable to the public. At least in the case of gross human rights violations, interested parties should have a right to independent review of a decision by a prosecutor not to prosecute.<sup>85</sup>

## b. Tunisian Law

### i. General Criminal Procedure

#### a) *The duty to investigate crimes*

Criminal proceedings can be initiated in three ways: (i) by the OPP *proprio motu* (on his or her own motion);<sup>86</sup> (ii) upon the instruction of the Minister of Justice to the *Procureur de la République* (hereafter “Prosecutor-General”), who refers the matter to the OPP;<sup>87</sup> or (iii) where the OPP decides not to proceed with an investigation, by the victim of a crime.<sup>88</sup> The OPP is ordinarily notified of offences through complaints filed by victims of crimes and reports from public officials, judicial police, private persons<sup>89</sup> or the Higher Committee on Human Rights and Fundamental Freedoms.<sup>90</sup> If the OPP terminates proceedings prior to an investigation being ordered, the victim/s can register as a civil party and request an investigative judge to open a preliminary investigation or summon the accused directly before the trial chamber.<sup>91</sup> In practice, criminal proceedings concerning serious violations of human rights are usually triggered when the victim files a complaint with the Judicial Police or OPP, and investigations are rarely instituted by civil parties where the Judicial Police or OPP do not act on the complaint.<sup>92</sup>

#### b) *The conduct of Investigations*

Tunisia’s legal system is based on the French civil law model with the responsibility for pre-trial investigations shared between the OPP and an investigative judge and responsibility for issuing indictments granted to an indictment chamber. Under the CCP, investigations are carried out by an investigative judge, who then orders the OPP to initiate a prosecution by requesting the indictment

<sup>85</sup> See e.g. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, 7 June 2012, para. 86; see also CoM Recommendation (2000)19, para. 34 and para. 1 of the Bordeaux Declaration, “Judges and Prosecutors in a Democratic Society”, Council of Europe Committee of Ministers, CM (2009)192, 15 December 2009; EU Directive 2012/29/EU (25 October 2012) establishing minimum standards on the rights, support and protection of victims of crime, art. 11 and Preamble, para. 43.

<sup>86</sup> Code of Criminal Procedure, arts. 2 and 20. Article 115 of the 2014 Constitution states that “prosecutors exercise their functions as determined by the law and within the framework of the penal policy of the State in conformity with the procedures established by the law.”

<sup>87</sup> Code of Criminal Procedure, art. 23. Under Tunisian law, prosecutors enjoy the same protections and obligations as the judiciary. Under article 115 of the 2014 Constitution, the Office of the Public Prosecutor (OPP) is considered part of the judiciary with the same constitutional guarantees and duties, including judicial immunity and the obligation to act with competence, impartiality and integrity. See 2014 Constitution, arts. 103-104, 115. Prosecutors, however, fall to some extent under the authority of the executive branch. Pursuant to article 22 of the CCP, the Prosecutor-General is placed at the head of the prosecution service but specifically “under the authority of the Minister of Justice” (Code of Criminal Procedure, art. 22), who may request the OPP to initiate investigations (Code of Criminal Procedure, art. 23) and order the Prosecutor-General to lodge an appeal against a ruling to the Court of Cassation (Code of Criminal Procedure, art. 258(6)). At the appeal stage, the powers of the Prosecutor-General are vested in the Attorney Generals of the Courts of Appeal within the limits of their jurisdiction, who also act under the direct authority of the Ministry of Justice (Law No. 87-80 of 29 December 1987, art.1; Code of Criminal Procedure, art. 24). These provisions serve to consolidate the Minister of Justice’s control over the OPP as a whole.

<sup>88</sup> Code of Criminal Procedure, arts. 2 and 36.

<sup>89</sup> Code of Criminal Procedure, arts. 13 and 26.

<sup>90</sup> Law No. 2008-37 of 16 June 2008 on the Higher Committee for Human Rights and Fundamental Freedoms, art. 2.

<sup>91</sup> Code of Criminal Procedure, arts. 36 and 206.

<sup>92</sup> See, ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, p. 20.

chamber to issue an indictment. The OPP must then submit the case file to the competent trial chamber for trial.

### (1) Investigation by the OPP and investigative judges

The OPP must review all complaints received by them<sup>93</sup> and conduct a preliminary inquiry to determine the nature of the charge by collecting evidence, questioning the suspect, taking witness statements and writing a report.<sup>94</sup> As there are 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.<sup>95</sup> Nothing in the relevant Tunisian legislation requires the OPP's decision to dismiss a complaint to be supported by any reasons, nor does the law provide explicitly for judicial review. The civil party can initiate investigations under their own "personal responsibility" if the OPP dismisses the case.<sup>96</sup>

If the OPP determines that the offence qualifies as a crime, the OPP must inform the Prosecutor-General and the competent Attorney-General,<sup>97</sup> and order an investigative judge within his jurisdiction to conduct an investigation,<sup>98</sup> who falls under the authority of the Prosecutor-General and, within the Courts of Appeal, under the Attorney-Generals<sup>99</sup> and who cannot be removed once assigned.<sup>100</sup>

Upon receipt of a case, the investigative judge must open an investigation, search for the truth and establish all the facts that will serve as a basis for whether to send to trial.<sup>101</sup> The investigative judge can only investigate the facts specified by the OPP in the case file,<sup>102</sup> except where additional facts have been disclosed in the course of the investigation and would constitute aggravating circumstances of the referred offence.<sup>103</sup> The investigative judge has the power to compel and hear witnesses and interrogate the accused,<sup>104</sup> and conduct searches and site visits, seize evidence, and order an expert report on any issue.<sup>105</sup> Throughout the investigation, the OPP<sup>106</sup> and the accused and their counsel<sup>107</sup> can request the investigative judge to execute any investigative acts (including a search for exculpatory evidence).<sup>108</sup> The investigative judge is not permitted to participate in the judgement of the case at trial.<sup>109</sup>

<sup>93</sup> Code of Criminal Procedure, art. 30.

<sup>94</sup> Code of Criminal Procedure, art. 26. The OPP can delegate these functions to the Judicial Police.

<sup>95</sup> Code of Criminal Procedure, art. 30.

<sup>96</sup> Code of Criminal Procedure, art. 36.

<sup>97</sup> Competent Attorney-Generals represent the OPP in all proceedings before the Court of Appeal.

<sup>98</sup> Code of Criminal Procedure, arts. 28, 47 and 347. Where there are several investigative judges in one jurisdiction, the OPP assigns an investigative judge of his or her choice. Code of Criminal Procedure, art. 49. If the suspect is caught *in flagrante delicto*, the OPP and the investigative judge enjoy the same powers. Code of Criminal Procedure, arts. 26, 34 and 35. In cases involving lesser offences, i.e. infractions, the OPP can investigate and the involvement of an investigative judge is optional. Code of Criminal Procedure, art. 47.

<sup>99</sup> Code of Criminal Procedure, art. 10.

<sup>100</sup> Code of Criminal Procedure, art. 51.

<sup>101</sup> Code of Criminal Procedure, art. 50.

<sup>102</sup> Code of Criminal procedure, art. 51(2).

<sup>103</sup> Code of Criminal Procedure, art. 51(2).

<sup>104</sup> Code of Criminal Procedure, arts. 53, 59, 61, 93-100.

<sup>105</sup> Code of Criminal Procedure, arts 53, 59, and 93-100. The investigative judge can appoint other investigative judges or the Judicial Police to carry out certain investigative acts on his or her behalf, including hearing witnesses. Code of Criminal Procedure, art 57. However, the investigative judge cannot delegate the power to execute warrants. For further details regarding the appointment of experts, see ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices on the collection, admissibility and assessment of evidence* – Practical Guide 3 (2020), part 2.b.i.c.

<sup>106</sup> Code of Criminal Procedure, art. 55(1).

<sup>107</sup> Code of Criminal Procedure, art. 72.

<sup>108</sup> Code of Criminal Procedure, art. 55(1).

<sup>109</sup> Code of Criminal Procedure, art. 50.

## (2) The preparation of indictments and initiation of prosecutions

Once an investigation is completed, the investigative judge must order<sup>110</sup> to: (i) return the case to the OPP on the basis that he or she does not have jurisdiction;<sup>111</sup> (ii) dismiss the case on the basis that it is not receivable, that the facts do not constitute an offence, or that there is insufficient evidence;<sup>112</sup> or (iii) refer the case to the indictment chamber.<sup>113</sup> The OPP must execute the investigative judge's order.<sup>114</sup>

The indictment chamber may dismiss the case if it determines the facts do not reveal the commission of a crime or there is insufficient evidence to charge the accused.<sup>115</sup> If there is a "sufficient presumption of guilt," the indictment chamber issues a written indictment and refers the case to the competent trial chamber.<sup>116</sup> The OPP must then transfer all evidence and testimonies to the competent court within four days and summon the accused to the next hearing.<sup>117</sup> If necessary, the indictment chamber may also seek further information from one of its judges or the investigative judge or, after hearing from the OPP, order that new proceedings be initiated to investigate facts which have not yet been investigated.<sup>118</sup>

## (3) Complementary investigations at trial

Pursuant to article 206 of the CCP, if the trial chamber receives the indictment and case file, and determines that it is not ready for trial, it may remit it back to the OPP.<sup>119</sup> Alternatively, although the CCP forbids an investigative judge from sitting on a case as a trial judge in which he or she participated as an investigative judge,<sup>120</sup> the CCP also allows the trial chamber to conduct complementary investigations after the case has been referred to them. In order to do so, the trial chamber designates one of the judges (commonly referred to as "juge rapporteur") on the trial bench to conduct a complementary investigation, during which trial proceedings are postponed.<sup>121</sup> The CCP is silent regarding the powers the "juge rapporteur" can exercise in this regard.

### c) *The role of the Prosecutor*

As set out above and in part 3.b.i below, the CCP requires the OPP to play an active role during the investigation and prosecution of crimes. It preserves prosecutorial discretion through a number of checks and balances, in particular through:

- The active participation of the OPP in investigations, including by requiring the OPP to initiate an investigation, request the investigative judge undertake certain complementary investigative acts, and participate in the confrontation procedure;
- The roles of the OPP and investigating judge in determining whether the facts reveal the commission of a crime, whether an investigation should be pursued and whether sufficient evidence has been gathered to proceed to prosecution;

<sup>110</sup> Code of Criminal Procedure, art. 104.

<sup>111</sup> Code of Criminal Procedure, art. 105. The OPP must then refer the case to the competent judicial body.

<sup>112</sup> Code of Criminal Procedure, art. 106.

<sup>113</sup> Code of Criminal Procedure, art. 107.

<sup>114</sup> Code of Criminal Procedure, art. 108.

<sup>115</sup> Code of Criminal Procedure, art. 116.

<sup>116</sup> Code of Criminal Procedure, arts. 116 and 119.

<sup>117</sup> Code of Criminal Procedure, art. 111.

<sup>118</sup> Code of Criminal Procedure, art. 116.

<sup>119</sup> Code of Criminal Procedure, art. 206.

<sup>120</sup> Code of Criminal Procedure, art. 50.

<sup>121</sup> Code of Criminal Procedure, arts. 143 and 206.

- The role of the OPP in submitting the relevant evidence to the trial chamber, identifying witnesses and submitting witness lists, examining and cross-examining witnesses, and making submissions on the case and sentencing; and
- The role of the OPP in appealing decisions of the investigating judge and indictment chamber to the Court of Appeal or Court of Cassation.

## ii. Transitional Justice Framework

The 2013 Law and 2014 Law granted special powers to the IVD to investigate gross human rights violations and other crimes under Article 8 of the 2013 Law. The Framework does not contain any specific provisions on whether or how general Tunisian criminal procedure applies.

To carry out its investigative function, the IVD, through its Internal Rules, established an Investigation Committee, which was composed of five IVD members and could be assisted by other IVD members, external expert collaborators or any person it deemed useful.<sup>122</sup> The IVD Internal Rules also specified that the Investigation Committee would operate in accordance with its own procedures manual, which were to be approved by the IVD Council.<sup>123</sup>

The IVD Council adopted the Investigation Committee Procedures Guide (IC Procedures Guide) on 29 January 2016, which constituted a set of internal rules of procedure.<sup>124</sup> It required that the Committee be headed by an IVD Commissioner and constituted of four units – three responsible for the pre-investigation phase and one for completing investigations – which were to act in accordance with specified rules.<sup>125</sup> The IC Procedures Guide required the Committee to exercise its tasks and powers with full neutrality and independence without interference.<sup>126</sup>

The 2013 Law and 2014 Law did not grant any role to the OPP, investigative judges or indictment chamber in the investigation of complaints submitted to the IVD. According to the information available at the time of publication, they have played no role in the investigation of cases referred to the IVD and the SCC.

### a) *The duty to investigate crimes*

Under the 2013 Law and the IVD Internal Rules, victims could submit complaints about human rights violations to the IVD within the first year of its operation.<sup>127</sup> As of 15 June 2016, the deadline for victims to submit files, the IVD had received over 60000 complaints.

The Investigation Committee's Sorting Unit – one of the four units established under the IC Procedures Guide – carried out preliminary admissibility assessments for all victim submissions to the IVD.<sup>128</sup> Decisions on admissibility were referred to the IVD's Research and Investigation

<sup>122</sup> IVD Internal Rules, art. 57 (provided that they did not participate or receive a vote in deliberations).

<sup>123</sup> IVD Internal Rules, art. 57.

<sup>124</sup> See article 6 of the IVD Investigation Committee Procedures Guide, issued on the basis of IVD's Decision No. 6 of 29 January 2016, available at <https://www.docdroid.net/qShNixt/-pdf.html>.

<sup>125</sup> IC Procedures Guide, arts. 8, 15, 23, and 27.

<sup>126</sup> IC Procedures Guide, art. 38.

<sup>127</sup> 2013 Law, arts. 39-40; IVD Internal Rules, art. 3 (a six-month extension was possible). Consistent with the 2013 Law, the IVD Internal Rules provided that the IVD shall, *inter alia*, uncover the reality of human rights violations committed from 1 July 1955 to 31 December 2013, and understand and address the past of these violations, including attacks leading to the fall of the martyrs of the revolution or the injury of its wounds; refer serious human rights violations to the OPP and follow up their fate before judicial bodies; hold those responsible for violations accountable; take necessary measures to preserve and document the national memory and establish guarantees of non-recurrence of violations; investigate cases of enforced disappearance and determine the fate and whereabouts of the victims and the identity of the perpetrators; collect data and document violations to create a database and unified register of victims of violations; and determine the responsibility of State organs or any other parties in violations covered by the 2013 Law. See article 3. Chapter III of the IVD Internal Rules outlined the procedures that the IVD had to follow to receive victims' complaints.

<sup>128</sup> IC Procedures Guide, art. 8. The Sorting Unit was composed of jurists, sociologists, and psychologists.

Committee,<sup>129</sup> which evaluated rejected files and sent them to the IVD Council for final determination (with reasons).<sup>130</sup> The Law did not set out the criteria for determining which cases the IVD should investigate, other than the requirement in article 40 to “investigate all the violations stipulated herein.”

*b) The conduct of investigations and rights of the accused*

*(1) Investigation by the IVD Investigation Committee*

The Transitional Justice Framework entrusted the IVD with a broad investigative mandate, but provided limited guidance on their investigation procedures. Articles 39 and 40 of the 2013 Law entrusted the IVD with investigative duties and powers. Article 39 of the 2013 law required the IVD to, amongst other things:

- Hold private or public hearings for victims of violations;
- Investigate cases of enforced disappearance based on submitted declarations and complaints and determine the fates of the victims;
- Gather data as well as track, count, verify and document the violations to create the needed database, and establish a unified record of victims of violations; and
- Determine the responsibility of State organs and any other parties in the relevant violations.<sup>131</sup>

Article 40 granted the IVD broad investigative powers, notably including:

- The power to investigate (using the French term “instruction,” which under the CCP, refers specifically to the role of an investigative judge) all violations using all necessary means, including accessing archives and summoning any person it deems necessary or of assistance;
- The power to request the assistance of public officials to execute tasks related to investigation, instruction and protection;
- The power to search public and private places and seize documents, providing it with “the same powers as the judicial police, with the accompanying duty to safeguard procedural guarantees”;<sup>132</sup> and
- Recourse to any other procedure or mechanism that may contribute to revealing the truth.<sup>133</sup>

The Confidential Hearing Unit and the Inquiry and Analysis Unit – two of the four units established under the IC Procedures Guide – were responsible for conducting preliminary investigations to determine whether the complaint should be subject to a full investigation. The Confidential Hearing Unit held confidential hearings for the victims<sup>134</sup> and transferred a detailed list of the processed files to the Investigation Committee, who in turn sent them to the Inquiry and Analysis Unit.<sup>135</sup>

The Inquiry and Analysis Unit analyzed the files based on the information provided by the victim and other information otherwise available to the IVD,<sup>136</sup> which could include the IVD’s archives and information obtained through interviews with victims, witnesses and accused persons, site visits,

<sup>129</sup> IC Procedures Guide, art. 10.

<sup>130</sup> IC Procedures Guide, art. 11, 12 and 26.

<sup>131</sup> Law No. 53-2013 of 24 December 2013, art. 39.

<sup>132</sup> Law No. 53-2013 of 24 December 2013, art. 40(10).

<sup>133</sup> For more detail regarding these provisions, see ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices on the collection, admissibility and assessment of evidence* – Practical Guide 3 (2020), part 2.b.ii.a.

<sup>134</sup> IC Procedures Guide, art. 15. The Unit was composed of composed of jurists, sociologists, and psychologists.

<sup>135</sup> IC Procedures Guide, art. 22.

<sup>136</sup> IC Procedures Guide, art. 23.

and the seizure of evidence subject to any necessary summons or orders it deemed necessary.<sup>137</sup> The Analysis Unit determined whether the complaint should be rejected, or referred to the one of the IVD's committees and/or the Investigation Unit – the fourth Investigation Committee Unit – for investigation.<sup>138</sup>

The Investigation Unit, presided over by a judge and composed of several investigation desks, each headed by a retired or "detached" investigator,<sup>139</sup> was required to carry out a full investigation of the complaint.<sup>140</sup> The Head of the Investigation Unit could exercise all the powers of a judicial officer, including to conduct inspections and seize documents, removable objects and tools used in connection with the violations under investigation, and was required to comply with all necessary procedural guarantees.<sup>141</sup> The head of each investigative team could request the assistance of investigative assistants and experts either internal to the IVD or external, provided that they were excluded from all decision-making.<sup>142</sup> Investigative work had to be conducted in the presence of an investigation clerk, who was required to direct summons and notifications and maintain detailed records in the file.<sup>143</sup> The IC Procedures Guide also specified that investigators must exhaust all the procedures leading to the disclosure of the truth.<sup>144</sup>

State institutions were under an obligation to share information and evidence that could assist investigations directly with the IVD at its request or that of the parties.<sup>145</sup> Under the 2013 Law, the principle of professional secrecy (or confidentiality) was not a valid reason to refuse to cooperate with a request for information or evidence issued by the IVD, and persons who disclosed confidential documents to the IVD cannot be sanctioned for doing so.<sup>146</sup> Based on the information available to the ICJ, in practice the IVD's investigations suffered from lack of support by State institutions and access to State archives was limited.<sup>147</sup>

At the conclusion each investigation, the Investigation Committee issued a decision for review and confirmation or rejection by the IVD Council.

## (2) The preparation of indictments and initiation of prosecutions

Article 42 of the 2013 Law required the IVD to refer to the OPP "the cases in which the commission of gross human rights violations is proven," and required that the IVD "be notified of all the measures that are subsequently taken by the judiciary."<sup>148</sup> In practice, the IVD prepared an indictment and transferred it along with the case file containing the evidence to the OPP. Article 3 of the 2014 Law requires the OPP to automatically submit cases referred to it to the SCC.<sup>149</sup> Read together with article

<sup>137</sup> IC Procedures Guide, art. 24.

<sup>138</sup> IC Procedures Guide, art. 25.

<sup>139</sup> IC Procedures Guide, art. 30. A "detached" civil servant in Tunisian administrative law is someone who initially works initially for one administrative authority but is then assigned by his employer to serve in a different administrative authority to which he was not initially assigned.

<sup>140</sup> IC Procedures Guide, arts. 30, 32, 39 and 40.

<sup>141</sup> IC Procedures Guide, art. 39.

<sup>142</sup> IC Procedures Guide, arts. 34, 36.

<sup>143</sup> Article 36 of the IC Procedures Guide required that all investigative work be documented, including hearings and interrogations (by audio and video), and that reports should be signed by the investigator, the investigation clerk, the member of the Commission that is present, the witness and their representative when needed. If the concerned person refused or was unable to sign, it must have been recorded in the report with the reason.

<sup>144</sup> IC Procedures Guide, art. 40.

<sup>145</sup> Law No. 53-2013 of 24 December 2013, art. 51.

<sup>146</sup> Law No. 53-2013 of 24 December 2013, art. 54.

<sup>147</sup> Sihem Bensedrine, Interview with Justice Info Net on 18 April 2019, <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/in-depth-interviews/41158-sihem-bensedrine-france-and-the-world-bank-should-compensate-tunisian-victims.html> (Last accessed 3 May 2019).

<sup>148</sup> Law No. 53-2013 of 24 December 2013, art. 42.

<sup>149</sup> Law No.17-2014 of 12 June 2014, art. 3.

3 of the 2014 Amendment, article 42 of the 2013 Law allows the SCC to rely exclusively on investigations conducted by the IVD, without further investigation or review by the OPP.

*c) The role of the Prosecutor*

The OPP played little role in the investigation of cases by the IVD and referral of cases to the SCC. References to the OPP in the 2013 Law and 2014 Law set out above are the only explicit references in the Transitional Justice Framework to their role in SCC cases.



### 3. The rights of the accused during investigations and prosecutions

Under Tunisian general criminal procedure, the rights of the accused during the trial and pre-trial phases of criminal proceedings are detailed in the CCP.<sup>150</sup> The Transitional Justice Framework does not contain any provisions governing the rights accorded to the accused during the pre-trial and trial stages of SCC cases. The IC Procedures Guide generally specified that investigations were to be conducted independently and impartially, while respecting the principles of transitional justice and the Constitution and the rights of the accused.

International law and standards require Tunisian authorities to respect, protect and fulfill the accused's right to liberty and right to a fair trial under the ICCPR, ACHPR and Arab Charter. Other applicable standards, including the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa of the AComHPR, the African Commission's Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa and the HRC's General Comments Nos. 32 and 35, clarify the scope of States' obligations under the ICCPR, ACHPR, and Arab Charter. Those rights that are of particular concern with respect to SCC cases are discussed in detail in this Part. The international law and standards governing other rights applicable at both the pre-trial and trial stages are discussed in detail in other ICJ publications.<sup>151</sup>

#### a. International law and standards

The right to liberty and to a "fair and public hearing" by a "competent, independent and impartial tribunal established by law" in criminal proceedings are recognized by articles 9 and 14 of the ICCPR, articles 13 and 14 of the Arab Charter, and articles 6, 7 and 26 of the African Charter on Human and Peoples' Rights (ACHPR), to which Tunisia is a party.<sup>152</sup> Other standards applicable to Tunisia include The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the AComHPR,<sup>153</sup> and the HRC's General Comment No. 32 on Article 14 (Right to equality before Courts and Tribunals and to a fair trial)<sup>154</sup> and General Comment No. 35 on Article 9 (Liberty and Security of Person),<sup>155</sup> which provide authoritative guidance on Tunisia's obligations under the ACHPR and article 14 of the ICCPR respectively.

As reflected in article 9 of the ICCPR, under international law the right to liberty incorporates a general prohibition on arbitrary arrest and detention and series of specific guarantees which are applicable during investigations and, where appropriate, throughout trial.

Article 9 reads:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

<sup>150</sup> Although these provisions do not always accord with international law and standards, they provide considerably more rights than under the Transitional Justice Framework. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia* (May 2016).

<sup>151</sup> ICJ, *A Manual on Trial Observation*, Practitioners' Guide No. 5 (2009); ICJ, *International Principles on the independence and accountability of judges, lawyers and prosecutors*, Practitioners' Guide No. 1 (2007). See also Amnesty International, *Fair Trial Manual*, Second Edition (2014).

<sup>152</sup> See also Universal Declaration of Human Rights (UDHR), art. 10.

<sup>153</sup> See above footnote 67.

<sup>154</sup> HRC, *General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, UN Doc. CCPR/C/GC/32, 23 August 2007.

<sup>155</sup> HRC, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Similarly, and as reflected in article 14 of the ICCPR, under international law the right to a fair trial incorporates both a general requirement of fairness, and a series of specific guarantees which apply at the pre-trial and/or trial stages of criminal cases.

Article 14 reads:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

Those rights that are of particular concern with respect to SCC cases are discussed in more detail below. The international law and standards governing other rights applicable at both the pre-trial and trial stages are discussed in detail in other ICJ publications.<sup>156</sup>

## i. Pre-trial rights

### a) *The right to liberty and to be brought promptly before a judge*

According to article 9(3) of the ICCPR, “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”<sup>157</sup> The purpose of bringing the person promptly before a judicial authority is to:

- (i) assess whether sufficient legal reasons exist for the arrest or detention;
- (ii) assess whether pre-trial detention is necessary and proportionate and, if not, under what conditions the person can be released pending trial;<sup>158</sup>
- (iii) safeguard the well-being of the detainee;
- (iv) prevent violations of the detainee’s fundamental rights; and
- (v) give the detainee the opportunity to challenge the lawfulness of their detention and order their release if the detention is unlawful or arbitrary.

If the detainee is brought before an official who is not a judge, that person must be authorised by law to exercise judicial power and must be independent and impartial.<sup>159</sup> International authorities including the HRC and the UN Working Group on Arbitrary Detention (WGAD) have confirmed that prosecutors, investigators, military officers and investigative judges are not sufficiently independent to qualify as such a judicial authority because they may intervene in subsequent proceedings against the accused person.<sup>160</sup> The judicial officer must have the authority to review the lawfulness of the

<sup>156</sup> ICJ, *A Manual on Trial Observation*, Practitioners’ Guide No. 5 (2009); ICJ, *International Principles on the independence and accountability of judges, lawyers and prosecutors*, Practitioners’ Guide No. 1 (2007). See also Amnesty International, *Fair Trial Manual*, Second Edition, 2014.

<sup>157</sup> See also ACHR, art. 7(5); ECHR, art. 5(3); Arab Charter, art. 14(5); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988, principles 4 and 11(1); and AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle M(3).

<sup>158</sup> Judicial hearings shall assess the lawfulness of the detention in the first place. See e.g. *Judgment of 30 October 2008*, IACtHR, *Bayarri v. Argentina*, Series C No. 187, para. 67; and *Moulin v. France*, ECtHR, Application No. 37104/06, Judgment of 23 November 2010, paras. 47-51. The ECtHR has also clarified that both the legality of detention and the question of release or remand pending trial must be considered promptly. It stated that it is “highly desirable” for these issues to be considered in the same hearing by a judicial officer who has the competence to rule on both issues. However, it found no violation of the European Convention where the two issues were considered in separate hearings by different courts, as both hearings took place within the required time frame. See *McKay v. United Kingdom*, ECtHR (Grand Chamber), Application No. 543/03, Judgment of 3 October 2006, para. 47. See also Amnesty International, *Fair Trial Manual*, Second Edition (2014), pp. 57-58.

<sup>159</sup> See Inter-American Commission on Human Rights, Report on the situation of human rights in Mexico, OAS document OEA/Ser.L/V/11.100, Doc 7 rev. 1, paras. 372 and 381; and *Medvedyev and others v. France*, ECtHR, Application No. 3394/03, Judgment of 10 July 2008, para. 61.

<sup>160</sup> See, for example, *Kulomin v. Hungary*, HRC Communication No. 521/1992, Views of 22 March 1996, para. 11.3; *Reshetnikov v. Russian Federation*, HRC Communication No. 1278/2004, Views of 23 March 2009, para. 8.2; *Zheludkova v. Ukraine*, HRC Communication No. 726/1996, 29 October 2002, para. 8.3; HRC Concluding Observations: Tajikistan, UN Doc. CCPR/CO/84/TJK (2005), para. 12; WGAD, China, UN Doc. E/CN.4/2005/6/Add.4 (2004), paras. 32(c), 78(a). See also *Judgment of 24 June 2005*, IACtHR, *Acosta-Calderón v. Ecuador*, Series C No. 129, paras. 79-81; *Judgment of 21 November 2007*, IACtHR Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Series C No. 170, paras. 84-86; *Brincat v. Italy*, ECtHR, Application No. 13867/88, Judgment of 26 November 1992, paras. 20-22; *Assenov and others v. Bulgaria*, ECtHR, Application No. 24760/94,

arrest or detention and the existence of reasonable suspicion against the individual in a criminal case, and must be empowered to order their release if the arrest or detention is unlawful.<sup>161</sup>

International and regional authorities have also clarified that no person may be detained for longer than 48 hours before being brought before a judicial authority. Delays longer than 48 hours from arrest or detention should remain absolutely exceptional and be justified under the specific circumstances.<sup>162</sup> Challenges affecting the organization of the criminal justice system cannot excuse noncompliance with the promptness requirement.<sup>163</sup>

### *b) The right to be promptly informed of the charges*

Under article 9(2) of the ICCPR, “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”<sup>164</sup> This provision imposes two requirements on authorities: first, to inform an individual of the reasons of the arrest; second, to inform her or him of any charges. The information on the arrest must be specific, including both the underlying legal and factual bases for the arrest, and be communicated in a language the person understands.<sup>165</sup> The existence of any charges must be communicated promptly, although not necessarily at the time of arrest. In its General Comment on article 9 of the ICCPR, the HRC stated:

The requirement to give notice of charges under paragraph 2 serves to facilitate the determination of whether the provisional detention is appropriate or not, and therefore paragraph 2 does not require that the arrested person is given as much detail regarding the charges as would be needed later to prepare for trial [under article 14(3)(a)].<sup>166</sup>

Nevertheless, the requirement to inform a person of the reasons for their arrest and of the charges against her or him should serve the purposes of, among other things, allowing such individual to challenge the arrest or detention and to prepare their defence (both discussed below). In *Kurbanov v. Tajikistan*, for example, the HRC found that a “delay in presenting the charges to the detained author and in securing him legal assistance affected the possibilities of [the accused] to defend himself,” and therefore constituted a violation of the right to be informed of the charges. The accused was informed he was a murder suspect on 29 April 2001 but was only charged with murder on 30

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Judgment of 28 October 1998, paras. 146-150; *Nikolova v. Bulgaria*, ECtHR Grand Chamber, Application No. 31195/96, Judgment of 25 March 1999, paras. 49-53; *De Jong, Baljet and van den Brink v. Netherlands*, ECtHR, Application Nos. 8805/79, 8806/79, 9242/81, Judgment of 22 May 1984, para. 49; *Hood v. United Kingdom*, ECtHR, Application No. 27267/95, Judgment of 18 February 1999, paras. 57-58; *Huber v. Switzerland*, ECtHR, Application No. 12794/87, 23 October 1990, paras. 42-43; *H.B. v. Switzerland*, ECtHR, Application No. 26899/95, 5 April 2001, paras. 62-64.

<sup>161</sup> See *Schiesser v. Switzerland*, ECtHR, Application No. 7710/76, Judgment of 4 December 1979, paras. 25-38; *Assenov and Others v. Bulgaria*, ECtHR, Application No. 24760/94, Judgment of 28 October 1998, paras. 146-150; *McKay v. United Kingdom*, ECtHR (Grand Chamber), Application No. 543/03, Judgment of 3 October 2006, para. 40; and *Medvedyev v. France*, ECtHR (Grand Chamber), Application No. 3394/03, Judgment of 29 March 2010, paras. 124-125.

<sup>162</sup> HRC, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 33. See also HRC Concluding Observations: El Salvador, UN Doc. CCPR/C/SLV/CO/6 (2010) para. 14; Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, UN Doc. E/CN.4/2003/68 (2002) para. 26(g) and UN Doc. A/65/273 (2010) para. 75; CAT Concluding Observations: Venezuela, UN Doc. CAT/C/CR/29/2 (2002) para. 6(f); and *Kandzhov v. Bulgaria*, ECtHR, Application No. 68294/01, Judgment of 6 November 2008, paras. 66-67.

<sup>163</sup> See *Koster v Netherlands*, ECtHR, Application No. 12843/87, Judgment of 28 November 1991, paras. 24 and 25.

<sup>164</sup> See also ACHR, art. 7(4); ECHR, art. 5(2); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988, principle 10; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle M(2)(a).

<sup>165</sup> *Drescher and Caldas v. Uruguay*, HRC Communication No. 43/1979, Views of 21 July 1983, para. 13.2; HRC, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 24-28.

<sup>166</sup> HRC, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 29-30.

July 2001, after being arrested on 5 May 2001 on other charges. He was only afforded access to a lawyer on 23 July 2001.<sup>167</sup>

*c) The right to legal counsel and to confidential communications*

Any arrested person has the right to the assistance of a lawyer of their own choice or an assigned lawyer during pre-trial proceedings, including during detention, questioning and preliminary investigations. Although the right to counsel upon arrest and during pre-trial proceedings is not explicitly required under the ICCPR, the ACHPR and Arab Charter, the bodies monitoring their implementation have clarified that access to counsel from the moment of arrest is required to ensure the accused's right to a fair trial.<sup>168</sup>

Access to legal counsel should be available from the beginning of detention or upon arrest.<sup>169</sup> Only exceptional circumstances, duly prescribed by law, may justify a delay in the exercise of this right. Such a delay must be indispensable in the specific circumstances to maintain security and good order and be authorized by a judicial or other authority,<sup>170</sup> but should not exceed 48 hours.<sup>171</sup>

The burden is on the State, as represented by justice sector actors, and not on the accused, to ensure adequate and effective legal counsel for those charged with criminal offences.<sup>172</sup> If the accused does not have the means to appoint counsel, they have the right to have a lawyer assigned to them free of charge whenever the interests of justice require.<sup>173</sup>

The right to legal counsel entails the right to have adequate time to consult their lawyer in confidence and to have the lawyer present during questioning.<sup>174</sup> To that end, police stations and places of detention, including in rural areas, must provide adequate facilities for arrested and detained persons to meet and communicate privately with their lawyers.<sup>175</sup> Similarly, lawyers' case files should be

<sup>167</sup> *Kurbanov v. Tajikistan*, HRC Communication No. 1096/2002, Views of 6 November 2003, para. 7.3.

<sup>168</sup> See, for example, HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997), para. 27; HRC Concluding Observations: Netherlands, UN Doc. CCPR/C/NLD/CO/4, 25 August 2009, para. 11; HRC, Concluding Observations: United Kingdom, UN Doc. CCPR/C/GBR/CO/6, 30 July 2008, para. 19; *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, AComHPR Communication No. 250/02, 20 November 2003, para. 55. See also Amnesty International, *Fair Trial Manual*, Second Edition (2014) p. 43. See also *Judgment of 17 November 2009*, IACtHR, *Barreto Leiva v. Venezuela*, Series C No. 206, para. 62; *Saldaz v. Turkey*, ECtHR, Application No. 36391/02, Judgment of 27 November 2008, paras. 54-55; Amnesty International, *Fair Trial Manual*, Second Edition (2014) p. 43.

<sup>169</sup> HRC, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35, 16 December 2014, paras. 35, 46. See also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988, principle 17; and *Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990 ("Basic Principles on the Role of Lawyers"), principle 1.

<sup>170</sup> *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 18(3).

<sup>171</sup> *Basic Principles on the Role of Lawyers*, principle 7; HRC, Concluding Observations: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 13. See also *Brannigan and McBride v. United Kingdom*, ECtHR, Applications Nos. 14553/89 and 14554/89, Judgment of 25 May 1993, para. 64.

<sup>172</sup> *Basic Principles on the Role of Lawyers*, principle 3.

<sup>173</sup> ICCPR, art. 14(3)(d); Arab Charter, art. 16(4).

<sup>174</sup> *Basic Principles on the Role of Lawyers*, principles 8 and 22; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 18(4); United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc. A/RES/70/175, 17 December 2015, rule 61; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, principles M(2)(f) and N(3)(e)(i-ii); HRC, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 32-34. See also *Gridin v. Russian Federation*, HRC Communication No. 770, Views of 20 July 2000, para. 8.5; *Khomidova v. Tajikistan*, HRC Communication No. 1117/2002, Views of 29 July 2004, para. 6.4; *Siragev v. Uzbekistan*, HRC Communication No. 907/2000, 1 November 2005, para. 6.3; ACHPR, art. 8(2)(d); ACHR, art. 16(3); ICC Statute, art. 67(1)(b).

<sup>175</sup> See *Modarca v. Moldova*, ECtHR, Application No. 14437/05, Judgment of 10 May 2007, paras. 84-99. See also CAT Concluding Observations: Latvia, UN Doc. CAT/C/LVA/CO/2 (2008) para. 7.

protected from seizure and inspection, and phone calls from interception.<sup>176</sup> Detainees should also have the right to keep documents related to their case in their possession.<sup>177</sup>

d) *The right to adequate time and facilities to prepare a defence*

Article 14(3)(b) of the ICCPR and article 16(2) of the Arab Charter require that persons accused of an offence have adequate time and facilities to prepare their defence, including during the investigative phase.<sup>178</sup> The right to adequate time is based on the right to equality before the law and courts,<sup>179</sup> which entails *inter alia* the right to equal treatment of all parties before the court.

“Adequate time” means that a lawyer must have sufficient time to prepare the accused’s defence; the adequacy of such time will vary in light of the concrete circumstances.<sup>180</sup> An accused has a right to have her or his case adjourned accordingly, particularly when she or he is charged with a serious criminal offence.<sup>181</sup>

The right to adequate time and facilities to prepare a defence requires the accused to be promptly informed of the nature and cause of the charges against them, including detailed information about the law under which they are charged and the alleged material facts which form the basis of the accusation against them. This must be done through an indictment or in some other written form, which must be detailed enough to prepare a defence.<sup>182</sup> Any amendment of the indictment or other written document, if not done promptly, may undermine both the accused’s right to be informed promptly of the charges against them (see above) and the right to adequate time and facilities to prepare a defence.

In *Pélissier and Sassi v. France*, the ECtHR held that the conviction of the accused on appeal for “aiding and abetting” criminal bankruptcy after they had been acquitted of the actual commission of criminal bankruptcy violated the “applicants’ right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence.”<sup>183</sup> In reaching this conclusion, the Court stated that:

[The] Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to

<sup>176</sup> Report of the Special Rapporteur on the Independence of Judges of Lawyers, UN Doc. A/64/181, 28 July 2009, para. 110.

<sup>177</sup> See *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, UN Doc. A/RES/67/187, 20 December 2012 (“Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”), principle 7, para. 28.

<sup>178</sup> See also ACHR, art. 8(2)(c); ECHR, art. 6(3)(b); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18(2); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(3).

<sup>179</sup> UDHR, art. 10; ICCPR, arts. 14(1), 26; CEDAW, arts. 2(c), 15(1); International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2 and 5(a); Convention on the Rights of Persons with Disabilities, arts. 12–13; Arab Charter on Human Rights, art. 12; ACHR, art. 8(2); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(2)(a). See also ICC Statute, art. 67(1); ICTR Statute, art. 20(1); ICTY Statute, art. 21(1).

<sup>180</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(3)(c): “Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant’s access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.”

<sup>181</sup> HRC General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial), UN Doc. CCPR/C/GC/32, 23 August 2007, para. 32.

<sup>182</sup> HRC, General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial), UN Doc. CCPR/C/GC/32, 23 August 2007, para. 31.

<sup>183</sup> *Pélissier and Sassi v. France*, ECtHR, Application no. 25444/94, Judgment of 25 March 1999, para. 63.



prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts.<sup>184</sup>

This right further requires that the accused and the lawyer have timely access to the relevant information on which the prosecution intends to rely (i.e. disclosure), and the accused has "the right to [retain] materials necessary to the preparation of a defence,"<sup>185</sup> including copies of the case file. As the HRC noted:

"Adequate facilities" must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of [the prohibition on torture and other cruel, inhuman or degrading treatment or punishment under] article 7 of the [ICCPR], information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim.<sup>186</sup>

#### *e) The right to be tried without undue delay*

Pursuant to article 14(3)(c) of the ICCPR, an accused has the right to be tried without undue delay, or within a reasonable time.<sup>187</sup> The right is designed to avoid keeping people in a state of uncertainty about their fate and, if in detention during trial, to ensure that such deprivation of liberty does not last longer than necessary.<sup>188</sup> The right encompasses the pre-trial, trial, sentencing and the appeals process, and applies from the moment of arrest or notification of charges until all possible review

<sup>184</sup> *Pélissier and Sassi v. France*, ECtHR, Application no. 25444/94, Judgment of 25 March 1999, para. 62. The ICTY, which permitted amendment of the indictment in certain cases, noted that "in criminal trials where the evidence turns out differently than expected," the indictment may be required "to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment." ICTY, *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-A, Appeals Chamber Judgment, 23 October 2001, para. 92. At the pre-trial stage, the ICTY considered whether the accused would be provided with sufficient notice of the scope and nature of the charges to provide an adequate opportunity to prepare an effective defence, and whether it would adversely affect their right to trial without undue delay. See, e.g. ICTY, *Prosecutor v. Popović*, Case No. IT-05-88-PT & IT-05-88/1-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 21. The Trial Chamber in *Prosecutor v. Kupreskić et al.* opined that "no general principle of criminal law common to all major legal systems of the world may be found." ICTY, *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-T, Trial Chamber Judgment, 14 January 2000, para. 738. The ICTR found that, "prior to granting leave for amendment of an Indictment, the Trial Chamber must pay special attention to respect for the fundamental rights of the Accused ...[and] must ask itself whether the amendment would unjustly penalize the Accused in the conduct of his defence, bearing in mind that the more belatedly the amendment is effected, the more it is likely to penalize the Accused." ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Appeals Chamber Judgment, 16 November 2001, para. 343.

<sup>185</sup> Basic Principles on the Role of Lawyers, principle 21; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(3)(d), (e)(iii-vii); Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 7, paras. 27-28.

<sup>186</sup> HRC, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 33.

<sup>187</sup> See also ACHPR, *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*, principle N(5).

<sup>188</sup> HRC, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 35.



and appeal mechanisms have been exhausted and final judgment is pronounced.<sup>189</sup> In cases in which the court has refused to grant a defendant bail, the latter must be tried as quickly as possible.<sup>190</sup>

Determining whether there has been undue delay in the proceedings should be assessed in the light of the specific circumstances of each case, in particular:

- The complexity of the case;
- The conduct of the accused and the parties; and
- The manner in which the administrative and judicial authorities have dealt with the matter.<sup>191</sup>

Various factors related to the complexity of the case may be considered in determining whether there has been undue delay in the proceedings: the nature and seriousness of the alleged offence(s); the number of charges; the nature and type of the investigation required; the number of people allegedly involved in the crime; the volume of evidence; the number of witnesses; and the complexity of the facts and the law.<sup>192</sup> Cases either involving several defendants, multiple offences, or with international dimensions are accepted as being more complex than routine criminal cases, for which longer delays have been considered reasonable.<sup>193</sup> Even in complex cases, however, particular diligence in administering justice expeditiously is required if the accused is detained

<sup>189</sup> HRC, *General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, para. 10; HRC, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 35; *Mwamba v. Zambia*, HRC Communication No. 1520/2006, Views of 10 March 2010, para. 6.6; *Kennedy v. Trinidad and Tobago*, HRC Communication No. 845/1998, 26 March 2002, para. 7.5; ACHPR, *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*, principle N(5)(b). See also *Judgment of 12 November 1997*, IACtHR, *Suárez Rosero v. Ecuador*, Series C No. 35, paras. 70-72.

<sup>190</sup> HRC, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 35. 178. See also *Yagci and Sargin v. Turkey*, ECtHR, Application Nos. 16419/90 and 16426/90, Judgment of 8 June 1995, para. 66; *Dobbertin v. France*, ECtHR, Application No. 13089/87, Judgment of 25 February 1993, para. 43.

<sup>191</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 35; ACHPR, *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*, principle N(5). These elements have been extensively addressed in international jurisprudence. Regarding the HRC, see e.g., *Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria*, Communication No. 1085/2002, Views of 15 March 2006, para. 8.5. With regard to the ECtHR see e.g. *Kemmache v. France*, ECtHR, Application Nos. 12325/86 and 14992/89, Judgment of 27 November 1991) para. 60; *McFarlane v. Ireland*, ECtHR (Grand Chamber), Application No. 31333/06, Judgment of 10 September 2010, paras. 140-156; *Kudła v. Poland*, ECtHR (Grand Chamber), Application No. 30210/96, Judgment of 26 October 2000, paras. 124-131; *König v. Germany*, ECtHR, Application No. 6232/73, Judgment of 28 June 1978, para. 99; *Neumeister v. Austria*, ECtHR, Application No. 1936/63, Judgment of 27 June 1968, para. 21; *Pélissier and Sassi v. France*, ECtHR (Grand Chamber), Application No. 25444/94, Judgment of 25 March 1999, para. 67. See also Council of Europe, *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb)*, updated 30 April 2019. With regard to the IACtHR, see e.g. *Judgment of 20 January 1999*, IACtHR, *Suárez Rosero v. Ecuador*, IACtHR, Series C No. 44, para. 73; *Judgment of 21 June 2002*, IACtHR, *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, Series C No. 94, para. 143; *Judgment of 29 January 1997*, IACtHR, *Genie Lacayo v. Nicaragua*, Series C No. 30, para. 77. See also Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, 22 October 2002, para. 234.

<sup>192</sup> See ICTR, *Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR7327, Decision on Prosper Mugiraneza's Interlocutory Appeal From Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, preambular para. 6(2).

<sup>193</sup> For example, after considering the complexity of the case, the IACtHR considered that a period of 50 months to complete proceedings violated the ACHR. See *Judgment of 12 November 1997*, IACtHR, *Suárez-Rosero v. Ecuador*, Series C No. 35, para. 73. In a case involving 723 accused and 607 criminal offences, the ECtHR held that it was reasonable that the trial lasted about eight and a half years. However, it held that subsequent periods of delay and inactivity, including three years before a court issued written reasons for its judgment, and appeals processes in two courts which lasted more than six years, were not reasonable. See *Mitap and Müftüoğlu v. Turkey*, ECtHR, Applications Nos. 15530/89 and 15531/89, Judgment of 25 March 1996, paras. 33-37; and *Coëme and others v. Belgium*, ECtHR, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 18 October 2000, paras. 137-141.

pending trial.<sup>194</sup> In the case of a murder suspect held for more than three and a half years before acquittal, the HRC found that the delay between indictment and trial could not be justified.<sup>195</sup>

In assessing the conduct of the accused, the ECtHR has taken into account the fact that the applicants resorted to actions likely to delay the proceedings, such as systematically challenging judges,<sup>196</sup> and waited to be informed that the transmission of the file to the public prosecutor was imminent before requesting a number of additional investigative measures.<sup>197</sup> However, delays attributable to the exercise of procedural rights in good faith must not be taken into account when evaluating whether proceedings were conducted within a reasonable time.<sup>198</sup> These include making use of the right to silence or not actively cooperating with the judicial authority.<sup>199</sup>

The authorities have a duty to expedite proceedings. If, for example, they fail to advance the proceedings due to neglect or allow the investigation and proceedings to stagnate, the time will be deemed unreasonable. Similarly, if the criminal justice system itself inhibits the speedy conclusion of trials, the right to trial within a reasonable time may be violated. States must organize and make available sufficient resources for their criminal justice system. The HRC has held that backlogs, economic or other conditions, judicial shortages and increased criminality were insufficient to justify undue delays in trials.<sup>200</sup> The ECtHR has held that: delays due to the temporary backlog of business are not unreasonable provided States take remedial action with the requisite promptness;<sup>201</sup> the State may be responsible for the non-attendance of the relevant participants (such as witnesses, co-accused, and representatives) where judicial or other authorities did not exercise available powers to compel their attendance;<sup>202</sup> but the State may be found not to have been responsible for substantial delays in the proceeding caused by an applicant's state of health.<sup>203</sup>

#### f) *The presumption of innocence*

As discussed in more detail in *Practical Guide No. 3 on Principles and best practices on the collection, admissibility and assessment of evidence*, the presumption of innocence is a fundamental principle of the right to a fair trial.<sup>204</sup> It imposes the burden of proving the charges on the prosecution,<sup>205</sup> and

<sup>194</sup> *Pishchalnikov v. Russia*, ECtHR, Application No. 7025/04, Judgment of 24 December 2009, para. 49.

<sup>195</sup> *Barroso v. Panama*, HRC Communication No. 473/1991, Views of 19 July 1995, para. 8.5.

<sup>196</sup> See e.g., *Eckle v. Germany*, ECtHR, Application no. 8130/78, 15 July 1982, para. 82; *Sociedade de Construções Martins & Vieira, Lda., and Others v. Portugal*, Applications Nos. 56637/10, 59856/10, 72525/10, 7646/11 and 12592/11, Judgment of 30 October 2014, para. 48; and *McFarlane v. Ireland*, ECtHR (Grand Chamber) Application No. 31333/06, Judgment of 10 September 2010, paras. 148-150.

<sup>197</sup> *I.A. v. France*, ECtHR, Application No. 1/1998/904/1116, Judgment of 23 September 1998, para. 121.

<sup>198</sup> See *Yagci and Sargin v. Turkey*, ECtHR, Applications Nos. 16419/90; 16426/90, Judgment of 8 June 1995, para. 66. See also *Taright et al v. Algeria*, HRC Communication No. 1085/2002, Views of 15 March 2006) paras. 8.4-8.5; *Engo v. Cameroon*, HRC Communication No. 1397/2005, Views of 22 July 2009, para. 7.9; and *Rouse v. Philippines*, HRC Communication No. 1089/2002, Views of 25 July 2005, para. 7.4.

<sup>199</sup> *Yagci and Sargin v. Turkey*, ECtHR, Application Nos. 16419/90 and 16426/90, Judgment of 8 June 1995, para. 66; *Dobbertin v. France*, ECtHR, Application No. 13089/87, Judgment of 25 February 1993, para. 43.

<sup>200</sup> *Lubuto v. Zambia*, HRC Communication No. 390/1990, Views of 31 October 1995 para. 7.3; *Sextus v. Trinidad and Tobago*, HRC Communication No. 818/1998, Views of 16 July 2001, para. 7.2. See also Order of 25 November 2005, IACtHR, *García-Asto and Ramírez-Rojas v. Peru*, paras. 162-172; *Caillot v. France*, ECtHR, Application No. 36932/97, Judgment of 4 June 1999, para. 27.

<sup>201</sup> See *Milasi v. Italy*, ECtHR, Application No. 10527/83, Judgment of 25 June 1987, para. 18; and *Baggetta v. Italy*, ECtHR, Application No. 10256/83, Judgment of 25 June 1987, para. 23.

<sup>202</sup> *Tychko v. Russia*, ECtHR, Application no. 56097/07, Judgment of 11 June 2015, para. 68.

<sup>203</sup> *Yaikov v. Russia*, ECtHR, Application no. 39317/05, Judgment of 18 June 2015, para. 76.

<sup>204</sup> See ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices on the collection, admissibility and assessment of evidence* – Practical Guide 3 (2020), part 4.a.i.

<sup>205</sup> HRC, *General Comment No. 13: Article 14, (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, para. 7; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted under General Assembly resolution 43/173 (1998), Principle 36(1); AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(e)(i). See also *Allenet de Ribemont v. France*, ECtHR, Application No. 15175/89 Judgment of 7 August 1996, para. 41; *Capeau v. Belgium*, ECtHR, Application No. 42914/98, Judgment of 13 January 2005, para. 25; *Navalnyy and Ofitserov v. Russia*, ECtHR, Application No. 46632/14, Judgment of 23 February 2016, para. 105; ICC Statute, Art. 66(2) and (3); ICTR Rules of Procedures,

requires them to provide the accused's guilt beyond reasonable doubt. The presumption is absolute and applies at all times until and unless proven guilty according to law after a fair trial.<sup>206</sup>

Persons undergoing trial, whether or not in detention, should be treated as innocent as long as their guilt has not been established by a court in accordance with the law. Ordinarily, defendants should not be shackled or caged during trial or presented to the court in any other way that gives the impression they may be dangerous criminals.<sup>207</sup> They should also not be compelled to appear in the courtroom in prison uniform but have the right to wear civilian clothes.<sup>208</sup>

Any trial must be based on the presumption of innocence. Judges must conduct trials without having formed an opinion on the guilt or innocence of the accused. The HRC has concluded that the presumption of innocence was violated in a case where the trial judge asked the prosecution a number of leading questions and refused to allow several defence witnesses to testify about the accused's alibi, and where senior officials made widely reported public statements portraying the accused as guilty.<sup>209</sup>

Public authorities and officials must respect the presumption of innocence. Accordingly, all public authorities have a duty to refrain from prejudging the outcome of a trial by refraining from making public statements affirming the guilt of the accused.<sup>210</sup> If a person is acquitted of a criminal offence by a court or tribunal, the public authorities, particularly prosecutors and the police, should refrain from implying that they may have been guilty.<sup>211</sup> Furthermore, the media should also avoid news coverage that undermines the presumption of innocence.<sup>212</sup>

## ii. The rights of the accused during trial

### a) *The right to trial by an independent, impartial, and competent court*

Article 14(1) of the ICCPR states that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at

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Rule 87(A); ICTY Rules of Procedures, Rule 87(A). Legal presumptions of fact or law are permissible in a criminal case only in narrow cases. For further discussion, see ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices on the collection, admissibility and assessment of evidence* – Practical Guide 3 (2020), part 4.a.i.

<sup>206</sup> UDHR, art. 11; ICCPR, art. 14(2); Convention on the Rights of the Child, art. 40(2)(b)(i); ACHPR, art. 7(1)(b); Arab Charter, art. 16; Body of Principles, art. 36(1); ICC Statute, art. 66. See also IACHR, 8(2); ECHR, art. 6(2).

<sup>207</sup> HRC, *General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, para. 30.

<sup>208</sup> See ICJ, *The Observation Manual for Criminal Proceedings*, Practitioner's Guide No. 5 (2009) p. 87.

<sup>209</sup> *Larrañaga v The Philippines*, HRC Communication No. 1421/2005, Views of 14 September 2006, para. 7.4.

<sup>210</sup> HRC, *General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, para. 30. See also AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(e)(ii). Public authorities and officials, including prosecutors, may inform the public about criminal investigations or charges but should not express a view as to the guilt of any defendant.

<sup>211</sup> AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(e)(ii). See also *Allen v. United Kingdom*, ECtHR (Grand Chamber), Application No. 25404/09, Judgment of 12 July 2013, para. 103.

<sup>212</sup> HRC, *General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, para. 30. See also *Gridin v. Russian Federation*, HRC Communication No. 770/1997, Views of 20 July 2000, paras. 3.5, 8.3; *Engo v. Cameroon*, HRC Communication No. 1397/2005, Views of 22 July 2009, para. 7.6; *Law Office of Ghazi Suleiman v. Sudan*, AComHPR Communication Nos. 222/98 and 229/99, 29 May 2003, paras. 54, 56; *Judgment of 25 November 2004*, IACtHR, *Lori Berenson-Mejía v. Peru*, Series C No. 119, paras. 158-161; *G.C.P. v. Romania*, ECtHR, Application No. 20899/03, Judgment of 20 December 2011, paras. 54-61 and 46; *Nestak v. Slovakia*, ECtHR, Application No. 65559/01, Judgment of 27 February 2007, paras. 88- 91; *Papon v. France (No 2)*, ECtHR, Application No. 54210/00, Decision of 15 November 2001, para. 6(d).

law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>213</sup> The right applies at both the investigation and appeal stage.

The right to be adjudicated by an independent, impartial and competent tribunal is an absolute right that is not subject to exception. It is a general principle of customary international law, binding on all states at all times, including during states of emergency and armed conflict.<sup>214</sup> Only a court of law may try to convict a person for a criminal offence<sup>215</sup> and any criminal conviction by a body not constituting a tribunal is prohibited under international law.<sup>216</sup>

The first requirement that a tribunal should be *established by law* – by the constitution or other legislation passed by the law-making authority, or by common law – is to ensure that trials are not conducted by special tribunals that do not use duly established procedures and that displace the jurisdiction belonging to ordinary courts, or by tribunals set up to decide a particular individual case.<sup>217</sup>

The second requirement, that persons must be adjudicated by a *competent* tribunal requires that it has the necessary jurisdictional authority over the subject matter and the person on trial, and the trial is conducted within any applicable time limit prescribed by law.<sup>218</sup> Only tribunals established by law may decide on issues relating to jurisdiction;<sup>219</sup> matters pertaining to jurisdiction should be decided in accordance with the law.<sup>220</sup>

The third requirement, that trials be conducted by an *independent* tribunal,<sup>221</sup> applies to both the judiciary as a whole (institutional independence) and individual judges (individual independence). Judicial independence must be enshrined in the Constitution or law of the country and respected by all governmental and other institutions.<sup>222</sup> Institutional independence is premised and reliant on the separation of powers between the legislative, executive and judicial branches.<sup>223</sup> Institutional independence must be coupled with individual independence to adequately safeguard fair trial

<sup>213</sup> See also Arab Charter on Human Rights, art. 13 (Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations).

<sup>214</sup> HRC, *General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, paras. 18 and 19. See also *Miguel González del Río v. Peru*, HRC Communication No. 263/1987, Views of 28 October 1992, para. 5.2. See also the Arab Charter on Human Rights, arts. 4(c) and 13(1).

<sup>215</sup> HRC, *General Comment No. 29, States of Emergency: Article 4*, CCPR/C/21/Rev.1/ Add.11, 31 August 2001, para. 16.

<sup>216</sup> HRC, *General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, para. 18. See also: Report No. 49/00 of 13 April 2000, IACoMHR, Case No. 11.182, Carlos Molero Coca et al. (Peru), para. 86.

<sup>217</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985), and endorsed by General Assembly resolutions 40/32 and 40/146 (1985) (“Basic Principles on the Independence of the Judiciary”), principle 5. See also Amnesty International, *Fair Trial Manual*, Second Edition (2014), p. 109.

<sup>218</sup> ACoMHRP, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(b).

<sup>219</sup> ACoMHRP, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(c).

<sup>220</sup> ACoMHRP, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(c).

<sup>221</sup> See also ACHPR, art. 26; ECHR, art. 6(1); and ACHR, art. 8(1).

<sup>222</sup> UN Basic Principles on the Independence of the Judiciary, principle 1; HRC, *General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, para. 19.

<sup>223</sup> Basic Principles on the Independence of the Judiciary, principle 1. See also Bangalore Principles of Judicial Conduct, November 26 2006, Principle 1; and ACoMHRP, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4); Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. E/CN.4/1995/39, 6 February 1995, para. 55; Report of Special Rapporteurs on the Situation of Human Rights in Nigeria, UN Doc. E/CN.4/1997/62/Add.1, 24 March 1997, para. 71 (judicial independence functions as a bulwark against abuses of power and is viewed as “a *sine qua non* for an independent and impartial judiciary to function effectively”).

rights.<sup>224</sup> Indeed, the State must ensure that judges and adjudicators are empowered to objectively decide on jurisdictional matters and the set of facts before them in accordance with the law, without fear of reprisal.<sup>225</sup>

The fourth requirement – an *impartial* tribunal – requires that judges not be biased, and that they do not engage in conduct or have relationships to parties in a case that would give rise to a perception that they are biased. Judges must not allow their judgement to be influenced by personal bias or prejudice, have pre-formed opinions about the particular case before them, or act in ways that improperly promote the interests of one of the parties to the detriment of the other. Judges must also appear to a reasonable observer to be impartial;<sup>226</sup> even if there is no evidence that they are actually biased, a reasonable perception that the judge is biased will give rise to a violation of the right to fair trial. Proceedings must be conducted in accordance with law and without restriction, improper influences, inducements, pressures and/or threats from any quarter for any reason.<sup>227</sup> The fairness of a trial may also be compromised by actual or perceived bias on the part of the prosecution or persons who conducted the investigation.

### b) *The right to a public hearing*

Article 14(1) of the ICCPR and article 13(2) of the Arab Charter require all criminal proceedings to be open to the public and all judgments to be published, subject only to specified exceptions.<sup>228</sup> Information such as the time and venue of oral hearings should be made accessible to the parties and the public,<sup>229</sup> and adequate facilities should be provided for members of the public to attend hearings and trials.<sup>230</sup>

A public hearing is not necessarily required for pre-trial decisions taken by prosecutors or other public authorities<sup>231</sup> or for all appellate proceedings.<sup>232</sup> Whether a public hearing is required depends upon a number of factors, including whether the appeal raises questions of law and/or fact and the manner

<sup>224</sup> See further ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioner's Guide No. 1 (2007), pp. 23-25.

<sup>225</sup> Basic Principles on the Independence of the Judiciary, principles 2, 17-20; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(4)(c) and (f); Bangalore Principles of Judicial Conduct, ECOSOC resolution 2006/23 (2006), Annex; UN Special Rapporteur on the independence of judges & lawyers, Report on Judicial Accountability, UN Doc A/HRC/26/32 (2014). CoM Recommendation (2010)12, para. 7; see also Explanatory Memorandum to the European Charter on the Statute for Judges, para. 1.2. UN bodies have repeatedly called on States to take all necessary measures to enable judges to carry out their roles and responsibilities without restriction. See UN Commission on Human Rights Resolution 2004/33, UN Doc. E/CN.4/RES/2004/33, 19 April 2004, operative para. 7; Report of the United Nations High Commissioner for Human Rights to the Commission on Human Rights, UN Doc. E/CN.4/2000/11, 9 March 2000, para. 189.

<sup>226</sup> HRC, *General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, 23 August 2007, para. 21. Members of the judiciary are entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, they shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Basic Principles on the Independence of the Judiciary, principle 8.

<sup>227</sup> Basic Principles on the Independence of the Judiciary, principle 2; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principles A(2)(h), (5)(a) and (5)(e).

<sup>228</sup> See also ACHR, art. 8(5); ECHR, art. 6(1); ICC Statute, arts. 64(7), 67(1) and 68(2); Arab Charter on Human Rights. See art. 4(2). See also HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 28. See also *Media Rights Agenda v. Nigeria*, AComHPR Communication No. 224/98, 6 December 2000 paras. 51-54; *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, AComHPR Communication No. 218/98, 7 May 2001, paras. 35-39.

<sup>229</sup> See *G. A. van Meurs v. The Netherlands*, HRC Communication No. 215/1986, Views of 13 July 1990, paras. 6.1; *Kulov v. Kyrgyzstan*, HRC Communication No. 1369/2005, Views of 26 July 2010, para. 8.6; and *Marinich v. Belarus*, HRC Communication No. 1502/2006, 16 July 2010, para. 10.5.

<sup>230</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 28. This could be achieved through the establishment of a permanent system for publicizing information about hearings.

<sup>231</sup> *Kavanagh v. Ireland*, HRC Communication No. 819/1998, Views of 4 April 2001, para. 10.4.

<sup>232</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 28; *R.M. v. Finland*, HRC Communication No. 301/1988, Views of 23 March 1989, para. 6.4.

in which the accused's interests are represented. Nevertheless, unless security reasons mandate otherwise, the parties' submissions and judicial orders and decisions should be made public.<sup>233</sup>

The right to a public trial may be restricted only in narrowly and strictly defined circumstances. These include: (i) when it is strictly necessary for reasons of "morals,"<sup>234</sup> public order<sup>235</sup> (which relates primarily to order within the courtroom)<sup>236</sup> or national security in a democratic society<sup>237</sup> that respects human rights and the rule of law; (ii) when the interest of the private lives of the parties so require,<sup>238</sup> particularly for the protection of children, witnesses and victims of sexual violence;<sup>239</sup> and (iii) when it is strictly necessary to protect the interests of justice.<sup>240</sup> Under the Arab Charter, the right is not subject to any derogation in times of public emergency under to article 4. Courts should give due consideration to whether closing trial proceedings on a partial basis is adequate,<sup>241</sup> or, where appropriate, employing measures to protect witnesses.<sup>242</sup> Even where the court deems it necessary to close trial proceedings, the judgment rendered, including the essential findings, evidence and legal reasoning must be pronounced in public,<sup>243</sup> except where the interests of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.<sup>244</sup> This could entail the redaction, rather than the wholesale confidentiality of the judgement.

### c) *The right to be tried in one's presence*

According to article 14(3)(d) of the ICCPR and article 16(3) of the Arab Charter, everyone has the right "to be tried in his presence" and "to defend himself in person or through legal assistance of his own choosing."<sup>245</sup> Justice sector actors must take all necessary steps to notify the accused and his or her defence counsel in sufficient time of the date and location of trial, request his or her presence and not wrongfully exclude him or her from participating.<sup>246</sup> The accused may voluntarily waive their right to be present, provided their waiver is "established in an unequivocal manner and preferably

<sup>233</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 29.

<sup>234</sup> See also ECHR, art. 6(1); *Z.P. v. Canada*, HRC Communication No. 341/1988, Views of 11 April 1991) para. 4.6; HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 29.

<sup>235</sup> Also see, ECHR, art. 6(1); and AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(f)(ii).

<sup>236</sup> See *Gridin v. Russian Federation*, HRC Communication No. 770, Views of 18 July 2000) para. 8.2; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, Engel, 2005, p. 325, para. 34.

<sup>237</sup> See ECHR, art. 6(1); and AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(f)(ii).

<sup>238</sup> See, ECHR, art. 6(1); and AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(f)(i).

<sup>239</sup> AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(g)-(i).

<sup>240</sup> See, ACHR, art. 8(5); Arab Charter on Human Rights, art. 13(2); ECHR, art. 6(1); and AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(f)(i). See also HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 29.

<sup>241</sup> Amnesty International, *Fair Trial Manual*, Second Edition (2014), p. 123.

<sup>242</sup> AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(g)-(i). As an exception to the principle of public proceedings, the ICC makes allowances for any part of trial proceedings to be conducted in private or for the presentation of evidence via electronic means, in order to protect the victims, witnesses or an accused. See ICC Statute, art. 68(2).

<sup>243</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 29.

<sup>244</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 29.

<sup>245</sup> See also ACHPR, art. 7; AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(c)(i); HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 23, 28.

<sup>246</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 36.



in writing,<sup>247</sup> and, according to the ECtHR, be accompanied by sufficient safeguards and commensurate with the public interest.<sup>248</sup> In such cases, the right to be represented by counsel persists.<sup>249</sup>

The right to be tried on one's presence can only be limited in exceptional circumstances where the accused repeatedly and improperly disrupts the proceedings such that it is impractical to continue. In such circumstances, the impact on the rights of the accused must be minimized through the use of video-link so they can observe the trial and provide instructions to counsel, and any restriction must be only imposed as long as necessary and in a proportional manner.<sup>250</sup> The ECtHR has found that a court should do everything it can to secure the accused's participation in the proceedings, including through the use of video-link.<sup>251</sup>

Under the ICCPR and ACHPR, persons may not be tried in absentia.<sup>252</sup> Such trials may exceptionally be permissible, "when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present."<sup>253</sup> Before a trial in absentia can take place, the court must verify whether the accused has been duly notified of the case, time and place of proceedings.<sup>254</sup> While there are limits to the efforts that can be reasonably expected of the competent authority to establish contact with the accused and notify them of the charges against them and details of the hearing, sufficient efforts must have been made to conclude that the accused's rights have been respected.<sup>255</sup> The authorities must provide the court with evidence of the efforts made - rather than assuming the accused had knowledge of the proceedings.<sup>256</sup>

When a trial in absentia is permitted, the court must be extra vigilant in ensuring the defence rights of the accused are respected.<sup>257</sup> This encompasses in particular the right to counsel, even if the accused has chosen not to attend proceedings and have counsel conduct their defence.<sup>258</sup> If the person has chosen a lawyer that lawyer must be able to participate fully in the trial, or if the person has not chosen a lawyer the court may need to appoint an independent lawyer to represent the person's interests.<sup>259</sup>

<sup>247</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(6)(c)(iii).

<sup>248</sup> *Colozza v. Italy*, ECtHR, Application No. 9024/80, Judgment of 12 February 1985, para. 28; *Poitrimol v. France*, ECtHR, Application No. 14032/88, Judgment of 23 November 1993, para. 31, *Hermi v. Italy*, ECtHR (Grand Chamber), Application No. 18114/02, Judgment of 18 October 2006, para. 73.

<sup>249</sup> See part 3.a.ii.d below.

<sup>250</sup> See, e.g., ICC Statute, art. 63(2).

<sup>251</sup> *Bivolaru v. Romania*, ECtHR, Application No. 28796/04, Judgment of 28 February 2017, paras. 138-139, 144-145.

<sup>252</sup> See also AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(6)(c)(ii).

<sup>253</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 36. See also *Salikh v. Uzbekistan*, HRC Communication No. 1382/2005, Views of 30 March 2009, para. 9.4; *Maleki v. Italy*, HRC Communication No. 699/1996, Views of 27 July 1999, para. 9.4.

<sup>254</sup> *Maleki v. Italy*, HRC, Communication No. 699/1996, Views of 27 July 1999, para. 9.4.

<sup>255</sup> *Salikh v. Uzbekistan*, HRC Communication No. 1382/2005, Views of 30 March 2009, para. 9.5.

<sup>256</sup> *Maleki v. Italy*, HRC Communication No. 699/1996, Views of 27 July 1999.

<sup>257</sup> HRC, Concluding Observations: Tajikistan, UN Doc. CCPR/CO/84/TJK (2004) para. 19.

<sup>258</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(6)(f)(iv).

<sup>259</sup> See also HRC *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 37; *Salikh v. Uzbekistan*, HRC Communication No. 1382/2005, Views of 30 March 2009, para. 9.5; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(6)(f)(iv).



If a person convicted *in absentia* is eventually apprehended by the authorities, the accused has the right to a retrial in person, particularly if the person was not in fact duly notified of the trial or the failure of the person to appear was in fact for reasons beyond their control.<sup>260</sup>

d) *The right to defend oneself in person or through legal counsel*

Article 14(3)(d) of the ICCPR, article 16(3) and (4) of the Arab Charter and article 7 of the ACHPR provide that an accused person has the right to the assistance of a lawyer of their own choice, or to be assigned a competent and independent lawyer if they are unable to afford a lawyer of their own choosing, during pre-trial and trial proceedings.<sup>261</sup> The right to be represented by counsel continues into the trial phase, in which all persons charged with a criminal offence have the right to defend themselves in person or through legal counsel of their choosing.<sup>262</sup> The rights to defend oneself in person and through legal counsel are not mutually exclusive. Accused persons retain the right to instruct legal counsel on the conduct of their case, within the limits of professional responsibility, and testify on their own behalf.<sup>263</sup> Furthermore, the right to represent oneself is not absolute.<sup>264</sup> The HRC has stated that where the interests of justice so require, legal counsel may be assigned to the accused against his or her wishes.<sup>265</sup> The right to be represented by counsel applies even if the accused chooses not to appear at the proceedings or is absent for other reasons (i.e. in case of trial in absentia).<sup>266</sup>

<sup>260</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(6)(c)(ii); HRC, *Maleki v. Italy*, HRC Communication No. 699/1996, Views of 27 July 1999, para. 9.5; HRC, *Concluding Observations: Croatia*, UN Doc. CCPR/C/HRV/CO/2 (2009), para. 11. See also *Colozza v. Italy*, ECtHR, Application No. 9024/80, Judgment of 12 February 1985, para. 28.

<sup>261</sup> The ICCPR, Arab Charter and the ACHPR envisage the right to legal counsel during the trial phase, yet not at the pre-trial stage; see ICCPR, art. 14(3)(d); ACHPR, art. 7. However, human rights bodies have considered that such provisions apply to the pre-trial phase as well; see HRC, *Concluding Observations: Netherlands*, UN Doc. CCPR/C/NLD/CO/4, 25 August 2009, para. 11; *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, AComHPR Communication No. 250/02, 20 November 2003, para. 55. See also Amnesty International, *Fair Trial Manual*, Second Edition (2014), p. 43; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle H(b)(i); Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 3, para. 20; and HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 37 and 38.

<sup>262</sup> ICCPR, art. 14(3)(d); ACHPR, art. 7(1)(c); ACHR, art. 8(2)(d); Arab Charter, art. 16(3); ECHR, art. 6(3)(c); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(2)(a); and ICC Statute, art. 67(1)(d).

<sup>263</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 37.

<sup>264</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 37.

<sup>265</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 37 and 38. The court may deem it necessary to assign legal counsel to the accused to uphold the interests of justice, including where: (i) the accused has substantially and persistently obstructed the proper conduct of the trial; (ii) the accused faces serious charges and is unable to act in his/her own interests; (iii) the accused faces the possibility of the death penalty if convicted, in which case it is axiomatic that the accused be effectively assisted by a lawyer at all stages of the proceedings; and (iv) it is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. See also *Correia de Matos v. Portugal*, HRC Communication No. 1123/2002, Views of 28 March 2006, paras. 7.4-7.5; ICTY, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006. See also *Croissant v. Germany*, ECtHR, Application No. 13611/88, Judgment of 25 September 1992. Any determination as to whether the interests of justice require the appointment of a lawyer should be premised on the gravity of the offence, the legal issues at stake, the complexity of the issues or the procedure, and the potential sentence (the latter being particularly important when the accused may be sentenced to death). See HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 38; and AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(2)(a).

<sup>266</sup> See part 3.a.ii.d above. See also *Poitrimol v. France*, ECtHR, Application No. 14032/88, Judgment of 23 November 1993, paras. 34-39.

The burden is on justice sector actors, and not on the accused, to ensure adequate and effective appointed legal counsel for those charged with criminal offences.<sup>267</sup> If the accused does not have the means to appoint counsel, they have the right to have a lawyer assigned to them free of charge whenever the interests of justice require,<sup>268</sup> with competence and experience commensurate with the nature of the offence charged.<sup>269</sup>

Counsel for an accused should be able to advise their client “without restrictions, influence, pressure or undue interference from any quarter.”<sup>270</sup> It is incumbent on States to protect lawyers threatened, as a result of carrying out their duties.<sup>271</sup> States should also ensure that lawyers are not identified with their clients or their clients’ causes as a result of defending them,<sup>272</sup> as identifying lawyers with the causes of their clients may amount to intimidation and harassment of the lawyers involved.<sup>273</sup>

### e) *The right to call and examine witnesses*

Both a right of defence and a fundamental component of the equality of arms<sup>274</sup> is equal opportunity to present the case during trial, and to challenge and contest the arguments and evidence presented by the opposing party.<sup>275</sup> Article 14(3)(e) of the ICCPR provides that accused persons must be able “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” Article 16(5) of the Arab Charter also guarantees this right.<sup>276</sup>

This right ensures that the accused has an opportunity to effectively challenge any evidence that is produced by the prosecution against him or her, and that the accused is guaranteed “the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”<sup>277</sup> This guarantee does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the

<sup>267</sup> See Basic Principles on the Role of Lawyers, principle 3; Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principles 2(15) and 10 and guidelines 11-13 and 15-16.

<sup>268</sup> ICCPR, art. 14(3)(d); Arab Charter, art. 16(4). See also ECHR, art. 6(3)(c); ACHR, art. 8(2)(e).

<sup>269</sup> Basic Principles on the Role of Lawyers, principle 6; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section H(a); ICC Statute, art. 67(1)(d); HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 38.

<sup>270</sup> Basic Principles on the Role of Lawyers, principle 16; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle H(e)(iii) and I(b); HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 34. Counsel for an accused person must uphold recognized professional ethics at all times. See ICJ, *The Observation Manual for Criminal Proceedings*, Practitioner’s Guide No. 5 (2009), pp. 90-92.

<sup>271</sup> Basic Principles on the Role of Lawyers, principle 17; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle I(f).

<sup>272</sup> Basic Principles on the Role of Lawyers, principle 18; AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle I(g).

<sup>273</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, E/CN.4/1998/39, 12 February 1998, para. 179.

<sup>274</sup> ACHR, art. 8(2)(f); Arab Charter on Human Rights, art. 16(5); ECHR, art. 6(3)(d); AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N(6)(f); and ICC Statute, art. 67(1)(e).

<sup>275</sup> *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, AComHPR Communication No. 231/99, 6 November 2000, para. 29. According to the HRC, any distinction must be based on law and justified on objective and reasonable grounds without entailing actual disadvantage or unfairness to the defendant. See HRC, *General Comment No. 32 on Article 14: Rights to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (2007), para. 13. See also *Dudko v. Australia*, HRC Communication No. 1347/2005, Views of 23 July 2007, para 7.4.

<sup>276</sup> See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. N(6)(f).

<sup>277</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 39. See, e.g. *Jansen-Gielen v. The Netherlands*, HRC Communication No. 846/1999, Views of 3 April 2001, para 8.2; *Äärelä and Näkkäläjärvi v. Finland*, HRC Communication No. 779/1997, Views of 24 October 2001, para. 7.4.

proceedings.<sup>278</sup> The prosecution should provide the defence with a list of names of witnesses that it intends to call at trial within a reasonable time in advance of the trial, in order that defence counsel has sufficient time to prepare his/her case.<sup>279</sup>

The accused must have the right to be present when witnesses are giving testimony. This right may only be restricted in exceptional circumstances, “such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive to the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified.”<sup>280</sup> If national law does not permit the accused to examine witnesses during pre-trial investigations, the defendant must have the opportunity, personally or through defence counsel, to examine or cross-examine witnesses at trial.<sup>281</sup>

Some limitations of the right to cross-examine witnesses may be justified in certain cases involving victims of sexual violence or minors.<sup>282</sup> Where necessary and proportionate, measures enabling such victims to be heard without having to be physically present in the courtroom, or at least without having to see the accused, may for instance be justified.<sup>283</sup> In its examination of cases involving child victims of sexual abuse, the ECtHR found that the principle of fairness entails affording the accused the opportunity to observe the interview of a child witness, via, for example, video-link, video-recording or from behind a one-way mirror. The accused retains his/her right to have questions put to the child either during the first interview or later.<sup>284</sup>

The provision of testimony by anonymous victims and witnesses during trial is a breach of due process.<sup>285</sup> Such testimony is admissible only in highly exceptional cases, for example if it is established on the evidence to be essential for the protection of the witness’s life and physical safety, and only during the investigation phase of proceedings and under strict judicial supervision. In all cases, the identity of anonymous victims and witnesses must be disclosed to the defendant sufficiently in advance of the commencement of the trial so that a fair trial and the effectiveness of the right of defence can be ensured and the accused can challenge the veracity of the testimonies.<sup>286</sup>

<sup>278</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 39. See also IACoMHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, 22 October 2002, para. 238; *Judgment of 30 May 1999*, IACtHR, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 153 and 154; and *Barberà, Messegué and Jabardo v. Spain*, ECtHR, Application No. 10590/83, Judgment of 6 December 1988.

<sup>279</sup> ACoMHR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(f)(i); ICJ, *The Observation Manual for Criminal Proceedings*, Practitioner’s Guide No. 5 (2009) p. 97. See also ICC Rules of Procedure and Evidence, Rule 76.

<sup>280</sup> ACoMHR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle N(6)(f)(iii).

<sup>281</sup> ICJ, *The Observation Manual for Criminal Proceedings*, Practitioner’s Guide No. 5 (2009) p. 98.

<sup>282</sup> ACoMHR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, principle A(3)(f)(i) and N(6)(f)(iii); Optional Protocol to the Convention on the Rights of the Child on the sale of children, art. 8(1)(e); Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 36(2); Council of Europe Convention on Trafficking in Human Beings, arts. 11 and 30; Council of Europe Convention on Violence against Women, art. 56; Guidelines on Child Witnesses and Victims, Guidelines X-XII; ICC Statute 68(2).

<sup>283</sup> Council of Europe Convention on Sexual Abuse against Children, arts. 35-36(2)(b); Council of Europe Convention on Violence against Women, art. 56; Guidelines on Child Victims and Witnesses, Guideline XI(31); African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Section O(p); ICC Statute, art. 68(2); UN Security Council, *Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary General*, UN Doc. S/2004/616, para. 25.

<sup>284</sup> *A.S. v. Finland*, ECtHR, Application No. 40156/07, Judgment of 28 September 2010, para. 56; *Accardi and Others v. Italy*, ECtHR, Application No. 30598/02, Inadmissibility Decision of 20 January 2005; and *W.S. v. Poland*, ECtHR, Application No. 21508/02, Judgment of 19 June 2007, paras. 61-64.

<sup>285</sup> *Judgment of 25 November 2005*, IACtHR, *García Asto and Ramírez Rojas v. Peru*, Series C No. 137, paras. 152-154; *Judgment of 25 November 2004*, IACtHR, *Lori Berenson Mejía v. Peru*, Series C No. 119, paras. 183, 184 and 192; and *Judgment of 30 May 1999*, IACtHR, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 153, 154 and 172.

<sup>286</sup> HRC, *Concluding Observations: Canada*, CCPR/C/CAN/ CO/5, 20 April 2006, para. 13; HRC, *Concluding Observations: United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18; IACoMHR,

The right to compel the attendance of witnesses may mean that they are detained to ensure their presence at trial and to testify.<sup>287</sup> This is an exceptional measure, which should be implemented as a result of a court decision only in special circumstances and where strictly regulated by law. Such measures cannot be used against witnesses who have the right to keep their sources of information confidential, such as journalists, to coerce them into disclosing such protected information.

Where the rights of the accused cannot be secured during the provision of testimony, courts must consider whether to exclude the evidence or, where it is not excluded, treat it with particular care.<sup>288</sup>

*f) The right not to be compelled to incriminate oneself and to remain silent*

The accused has the right not to be compelled to incriminate oneself during the investigation and at trial. The right is an inherent requirement of the presumption of innocence, and reinforces the prohibition on torture and other cruel, inhuman and degrading treatment or punishment.<sup>289</sup> The right prohibits any form of direct and indirect coercion.

The right to remain silent is also implicit in the presumption of innocence, and the right not to be compelled to testify against oneself or confess guilt. Although the right to remain silent is not expressly recognized in the ICCPR, ACHPR or Arab Charter, the HRC considers it to be fundamental to the right to a fair trial.<sup>290</sup> The right is also recognized in the Principles on Fair Trial in Africa.<sup>291</sup>

The Principles on Fair Trial also prohibit drawing adverse inferences from an accused's exercise of the right to remain silent.<sup>292</sup> The HRC has also raised concern about laws permitting adverse inferences to be drawn from an accused's silence.<sup>293</sup> The ECtHR has taken a different approach, finding that adverse inferences would violate the presumption of innocence and right not to incriminate oneself if the conviction was based solely or mainly on their silence. It held that whether adverse inferences may be drawn must be determined in light of all the circumstances, including: the individual's access to their lawyer and the assistance of their lawyer during questioning; warnings

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Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, 22 October 2002, para. 262, Second Report on the Situation of Human Rights in Peru, doc. cit., paras. 103, 104 and 110, and Third Report on the Situation of Human Rights in Colombia, doc. cit., paras. 121, 122, 123 and 124; and *Kostovski v. The Netherlands*, ECtHR, Application No. 11454/85, Judgment of 20 November 1989, paras. 43-45.

<sup>287</sup> ICTY, *The Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, paras. 20-21, 47-48.

<sup>288</sup> *S.N. v. Sweden*, ECtHR, Application No. 34209/96, Judgment of 2 July 2002, paras. 47-53.

<sup>289</sup> For a discussion of prohibition on the use of evidence obtained through torture and other ill-treatment, other forms of coercion or unlawful means, see ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices on the collection, admissibility and assessment of evidence* – Practical Guide 3 (2020), part 3.a.i.

<sup>290</sup> HRC Concluding Observations: France, UN Doc. CCPR/C/FRA/CO/4 (2008) para. 14; Algeria, UN Doc. CCPR/C/DZA/CO/3 (2007), para. 18. See also *John Murray v. United Kingdom*, ECtHR (Grand Chamber), Application No. 18731/91, Judgment of 8 February 1996, para. 45; *Saunders v. United Kingdom*, ECtHR, Application No. 19187/91, Judgment of 17 December 1996, paras. 75-76; *Funke v. France*, ECtHR, Application No. 10828/84, Judgment of 25 February 1993, para. 44; *Heaney and McGuinness v. Ireland*, ECtHR, Application No. 34720/97, Judgment of 21 December 2000, paras. 55-59, *J. B. v. Switzerland*, ECtHR, Application No. 31827/96, Judgment of 3 May 2001, paras. 65-71; ICC Statute, art. 55(2)(b); ICTR Rules of Procedure and Evidence, rule 42(A)(iii); ICTY Rules of Procedure and Evidence, rule 42(A)(iii).

<sup>291</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N6(d)(ii).

<sup>292</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle N6(d)(ii). See also ICC Statute, art. 67(1)(g).

<sup>293</sup> HRC Concluding Observations: United Kingdom, UN Doc. CCPR/C/CO/73/UK (2001) para. 17; See also HRC Concluding Observations: Ireland, UN Doc. CCPR/C/IRL/CO/3 (2008) para. 14; *Malawi African Association and Others v. Mauritania* (54/91 et al), African Commission (2000) para. 95.

given to the accused about the consequences of silence; and the permissible weight afforded to the silence when evaluating the evidence.<sup>294</sup>

g) *The right to appeal*

Article 14(5) of the ICCPR, article 16(7) of the Arab Charter and article 7(1)(a) of the ACHPR require that an accused person have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law.<sup>295</sup> The HRC stated that the right to appeal imposes on State Parties “a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.”<sup>296</sup> A review that is restricted to the formal or legal aspects of a conviction and fails to give any consideration to the facts of the case, does not meet the requirements of the ICCPR.<sup>297</sup> Tribunals conducting reviews are not expected to carry out a full retrial, but rather, are required to study the “factual dimensions of the case.”<sup>298</sup>

The higher tribunal must have the opportunity to conduct a thorough and substantial review of the verdict reached and sentence imposed.<sup>299</sup> If the review is confined to an assessment of formal, legal or procedural aspects of the conviction, thereby preventing a full and genuine review of the conviction or sentence, then the right to appeal has been violated.<sup>300</sup>

States’ obligations in relation to the right to appeal go beyond the mere establishment of an appeals framework. Rather, States are required to adopt positive measures in order to ensure that appeals are effectively submitted and processed. For example, States should ensure that appellants have adequate access to case materials, such as transcripts and judicial rulings.<sup>301</sup>

The right to request reconsideration of a conviction or an acquittal, even after a final appeal, upon the emergence of a new fact that was not discoverable with the exercise of due diligence at trial, is guaranteed in many jurisdictions.<sup>302</sup>

<sup>294</sup> For the specific factors that the ECtHR says should be taken into account see: *John Murray v. United Kingdom*, ECtHR (Grand Chamber), Application No. 18731/91, Judgment of 8 February 1996, paras. 46-70; *Condrón v. United Kingdom*, ECtHR, Application No. 35718/97, Judgment of 2 May 2000 paras. 55-68; *Heaney and McGuinness v. Ireland*, ECtHR, Application No. 34720/97, Judgment of 21 December 2000, paras. 55-58, *Funke v. France*, ECtHR, Application No. 10828/84, Judgment of 25 February 1993, paras. 41-44.

<sup>295</sup> See also AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle A(2)(j) and N(10); HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 51.

<sup>296</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 48. See also: *Bandajevsky v. Belarus*, HRC Communications No. 1100/2002, Views of 28 March 2006, para. 10.13; *Aliboeva v. Tajikistan*, HRC Communication No. 985/2001, Views of 18 October 2005, para. 6.5; *Khalilova v. Tajikistan*, HR, Communication No. 973/2001, Views of 30 March 2005, para. 7.5; *Domukovsky et al. v. Georgia*, Communication No. 623-627/1995, Views of 6 April 1998, para. 18.11.

<sup>297</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 48.

<sup>298</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 48.

<sup>299</sup> *Cesáreo Gómez Vázquez v. Spain*, HRC Communication No. 701/1996, Views of 20 July 2000, para. 11.1.

<sup>300</sup> *Bandajevsky v. Belarus*, HRC Communication No. 1100/2002, Views of 28 March 2006, para. 10.13; *Aliboeva v. Tajikistan*, HRC Communication No. 985/2001, Views of 18 October 2005, para. 6.5; *Khalilova v. Tajikistan*, HRC Communication No. 973/2001, Views of 30 March 2005, para. 7.5; *Domukovsky and others v. Georgia*, HRC Communications Nos. 623 to 627/1995, Views of 6 April 1998, para. 18.11; *Saidova v. Tajikistan*, HRC Communication No. 964/2001, Views of 8 July 2004, para. 6.5; and *Gelazauskas v. Lithuania*, HRC Communication No. 836/1998, Views of 17 March 2003, para. 7.2.

<sup>301</sup> HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 49.

<sup>302</sup> See e.g. ICC Statute, art. 84(1); ICTR Statute, art. 25; ICTY Statute, art. 26. See also Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, guideline 11, section 55(b), which provides that legal aid should be provided to accused persons seeking reconsideration upon the discovery of a new fact.



## b. Tunisian law

### i. General Criminal Procedure

#### a) Pre-trial rights

##### (1) The right to liberty and to be brought promptly before a judge

Under the CCP, a person may be arrested or detained upon the order of a legally competent authority or when caught *in flagrante delicto* (in the act)<sup>303</sup> and detained for up to 5 days for interrogation.<sup>304</sup> If the accused does not appear before the investigative judge upon their order, the investigative judge has the power to issue a warrant to secure the person's presence ("*mandat d'amener*").<sup>305</sup> The accused must be interrogated within three days of their apprehension, failing which the accused must be brought before the OPP who must request the investigative judge to proceed immediately.<sup>306</sup>

Following the interrogation, the accused must be released (with or without bail) within five days after interrogation if they have a fixed residence in Tunisia and have not previously been sentenced to more than six months' imprisonment, and when the maximum penalty is not more than two years' imprisonment.<sup>307</sup> The investigative judge may also order the accused's provisional release with conditions in all other circumstances *ex officio* after consultation with the OPP, or upon the request of the OPP, the or the accused or their lawyer.<sup>308</sup> The investigative judge may issue an arrest warrant detain the accused ("*mandat de dépôt*"), provided they are charged with an offence punishable with imprisonment or higher sentence.<sup>309</sup> They may be detained for up to six months pre-trial where there is a "serious presumption that detention seems necessary as a safety measure to prevent new offenses, as a guarantee of the execution of sentence or as a means to ensure the security of information,"<sup>310</sup> renewable twice for four months for serious offences subject to appeal.<sup>311</sup>

<sup>303</sup> Code of Criminal Procedure, art. 12. See also art. 250 of the Criminal Code.

<sup>304</sup> Upon the order of the OPP, Judicial Police officers may detain a person if necessary "for the requirements of an investigation" (Code of Criminal Procedure, art. 13*bis*) for up to 48 hours, renewable for another 48 hours in the case of serious offences or 24 hours in the case of less serious offences (Code of Criminal Procedure, art. 13*bis*). Serious offences are crimes that carry sentences of at least five years' imprisonment; less serious offences are crimes that carry sentences of less than five years' imprisonment; and minor offences are crimes attracting up to 15 days in prison. Police custody is limited to a non-renewable period of 24 hours for minor offences.

<sup>305</sup> Code of Criminal Procedure, art. 78.

<sup>306</sup> Code of Criminal Procedure, art. 79.

<sup>307</sup> With the exception of the offences provided for in articles 68, 70 (crimes relating to conspiracy for the purpose of an attack against the internal security of the State) and 217 (involuntary manslaughter) of the Criminal Code. See Code of Criminal Procedure, art. 85.

<sup>308</sup> Code of Criminal Procedure, art. 86. The investigative judge may impose in whole or in part the following measures to the accused: (i) domicile in the district of the court; (ii) prohibition of leaving the territorial limits defined by the judge except under specific conditions; (iii) prohibition to show oneself in specific places; (iv) duty to inform the investigative judge of his or her movements in specific places; and (v) duty to appear before the judge whenever he so requests and to respond to the summonses addressed to him or her by the authorities with regard to the proceedings against him or her.

<sup>309</sup> Code of Criminal Procedure, art. 80. Arrest warrants must be drafted by the investigative judge and indicate all relevant information, including the name of the judge responsible for it, the personal information of the accused, the list of charges, the applicable law as well as the authorization to detain the concerned person. See Code of Criminal Procedure, art. 81. If the arrest warrant does not reflect the indictment prepared by the OPP, the OPP can appeal it before the indictment chamber within 4 days of its issuance. See Code of Criminal Procedure, art. 80. The person responsible for executing the arrest warrant has the power to ask for the assistance of the police in case of necessity as well as to conduct searches. Any search conducted in these circumstances should be reported.

<sup>310</sup> Code of Criminal Procedure, arts. 84-85.

<sup>311</sup> Code of Criminal Procedure, art. 85. Detention is only renewable once for three months for less serious offences.

The provisional release of the accused does not prevent the investigative judge or court seized from issuing a new arrest warrant ("*mandat de dépôt*") if necessary because the accused does not appear upon a summons or because of new and serious circumstances,<sup>312</sup> unless provisional release was granted on appeal by the indictment chamber, which must then decide that the investigative judge may issue the new warrant after hearing from the OPP.<sup>313</sup>

## (2) The right to be promptly informed of the charges

Article 69 of the CCP requires an investigative judge to inform the accused of the charges against them at the first interrogation.

## (3) The right to legal counsel and to confidential communications

Under the CCP, the accused was also entitled to a lawyer during the investigation. During police custody, a suspect's lawyer may visit the suspect once for half an hour. Where the period of custody is prolonged, the suspect or his or her lawyer may request another meeting of the same duration.<sup>314</sup> The accused has the right to appoint a lawyer or have a lawyer appointed to them, about which they must be informed.<sup>315</sup> The accused's lawyer must be present during any interrogation or confrontation, may ask questions after the interrogation or after their examination or confrontation with another person<sup>316</sup> and may add written observations to the investigation file or provide them to the Judicial Police officers in charge of custody.<sup>317</sup>

## (4) The right to adequate time and facilities to prepare a defence

Throughout the investigation, the OPP<sup>318</sup> and the accused and their counsel<sup>319</sup> can request the investigative judge to execute any investigative acts (including a search for exculpatory evidence).<sup>320</sup> Any decision not to proceed with certain investigative acts requested by the OPP must be supported by reasons; the OPP can appeal the decision to the indictment chamber within four days.<sup>321</sup>

When an accused has been called for interrogation or confrontation with witnesses, their lawyer may consult the investigation file one hour before the interrogation or confrontation without taking copies.<sup>322</sup> In addition to examining witnesses during the confrontation procedure (see part 3.b.i.b.3 below), the investigative judge must also present to the accused the exhibits in their possession that might be used as evidence at trial. The accused or their counsel have the opportunity to respond on the record: they can challenge or make any observations they think appropriate, which must be recorded, signed by the accused, and transferred to the trial chamber as part of the record.<sup>323</sup>

Once the case has been referred to the trial chamber or the accused has been summoned, counsel for the parties have the right to request copies of all documents relating to trial proceedings before the trial chamber.<sup>324</sup> The parties may access the complaint, but any right of access to the other

<sup>312</sup> Code of Criminal Procedure, art. 88.

<sup>313</sup> Code of Criminal Procedure, art. 88.

<sup>314</sup> Code of Criminal Procedure, art. 13*quater*.

<sup>315</sup> Code of Criminal Procedure, art. 31*ter*.

<sup>316</sup> Code of Criminal Procedure, arts. 13*ter*, 13*quinquies* and 13*sexies*.

<sup>317</sup> Code of Criminal Procedure, art. 13*sexies*.

<sup>318</sup> Code of Criminal Procedure, art. 55(1).

<sup>319</sup> Code of Criminal Procedure, art. 72.

<sup>320</sup> Code of Criminal Procedure, art. 55(1).

<sup>321</sup> Code of Criminal Procedure, art. 55(3).

<sup>322</sup> Code of Criminal Procedure, art. 13*quinquies*.

<sup>323</sup> Code of Criminal Procedure, art. 77.

<sup>324</sup> Code of Criminal Procedure, art. 193.



documents in the case file is subject to the OPP's or, in cases before the Court of Appeal, the Attorney-General's approval (and an appeal right, set out in part 3.b.i.b.5 below).<sup>325</sup>

#### (5) The right to be tried without undue delay

The CCP does not contain any provisions requiring the accused to be tried without undue delay.

#### (6) The presumption of innocence

As discussed in more detail in the ICJ's Practical Guide No. 3 on *Principles and best practices on the collection, admissibility and assessment of evidence*,<sup>326</sup> if there is a "sufficient presumption of guilt," the indictment chamber issues a written indictment and refers the case to the competent trial chamber.<sup>327</sup> At trial, the court issues its determination on the guilt or innocence of the accused based on the "*intime conviction*" standard,<sup>328</sup> relying on evidence that has been presented in "debates" and "discussed orally" between the parties<sup>329</sup> and according to the principle of "freedom of evidence."<sup>330</sup>

#### b) Trial rights

Following the issuance of an indictment by the indictment chamber, the OPP must then submit the indictment and case file to the competent trial chamber for trial, and represent the State at trial. The trial chamber must conduct a trial hearing in the presence of the prosecutor and the parties.<sup>331</sup> The trial hearing is ordinarily held in public, unless the court determines *proprio motu* or on the OPP's request that it is otherwise in the public interest.<sup>332</sup>

#### (1) The right to be tried in one's presence

The CCP provides that a person accused of offences punishable with imprisonment must always be present at trial.<sup>333</sup> Any accused or witness must be summoned at least three days in advance of the first trial hearing,<sup>334</sup> or 30 days if the concerned person is not resident in the country,<sup>335</sup> upon the request of the OPP, the civil party or any other authorized administrative office.<sup>336</sup> Where the accused is already held in custody, the notification should be executed by the Judicial Police.<sup>337</sup> If the hearing is postponed on a fixed day, the summons need not be renewed.<sup>338</sup> Summons must be given to the accused in person or any other authorized representative, including servants and any other person having the same residency.<sup>339</sup>

<sup>325</sup> Code of Criminal Procedure, art. 194.

<sup>326</sup> See ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices on the collection, admissibility and assessment of evidence* – Practical Guide 3 (2020), part 4.b.i.a.2.

<sup>327</sup> Code of Criminal Procedure, arts. 116 and 119.

<sup>328</sup> Code of Criminal Procedure, art. 150.

<sup>329</sup> Code of Criminal Procedure, art. 151.

<sup>330</sup> Code of Criminal Procedure, art. 150.

<sup>331</sup> Code of Criminal Procedure, art. 143.

<sup>332</sup> Code of Criminal Procedure, art. 143.

<sup>333</sup> Code of Criminal Procedure, art. 141.

<sup>334</sup> Code of Criminal Procedure, art. 136.

<sup>335</sup> Code of Criminal Procedure, art. 136.

<sup>336</sup> Code of Criminal Procedure, art. 135. Summons must indicate the list of charges and the applicable law, and specify the location, date and time of the hearing. Both the person in charge of its delivery and the summoned person should sign the document, and if the latter refuses to do it, it should mention it. The document must be returned to the Registry of the court and attached as annex to the trial's documents. See Code of Criminal Procedure, art. 140.

<sup>337</sup> Code of Criminal Procedure, art. 137.

<sup>338</sup> Code of Criminal Procedure, art. 138.

<sup>339</sup> Code of Criminal Procedure, art. 139. If the person responsible for handing over the summons does not find the accused at home or if the person found refuses to receive it, the document must be given to either the district head, the *cheikh*, the police station or the National Guard responsible for the district where the accused's residence is located.

Where the accused evades the proceedings against him or her, the court may order either a warrant to secure the person's presence in court (*mandat d'amener*) or an arrest warrant (*mandate de dépôt*) and order, upon the approval of the OPP, the sequestration of his or her property.<sup>340</sup> If the accused appears, the court (or one of its members) must interrogate the accused immediately; if this is not possible, the examination must take place within three days from the date of his detention.<sup>341</sup> At the end of this period, the director of the detention facility must automatically bring the accused before the OPP to request the court to take a decision on the case; if the OPP fails to do so, the director must immediately release the accused.<sup>342</sup> In the event that the warrant requires the Judicial Police to detain the accused, the Judicial Police must bring them before the competent court without delay and, at the latest, within 48 hours.<sup>343</sup>

If the defendant does not appear after being duly summoned, an accused may be tried *in absentia* (*par défaut*).<sup>344</sup> Apart from the provision which states generally that the assistance of a lawyer is obligatory in criminal cases, both at trial and on appeal,<sup>345</sup> there are no specific provisions governing the appointment of a lawyer where the trial is held *in absentia*. If "service was not made" on the accused or they were not made aware of the judgement by its execution, they may object to the conviction within 10 days of service of the judgement if they reside in Tunisia, or within 30 days if they reside outside Tunisia,<sup>346</sup> or, if service of the judgement has not been rendered, until the expiration of the term of imprisonment imposed.<sup>347</sup> A hearing on the objection must be held within 30 days.<sup>348</sup> If the accused appears for the hearing and the objection is held to be admissible, the case is subject to a re-trial.<sup>349</sup> If the accused does not appear for the hearing on their objection, the conviction stands but the accused retains the right to appeal.<sup>350</sup>

## (2) The right to defend oneself in person or through legal counsel

The accused must be represented by a lawyer; if the accused does not appoint one, the president of the chamber must do so.<sup>351</sup> Under Law No. 2002-52, the accused can apply for legal aid,<sup>352</sup> which can cover some or all of the costs including court fees, expert reports, notary fees, travelling to the crime scene, summonses and notifications, translation and lawyers' fees.<sup>353</sup> Decisions by the Legal Aid Bureau, established in each trial court, on applications for legal aid<sup>354</sup> cannot be appealed.<sup>355</sup> Legal aid may be granted if the applicant has no income or has an annual income that is insufficient to cover legal costs without affecting the applicant's essential needs in a substantial way.<sup>356</sup> According to information provided to the ICJ, this provision is not interpreted strictly, and the legal

<sup>340</sup> Code of Criminal Procedure, art. 142. According to the same article, any such measure must be published in the Official Gazette of the Republic of Tunisia and in a display at the seat of the governorate of residency of the accused. Sequestration decisions may only be lifted by a court. On the subpoena and arrest warrant, see also articles 78-83 of the Code of Criminal Procedure.

<sup>341</sup> Code of Criminal Procedure, art. 142.

<sup>342</sup> Code of Criminal Procedure, art. 142.

<sup>343</sup> Code of Criminal Procedure, art. 142. In this case, article 78 (3) of the Code of Criminal Procedure applies.

<sup>344</sup> Code of Criminal Procedure, arts. 141 and 142.

<sup>345</sup> Code of Criminal Procedure, art. 141.

<sup>346</sup> Code of Criminal Procedure, art. 175.

<sup>347</sup> Code of Criminal Procedure, arts. 175 and 176. An acquitted party is responsible for the costs associated with their opposition. Code of Criminal Procedure, art. 177.

<sup>348</sup> Code of Criminal Procedure, art. 175.

<sup>349</sup> Code of Criminal Procedure, art. 182.

<sup>350</sup> Code of Criminal Procedure, art. 183.

<sup>351</sup> Code of Criminal Procedure, art. 141. If the accused is charged with offences not subject to imprisonment, and in all cases where the accused was summoned directly by the civil party, he or she may instead be represented by a lawyer. Even in that case, however, the court may, if it deems it necessary, order the accused to appear in the court in person.

<sup>352</sup> Law No. 2002-52 of 3 June 2002 on the granting of legal aid, art. 1.

<sup>353</sup> Law No. 2002-52 of 3 June 2002 on the granting of legal aid, art. 14.

<sup>354</sup> Law No. 2002-52 of 3 June 2002 on the granting of legal aid, art. 4.

<sup>355</sup> Law No. 2002-52 of 3 June 2002 on the granting of legal aid, art. 13.

<sup>356</sup> Law No. 2002-52 of 3 June 2002 on the granting of legal aid, art. 3.

aid system is largely ineffective and the resources dedicated to it are insufficient to meet demand.<sup>357</sup> While some civil society organizations offer legal assistance to victims, this is only done infrequently and on emblematic cases.

### (3) The right to call and examine witnesses

The Court determines which witnesses will be called to testify. The OPP as well as the accused and civil parties may submit a list of proposed witnesses.<sup>358</sup> At trial, all parties, including the prosecutor, must direct their questions through the president of the trial chamber and can present their own conclusions.<sup>359</sup> The OPP may direct questions to witnesses under the supervision of the trial chamber president.<sup>360</sup> The trial chamber's decision to refuse such requests must be accompanied by reasons,<sup>361</sup> and the OPP, the accused and civil parties can appeal such decisions.

The accused also has the right to confront witnesses at the investigation stage through the "confrontation procedure." During the confrontation procedure in which the accused and witnesses are examined, the investigative judge examines witnesses in the absence of the accused,<sup>362</sup> and a record of their examination is immediately prepared to be signed by the witness, unless they refuse to do so.<sup>363</sup> Once witness testimony has been obtained, the investigative judge can confront the witnesses with each other or with the accused, and the accused with the co-accused or with the victim.<sup>364</sup> The oral confrontation is recorded in the "procès verbal," which is annexed to the case file and transferred to the trial chamber.

After the trial chamber has heard the evidence, the OPP can submit its "conclusions" regarding the case, which in practice is understood to mean submissions on the substance of the case and on sentencing.<sup>365</sup>

### (4) The right not to be compelled to incriminate oneself and to remain silent

The investigative judge can carry out a confrontation procedure in which they undertake a separate hearing to interrogate the accused in the presence of their counsel,<sup>366</sup> and the examination of the

<sup>357</sup> According to a recent study, the Legal Aid Bureau which should take responsibility for examining the requests both to cover legal costs and lawyers' fees, in reality does not discharge this function and the decisions are in fact taken by deputy prosecutors designated by the public prosecutor. Avocats Sans Frontières and ATL MST/SIDA, *L'état de l'aide légale en Tunisie*, 29 April 2014, p. 60.

<sup>358</sup> Code of Criminal Procedure, art. 144. The list must include the subject of the proposed witnesses' testimony.

<sup>359</sup> Code of Criminal Procedure, art. 143.

<sup>360</sup> Code of Criminal Procedure, art. 143. See also article 151 which provides that any decision by the trial chamber must be based on the evidence presented during the debates and discussed orally by all parties.

<sup>361</sup> Code of Criminal Procedure, art. 144.

<sup>362</sup> Code of Criminal Procedure, art. 65: "The witnesses are heard separately and without the presence of the accused, they file without the assistance of any writing. They are, at the beginning of their testimony, invited to declare their identity and to indicate whether there is a ground for recusation between them and one of the parties. Once the deposition has been completed, the judge can call on them, confront them with each other or with the accused, and, with their help, carry out any useful operations for the manifestation of the truth. The depositions and confrontations are recorded in the minutes which are read to the appearing persons and which are then signed by them, the judge and the clerk. If a witness does not want or can not sign, it is mentioned."

<sup>363</sup> Code of Criminal Procedure, art. 65.

<sup>364</sup> Code of Criminal Procedure, art. 65.

<sup>365</sup> Code of Criminal Procedure, art. 143.

<sup>366</sup> Code of Criminal Procedure, art. 13<sup>quiquies</sup>. Article 57 of the Code of Criminal Procedure, however, provides: "The investigating judge may, in terrorist cases and in cases where the necessity of the investigation so requires, not allow the lawyer to visit the suspect, maintain him, attend his interrogation, or his confrontation or consult the documents of the file before the judge committed for a duration not more than forty eight hours from the date of the police custody, unless this decision on prohibition is taken before by the public prosecutor". See part. 3.b.i.a.3 above.

accused is immediately recorded and signed by the accused.<sup>367</sup> The accused may refuse to answer or to sign the record of the examination.<sup>368</sup>

## (5) Right of appeal and review

The parties may file an interlocutory appeal on the merits of an offence or the exercise of jurisdiction, as well as decisions on provisional release of the accused, and any orders modifying the decision to provisionally release the accused. The failure to make a decision upon a request for provisional release within four days may also be appealed by the OPP, the accused or his or her counsel before the indictment chamber.<sup>369</sup>

The OPP, civil party and accused can appeal an order by the investigation chamber to refer the matter to the indictment chamber within four days of being notified,<sup>370</sup> which is decided by the indictment chamber. The OPP may make oral submissions on appeal;<sup>371</sup> the accused and the civil party do not have a right to be present, but can make written submissions.<sup>372</sup>

The decision of the indictment chamber can be appealed to the Court of Cassation by the OPP or accused within four days;<sup>373</sup> the civil party has limited grounds of appeal against the indictment chamber's decision, and only if the OPP files an appeal.<sup>374</sup>

Following the issuance of the first instance judgment, the OPP and the accused may appeal to the Court of Appeal against the jurisdiction of the court and against the judgment within 10 days of its delivery.<sup>375</sup> The competent Attorney General of the Court of Appeal<sup>376</sup> may also file an appeal, within 60 days from the delivery of the judgement.<sup>377</sup> The parties to a case must be notified of the appeal,<sup>378</sup> with the exception of the civil parties, who only need be notified if the appeal challenges the civil action. Although article 209 of the CCP does not specify the basis for the appeal, the ICJ is informed that, in practice, appeals may be filed against errors of law and errors of fact.<sup>379</sup> A civil party may only file an appeal with respect to his or her civil interests only.<sup>380</sup>

Appeals of all other decisions, including a trial chamber's refusal to call witnesses<sup>381</sup> and the OPP or Attorney-General's decision not to provide copies of the trial documents,<sup>382</sup> can only be appealed with an appeal of the judgment on the merits.<sup>383</sup>

<sup>367</sup> Code of Criminal Procedure, art. 72.

<sup>368</sup> Code of Criminal Procedure, arts. 13, 72.

<sup>369</sup> Code of Criminal Procedure, art. 87.

<sup>370</sup> Code of Criminal Procedure, art. 109.

<sup>371</sup> Code of Criminal Procedure, art. 110. If the appeal is lodged by the OPP and the accused is already in custody, the detention continues until the decision of the indictment chamber.

<sup>372</sup> Code of Criminal Procedure, art. 114.

<sup>373</sup> Code of Criminal Procedure, arts. 120, 258-260, and 262.

<sup>374</sup> Code of Criminal Procedure, art. 260.

<sup>375</sup> Code of Criminal Procedure, arts. 209-210, and 213. The notice of appeal and the documents of the proceedings must be forwarded without delay to the representative of Attorney General at the appeal court. Code of Criminal Procedure, art. 215. The appeal is lodged with the registry of the court which rendered the judgment, either by verbal or written declaration. If the appellant is detained, the appeal is received by the prison supervisor, who must immediately communicate it to the court clerk's office. Code of Criminal Procedure, art. 212.

<sup>376</sup> On appeal, irrespective of who filed the appeal, the Prosecutor-General is represented by Attorney General of the Court of Appeal. Code of Criminal Procedure, art. 24.

<sup>377</sup> Code of Criminal Procedure, art. 213.

<sup>378</sup> Code of Criminal Procedure, art. 134.

<sup>379</sup> Appeals may therefore be based on various grounds, such as a trial chamber's decision to not hear a witness or the type of sentence imposed on the accused.

<sup>380</sup> Code of Criminal Procedure, art. 210.

<sup>381</sup> Although there is no explicit reference to such a right in the Code of Criminal Procedure, it is understood that in practice the parties have such a right.

<sup>382</sup> Code of Criminal Procedure, art. 194.

<sup>383</sup> Code of Criminal Procedure, arts. 209 and 210.

The parties may file a further file an appeal against the Court of Appeals decision within 10 days (five days if the death penalty was imposed) to the Court of Cassation on the basis of "incompetence, excess of power, violation or false application of the law."<sup>384</sup> The Minister of Justice may also request an Attorney General of the Court of Appeal to appeal a decision of the Court of Appeal;<sup>385</sup> the Attorney General has 60 days to appeal.<sup>386</sup> An appeal hearing may be held, in which lawyers for the parties may appear.<sup>387</sup> If the Court of Cassation determines the impugned decision must be quashed in whole or in part, it must refer the case to a different chamber of the Court of Appeal or another Court of Appeal for reconsideration, unless quashing the whole or part of the decision dispenses with the need for reconsideration altogether.<sup>388</sup> A civil party can lodge an appeal to the Court of Appeal and to the Court of Cassation, but only in relation to the civil claim<sup>389</sup> and only where the prosecutor has already lodged an appeal.<sup>390</sup>

The Minister of Justice and the accused, or the accused's spouse, children or heirs in the case of their death, may also seek review of a conviction if: (i) after conviction for homicide, evidence emerges proving the victim is alive; (ii) a subsequent conviction of another perpetrator proves the innocence of the accused; (iii) a witness against the accused was convicted of providing false testimony and cannot testify in a new trial; or (iv) a new fact emerges which is likely to establish the innocence of the accused or demonstrate the offence was a less serious than the offence for which they were convicted.<sup>391</sup> Requests must be submitted to the Minister of Justice, who must, "where appropriate," transfer them to the OPP, who must then refer them to the court which issued the impugned decision.<sup>392</sup> The chamber must rule on the admissibility of the request, and may then hold a hearing on the merits.<sup>393</sup>

## ii. Transitional Justice Framework

### a) Pre-trial rights

The Transitional Justice Framework did not contain any provisions governing the detention of accused persons during investigations by the IVD. As mentioned above, the Inquiry and Analysis Unit could interview accused persons, for which no guidance was provide in the Transitional Justice Framework. Once the file had been forwarded to the Investigation Unit, Head of the Unit could exercise all the powers of a judicial officer and was required to comply with "all necessary procedural guarantees."<sup>394</sup> Investigative work had to be conducted in the presence of an investigation clerk, who was required to direct summons and notifications and maintain detailed records in the file.<sup>395</sup> The IC Procedures Guide specified that investigations were to be conducted independently and impartially,<sup>396</sup> while respecting the principles of transitional justice and the Constitution, in particular

<sup>384</sup> Code of Criminal Procedure, arts. 258 and 262. This explicitly excludes appeals against sentence where the sentence pronounced is the same as that prescribed by law. See art. 271. Articles 263*bis et seq* govern the appeal briefing procedure.

<sup>385</sup> Code of Criminal Procedure, art. 258(6).

<sup>386</sup> Code of Criminal Procedure, art. 262. The Attorney General of the Court of Cassation may file an appeal outside the time limit if they determine the lower court decision was made in violation of the law and no parties appealed on time. Code of Criminal Procedure, art. 276.

<sup>387</sup> Code of Criminal Procedure, art. 267.

<sup>388</sup> Code of Criminal Procedure, arts. 269, 272 *et seq*.

<sup>389</sup> Code of Criminal Procedure, arts. 210 and 258.

<sup>390</sup> Code of Criminal Procedure, art. 260.

<sup>391</sup> Criminal Procedure Code, art. 277.

<sup>392</sup> Criminal Procedure Code, art. 279.

<sup>393</sup> Criminal Procedure Code, art. 281.

<sup>394</sup> IC Procedures Guide, art. 39.

<sup>395</sup> Article 36 of the IC Procedures Guide required that all investigative work be documented, including hearings and interrogations (by audio and video), and that reports should be signed by the investigator, the investigation clerk, the member of the Commission that is present, the witness and their representative when needed. If the concerned person refused or was unable to sign, it must have been recorded in the report with the reason.

<sup>396</sup> IC Procedures Guide, art. 38.

the presumption of innocence, the principle of confrontation and the rights of the defence,<sup>397</sup> and that investigators must exhaust all the procedures leading to the disclosure of the truth.<sup>398</sup>

*b) Trial rights*

The Transitional Justice Framework contains few provisions regarding the conduct of trials before the SCC. As set out above, article 3 of the 2014 Law provides that the OPP shall “automatically” transfer any cases it receives from the IVD to the SCC without providing any further provisions on the OPP’s role at trial, including in relation to the calling of witnesses or the conduct of examination or cross-examination, making of submissions before the court or the parties’ powers to appeal orders, decisions or judgements issued by the SCC. With regard to trials in *absentia*, the Transitional Justice Framework is silent. Accordingly, once trial begins, it appears that the general CCP procedure applies to trials conducted under the Transitional Justice Framework.

With respect to appeal rights, upon receipt of an IVD decision rejecting a complaint, plaintiffs could request reconsideration of the decision,<sup>399</sup> which was referred to an appeals committee composed of members representing each of IVD sub-committee as well as financial analysts and legal affairs specialists (Appeals Committee).<sup>400</sup> Upon review of the request, the Appeals Committee submitted its proposal to either accept or reject the reconsideration request, which it then submitted to the Commission.<sup>401</sup> Appeals against refusal were determined by the Investigation Committee sitting in a different composition.<sup>402</sup> However, it does not appear that accused persons had the right to appeal decisions issued by the Investigation Committee and confirmed by the IVD.

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<sup>397</sup> IC Procedures Guide, art. 33.

<sup>398</sup> IC Procedures Guide, art. 40.

<sup>399</sup> IC Procedures Guide, art. 26. Article 27 through 29 set out the procedure and (15 day) deadline for reconsideration requests of rejection decisions.

<sup>400</sup> IC Procedures Guide, art. 29.

<sup>401</sup> IC Procedures Guide, art. 29 new.

<sup>402</sup> IC Procedures Guide, art. 30.

## 4. The Rights of Victims and their Families

Civil parties have the right to apply to participate in criminal proceedings or to institute a civil action where they suffered the harm caused by the offence under the general criminal procedure. 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 the relevant authority, submitting their conclusions on the case to the First Instance Tribunal and filing appeals in relation to some (but not all) decisions. For such purposes, they may access legal aid and be represented by a lawyer. 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, but does not otherwise address the rights of victims and their family members at trial.

International law and standards require Tunisia to ensure that victims and their families have the right to an effective remedy and reparation and, accordingly, to effectively participate in the proceedings. The HRC requires States to ensure that all persons, including victims, have equal access to courts without discrimination. International standards, including the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and the Updated Set of principles for the protection and promotion of human rights through action to combat impunity affirm that victims and their family members should have the right act as a party to the proceedings. To exercise such rights, victims must be granted access to information about the proceedings, including regarding the procedures followed, the substance of investigations, the content of decisions and the reasons for those decisions. This part of the Guide sets out the international law and standards governing the rights of victims and their family members, as well as dependents and individuals who have suffered harm when intervening to assist victims, during the criminal justice process.

### a. International law and standards

The rights of victims and families must be respected at all stages of the proceedings. Particularly in a system where effective remedy and reparation for victims depends on their standing as civil parties in criminal proceedings, international law and standards require that they be able to effectively participate in the proceedings.

Under international law and standards, victims of crimes have rights throughout the criminal justice process.<sup>403</sup> Such rights extend, when appropriate, to family members, dependents and individuals who have suffered harm when intervening to assist victims.<sup>404</sup> Indeed, authorities should ensure that all persons, including victims, have equal access to courts without discrimination.<sup>405</sup>

<sup>403</sup> See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8; Protocol to Prevent, Suppress and punish Trafficking in Persons, Especially Women and Children, (supplementing the United Nations Convention against Transnational Organized Crime), art. 6(2); Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 4.

<sup>404</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 8.

<sup>405</sup> See HRC, *General Comment No. 32: Article 14 on the right to equality before the courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 9; CEDAW Committee Concluding Observations: Rwanda, UN Doc. CEDAW/C/RWA/CO/6 (2009) paras. 23-24.



Regional and international instruments require states to ensure victims of gross human rights violations have access to justice and prompt redress for the harm they have suffered.<sup>406</sup> To give effect to this right, States must guarantee that such victims and/or their family members have broad procedural standing in criminal proceedings. Independent of the terminology used for standing in criminal proceedings – such as, for example, “civil party,” “private accusation,” or “popular action” – States should ensure victims of gross human rights violations and/or their family members can act as a party to the proceedings and be able to, *inter alia*:

- Present and request evidence;
- Present, request and obtain witnesses’ testimony;
- Have access to documentation and evidence;
- Interrogate their witnesses and the opposing party’s witnesses;
- Question or challenge the evidence and witnesses presented by the defense;
- Involve expert witnesses; and
- Challenge and appeal the decision of the judge or the court, including judgments or final decisions. The effective remedy must be substantiated in accordance with the rules of due process or law and the requirements of a fair trial.<sup>407</sup>

The right to access information is particularly important for ensuring victims’ participation.<sup>408</sup> Under international standards, States are responsible for “[i]nforming victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.”<sup>409</sup> The right to information applies to all phases of the proceedings and includes access to information regarding the procedures followed, the substance of investigations, the content of decisions and the reasons for those decisions.<sup>410</sup>

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa requires reflect these requirements, requiring judicial officers, prosecutors and lawyers, as appropriate, to:

1. Inform victims of their role and the scope, timing and progress of the proceedings and the final outcome of their cases;
2. Allow victims’ views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
3. Provide victims with proper assistance throughout the legal process;

<sup>406</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section N(a); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 12. See also Recommendation (85) 11 E, on the position of the victim in the framework of criminal law and procedure, of the Committee of Ministers of the Council of Europe (1985); and the Council Framework Decision on the standing of victims in criminal proceedings, of the Council of the European Union (2001).

<sup>407</sup> For a detailed discussion, see ICJ, *International Law and the Fight Against Impunity*, Practitioners’ Guide No.7, (2015) Chapter IV(e); and ICJ, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Practitioners’ Guide No. 2, Second edition (2018).

<sup>408</sup> See e.g. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, principles 11(c), 12 and 24; UN Principles on Extra-Legal Executions, principle 16; UN Principles on Investigation and Documentation of Torture and other Ill-treatment, principle 4; Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guidelines, principle 7, para. 28; and Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 19, which affirms that “States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein”.

<sup>409</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985 (“Basic Principles of Justice for Victims of Crime”), para. 6.

<sup>410</sup> Basic Principles of Justice for Victims of Crime, para.6. See also AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle P(f).

4. Take measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
5. Avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.<sup>411</sup>

The United Nations Basic Principles on the Right to a Remedy and Reparation require States to inform victims of all available remedies for gross human rights violations, provide proper assistance to victims seeking access to justice, and make all legal, diplomatic and consular assistance means available to ensure victims can access their right to a remedy.<sup>412</sup> The UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity stipulate that: "[a]lthough the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein."<sup>413</sup>

The right of victims to participate in criminal proceedings is also recognized in the framework of international criminal jurisdictions.<sup>414</sup> The International Criminal Court (ICC), for example, requires States to ensure that victims' views and concerns can be presented and considered at appropriate stages where their personal interests are affected, without prejudice to the rights of the accused.<sup>415</sup>

International and regional authorities have confirmed the right of victims to such participation. The HRC stated that "the authorities investigating enforced disappearances must give the families a timely opportunity to contribute their knowledge to the investigation."<sup>416</sup> The UN Committee Against Enforced Disappearances (CED) also urged States to ensure that their legislation allows "the victims of enforced disappearance to participate fully in judicial proceedings relating to the investigation of such an offence,"<sup>417</sup> and to ensure that victims have the right to "challenge the legal merits of any decisions made at the end of an investigation to prosecute the suspects, to close the investigation,

<sup>411</sup> AComHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principles F(i)(2) and P(f)(2).

<sup>412</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, principle 12.

<sup>413</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Principle 19, para. 2.

<sup>414</sup> See, *inter alia* ICC Statute, arts. 68(3) and 75; Rules of procedure and evidence of the International Criminal Court, Rules 85 - 99; the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rule 23); and the Statute of the Special Tribunal for Lebanon (arts. 17 and 28).

<sup>415</sup> Article 68(3) of the ICC Statute states that "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence." See also ICC, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-1432, Appeals Chamber, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, paras. 98-100, 104.

<sup>416</sup> *Hero v. Bosnia and Herzegovina*, HRC Communication No. 1966/2010, Views of 28 October 2014, para. 9.6. See also *Kozljak v. Bosnia and Herzegovina*, HRC Communication No. 1979/2010, Views of 28 October 2014, para. 9.6.

<sup>417</sup> CED, Concluding observations on the report submitted by Uruguay under article 29, paragraph 1, of the Convention, CED/C/URY/CO/1 of 8 May 2013, para. 22. See also "General Comment on the right to the truth in relation to enforced disappearances," para. 3, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 2010. Along the same line, see: Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2 January 10, 2008, para. 163; General Comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session (October 31 to November 9, 2012), A/HRC/WGEID/98/1 of 14 February 2013, para. 37.

or to suspend or terminate the search for the victim.<sup>418</sup> The CAT “emphasizes the importance of victim participation in the redress process.”<sup>419</sup>

## b. Tunisian Law

### i. General Criminal Procedure

Under the CCP, a right of “civil action” belongs to “all those who personally suffered the harm caused directly by the offence.”<sup>420</sup> An individual who meets this test can apply to become a civil party to the criminal proceedings by applying in writing to the OPP, the investigative judge or the trial chamber, depending on the stage of proceedings, who then decides upon the request.<sup>421</sup> The OPP, the victim or the accused can appeal the investigative judge’s decision,<sup>422</sup> but not the trial chamber’s.

A civil party cannot be heard as a witness,<sup>423</sup> but the investigative judge can summon civil party to provide information,<sup>424</sup> has a general right to obtain information at any stage of the proceedings,<sup>425</sup> can make a complaint where he or she believes the investigative judge lacks jurisdiction,<sup>426</sup> can request that an expert appointed by the investigative judge be recused<sup>427</sup> and can appeal an investigative judge’s decision to close the file to the indictment chamber.<sup>428</sup> A civil party is also entitled to obtain copies of all documents relating to proceedings before the indictment chamber<sup>429</sup> and make written submissions, however does not have the right to attend indictment chamber hearings.<sup>430</sup>

During the trial, civil parties are entitled to receive copies of all documents relating to the proceedings,<sup>431</sup> can request the examination of witnesses,<sup>432</sup> and, where the prosecutor and the accused do not object, give evidence during the hearing.<sup>433</sup> They can also present their conclusions at the hearing.<sup>434</sup> Under Law No. 2002-52, the civil party can apply for legal aid in accordance with

<sup>418</sup> CED, Concluding observations on the report submitted under Article 29, paragraph 1, of the Convention to: France, CED/C/FRA/CO/1 of 8 May 2013, para. 25 (the CED urged States to ensure that their domestic law grants “any person who reports an enforced disappearance the right to challenge the legal merits of the decision of the prosecutor not to investigate or prosecute cases”).

<sup>419</sup> CAT, General Comment No. 3, *Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, 19 November 2012, para.4. The IACtHR has also stated that the victims and/or their relatives must have full access to and capacity to act at all stages and levels of the investigation, to formulate their claims and to present evidence, with regards to both clarifying the facts and punishment of those responsible and with regard to ensuring fair reparation. See, inter alia: *Judgment of 22 September 2009*, IACtHR, Anzualdo Castro v. Peru, Series C No. 202, para. 118; *Judgment of 4 July 2006*, IACtHR, Ximenes Lopes v. Brazil, Series C No. 149, para. 193; *Judgment of 1 July 2006*, IACtHR, Case of the Ituango Massacres v. Colombia, Series C No. 48, para. 296; *Judgment of 7 June 2003*, IACtHR, Juan Humberto Sánchez v. Honduras, Series C No. 99, para. 186; and *Judgment of 29 August 2002*, IACtHR, Case of the Caracazo v. Venezuela, Series C No. 95, para. 118.

<sup>420</sup> Code of Criminal Procedure, art. 7. Since September 2011, civil society organizations can also apply to become a civil party. See Law decree 88 of 24 September 2011, art. 14.

<sup>421</sup> Code of Criminal Procedure, arts. 38 and 39.

<sup>422</sup> Code of Criminal Procedure, art. 38. The prosecutor has 4 days from the date of the decision of the investigative judge to lodge an appeal. The victim and the accused have 4 days from the notification of the decision of the investigative judge in which to lodge an appeal.

<sup>423</sup> Code of Criminal Procedure, art. 43.

<sup>424</sup> Code of Criminal Procedure, art. 63. Although not guaranteed in law, in practice a civil party can also submit information to the investigative judge throughout the investigation. ICJ interview with civil party lawyers, 23 September 2014.

<sup>425</sup> Code of Criminal Procedure, art. 193.

<sup>426</sup> Code of Criminal Procedure, art. 75. The investigative judge’s decision on the complaint can be appealed to the indictment chamber.

<sup>427</sup> Code of Criminal Procedure, arts. 75 and 101. The request is decided by the investigative judge without the possibility of appeal. Code of Criminal Procedure, art. 101.

<sup>428</sup> Code of Criminal Procedure, art. 109.

<sup>429</sup> Code of Criminal Procedure, art. 114.

<sup>430</sup> Code of Criminal Procedure, art. 114.

<sup>431</sup> Code of Criminal Procedure, art. 193.

<sup>432</sup> Code of Criminal Procedure, arts. 143 and 144.

<sup>433</sup> Code of Criminal Procedure, art. 160. This evidence is not given under oath.

<sup>434</sup> Code of Criminal Procedure, art. 144.

the provisions that are applicable to the accused (see part 3.b.i.b.2 above).<sup>435</sup> At trial, the civil party can be always represented by a lawyer, unless the court orders otherwise.<sup>436</sup>

## ii. Transitional Justice Framework

As set out in part 2.b.ii above, the 2013 Law 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>437</sup> The Transitional Justice Framework does not address the rights of victims and their family members at trial.

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<sup>435</sup> Law No. 2002-52 of 3 June 2002 on the granting of legal aid, art. 1.

<sup>436</sup> Code of Criminal Procedure, art. 141.

<sup>437</sup> See Part 2.b.ii above.

## 5. Recommendations

As discussed in Practical Guide No. 1, the Tunisian Constitution is clear on the primacy of international treaties over domestic law, and there is nothing in the Constitution that precludes domestic courts, including the SCC, from applying such international treaties as well as relevant customary international law.<sup>438</sup> This should enable the SCC to give due regard to international treaties and customary international law when assessing how the SCC should apply Tunisian law in a manner consistent with Tunisia's international obligations.

Under the general rules of State responsibility in international law, as well as under human rights treaties, the SCC is an organ of the State and its acts and certain forms of inaction can constitute or result in Tunisia violating its international legal obligations. The SCC consequently has a duty to exercise all means open to it to help ensure Tunisia complies with its obligations deriving from ratified international law treaties and customary international law. These obligations apply to, among other things, the duty to conduct prompt, effective and thorough, independent and impartial and transparent investigation into crimes under international law and prosecute them where appropriate, and the duty to respect, protect and fulfill the accused's right to a fair trial and victims' rights to effectively participate in proceedings and to an effective remedy.

Accordingly, while investigating, prosecuting and adjudicating cases involving gross human rights violations that amount to crimes under international law, the SCC should interpret domestic law consistently with Tunisia's international law obligations, including with respect to the investigation of cases and conduct of trials. Particular regard should be had to the accused's right to be tried by an independent, impartial and competent tribunal established by law, which requires States to ensure that trials are not conducted by special tribunals that do not use duly established procedures.<sup>439</sup>

With respect to the investigation of gross human rights violations, as State authorities, the IVD and SCC are under an obligation to investigate, prosecute, punish and provide effective remedy and reparations for human rights violations that constitute crimes under international law. Investigations must be prompt, exhaustive, impartial, independent and transparent, and prosecutions of such violations must be commenced where appropriate. As set out in part 3.a.i.f and the ICJ's Practical Guide No. 3 on *Principles and best practices on the collection, admissibility and assessment of evidence*,<sup>440</sup> Tunisia is also obligated to respect the accused's rights to the presumption of innocence and equality of arms, which require the applicable burden of proof be applied to the facts necessary to prove each element of the crime and mode of liability charged at both the pre-trial and trial stages. Tunisia is also under an obligation to ensure the IVD and SCC are afforded 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. In light of this, the SCC practitioners will need to examine each case file to make a determination regarding whether each investigation was exhaustive, as defined by international standards, and, where there are gaps in the investigation, determine which procedures to adopt to ensure the investigation can be completed and the case can be prosecuted, where appropriate. The obligation on prosecutors to play an active role in proceedings to ensure the duty to investigate, prosecute and punish is met and rights of the accused are upheld requires the OPP to consider legal basis upon which it can facilitate additional investigations and the preparation of indictments, as well as actively participate in the prosecution of SCC cases where the Transitional Justice Framework is silent.

<sup>438</sup> ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* – Practical Guide 1 (2019), pp. 10-11.

<sup>439</sup> UN Basic Principles on the Independence of the Judiciary, principle 5. See also Amnesty International, *Fair Trial Manual*, Second Edition (2014), p. 109.

<sup>440</sup> See ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and best practices on the collection, admissibility and assessment of evidence* – Practical Guide 3 (2020), part 4.a.i.

With respect to the right of the accused to a fair trial, the IVD and SCC are under an obligation to respect, protect and fulfill the fair trial rights of the accused at all stages of the investigative and prosecutorial process. Among other things, this includes obligations to ensure the accused are promptly informed of the charges and have adequate time and facilities to prepare a defence, to be tried without undue delay, to be tried in one's presence and to defend oneself in person or through legal counsel. Within Tunisian law, the CCP provides the only codified and legally-binding set of criminal trial procedural rules currently available to the SCC. The Transitional Justice Framework does not explicitly authorize the SCC to adopt its own rules of procedure and to date the SCC has not purported to do so. Under article 10 the 2014 Constitution, Tunisian authorities have an obligation to comply with a prohibition on the "enactment of derogatory procedures that may prejudice the principles of fair trial." Given the absence of dedicated procedures for the conduct of the trial in the Transitional Justice Framework, the potential for inconsistencies in the application of laws between accused persons before the SCC and the general criminal procedure and the obligation to ensure the accused have equality of arms, SCC judges and prosecutors should consider whether CCP provisions should be applied to fill such gaps. In the event the CCP is applied at trial, the SCC will need to ensure that is applied in a manner that is consistent with Tunisia's obligation to ensure the accused's right to a fair trial under international law and standards.

With respect to the rights of victims, the SCC are under an obligation to ensure victims of crimes and their family members and dependents and individuals who have suffered harm when intervening to assist victims have the right to an effective remedy and the accordant right to have broad procedural standing in criminal proceedings, including to present and request evidence, present and interrogate witnesses, have access to documentation and evidence, to call expert witnesses, challenge and appeal the decisions of the judge or the court, including judgments or final decisions. Victims, family members and other affected persons must have access information all phases of the proceedings, including to access information regarding the procedures followed, the substance of investigations, the content of decisions and the reasons for those decisions, to enable them to participate effectively. Although the Transitional Justice Framework granted victims the right to file complaints and provide testimony to the IVD, it otherwise provides no guidance on victims, their family members and other affected persons' participation in SCC proceedings, such that SCC judges will need to have regard to the more detailed provisions under the CCP and international law and standards to ensure victims, their families and other affected persons are accorded the right to an effective remedy and to participate effectively in the proceedings.

Accordingly:

- i. SCC judges should be aware of relevant international law and standards applicable to Tunisia.<sup>441</sup> SCC judges should be aware that, as an organ of the State, an act (or failure to act) by the judge that is inconsistent with international law will place Tunisia in violation of its international obligations. SCC judges should accordingly seek to ensure that all their decisions and other acts or decisions not to act are consistent with Tunisia's international legal obligations.
- ii. To these ends, with respect to the investigation of cases referred to the SCC:
  - a. SCC judges should be prepared to review each case file referred to them with a view to determining whether the IVD investigation was effective and thorough, and thereby exhaustive, and whether further investigative steps are needed to meet Tunisia's international obligation in this regard;

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<sup>441</sup> See Bangalore Principles of Judicial Conduct, endorsed by ECOSOC resolution ECOSOC 2006/23, Value 6 (Competence and Diligence), Principle "Competence and diligence are prerequisites to the due performance of judicial office", application "6.4. A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms."

- b. Where additional investigations are required, SCC judges and prosecutors should consider whether the procedures prescribed by the CCP can be relied upon to ensure such investigations can be completed;
- c. With respect to cases for which the investigation is not complete but the file has been transferred to the SCC, SCC judges should consider whether the case should be referred to a *juge rapporteur*, the OPP and/or investigating judge for further investigations and, if so, under what law and procedure;
- d. With respect to cases for which the investigation is not complete and the file has not been transferred to the SCC, SCC prosecutors should consider whether the case should be referred to the SCC or an investigating judge for further investigations and, if so, under what law and procedure;
- e. With respect to cases which have been referred to a *juge rapporteur*, whether their appointment may infringe the requirement of an impartial tribunal, in particular where judges investigating the case would then sit as arbiters at trial, an accordingly whether other options for completing investigations should be considered;
- f. Where additional investigations are conducted but an indictment was already issued by the IVD, SCC judges and prosecutors should consider whether the indictment and the charges and facts contained therein reflect the evidence available in the case;
- g. Where additional investigations are conducted but no indictment has been issued or the indictment does not reflect the evidence in the case, SCC judges and prosecutors should consider whether the SCC or indictment chamber is competent to revise the indictment and what law and procedures they are obligated to follow; and
- h. SCC judges and prosecutors should consider what roles they and the parties to the case should play during additional investigations of cases that have been referred, with a view to ensuring the obligation of the OPP to play an active role is met and the rights of the accused, victims and witnesses are upheld;
- iii. With respect to the rights of the accused during the investigation and prosecution of SCC cases:
  - a. SCC judges and prosecutors should ensure the rights of the accused to liberty and a fair trial are respected and fulfilled, and therefore consider how the CCP and Transitional Justice Framework can be applied in a manner that ensures respect for the rights of the accused line with international law and standards;
  - b. SCC judges and prosecutors should consider the extent to which the CCP may be applied to ensure the rights of the accused are upheld where the Transitional Justice Framework is silent;
  - c. In particular:
    - i. Where additional investigations are undertaken:
      1. SCC judges and any other authorities involved in additional investigations of SCC cases should ensure that the accused is 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 for exercising these rights;
      2. The investigating authority should ensure the accused has the opportunity to participate, including by examining and cross-examining witnesses, requesting investigate steps be taken, and introducing independent expert evidence, and therefore to exercise their rights to equality of arms, to defend themselves and to examine witnesses;
      3. The SCC should determine whether the case should be temporarily suspended to ensure the accused can be informed of the nature of the charges against them and can exercise their right to adequate time and facilities to prepare a defence;



4. Where the case is suspended, SCC judges should consider whether it will impact the right to trial without undue delay in a manner requiring a remedy;
  5. Where accused persons are detained, whether the suspension of trials to conduct further investigations could violate the accused's right to liberty and whether the accused should be provisionally released;
- ii. With respect to the right to have access to counsel, where accused persons are detained, SCC judges should adopt measures to ensure the accused have unimpeded access to counsel during their detention;
  - iii. With respect to the right to adequate time and facilities to prepare a defence, SCC judges should ensure the accused has access to information regarding the charges and evidence in sufficient time to participate during an investigation and any interrogation that may be undertaken, and to prepare a defence at both the investigation and trial stages;
  - iv. With respect to the right to be tried in one's presence, SCC judges should use all means at their disposal, including legal powers to order coercive measures, to ensure the accused is present at trial. Trials *in absentia* should be avoided, with the possible exception of the narrowly defined circumstances as provided for by international law, namely when: (i) all necessary steps have been taken to inform the accused of the charges against them and notify them of the criminal proceedings; (ii) all necessary steps have been taken to inform the accused sufficiently in advance of the date and place of their trial and to request and compel their attendance; and (iii) the tribunal or court has taken all necessary steps to ensure the strict observance of defence rights, in particular by assigning legal counsel, and upholds the basic requirements of a fair trial;
  - v. If the SCC nevertheless decides to conduct a trial *in absentia*, SCC judges should ensure counsel are appointed to represent the interest of the accused, and ensure that the matter is automatically set for retrial if the person is apprehended;
  - vi. With respect to the right to defend oneself in person or through legal counsel, SCC judges should ensure the accused has adequate and effective representation of independent and competent legal counsel or has voluntarily waived their right to counsel, if they have not waived their right, whether to adjourn proceedings so that their right to counsel is met;
  - vii. With respect to the right to trial without undue delay, SCC judges should consider means to expedite the progress of trials, including by using all enforcement measures within their authority to ensure the attendance of accused persons and increasing sitting days where possible;
  - viii. With respect to the right to call and examine witnesses, SCC judges should ensure the parties have the full opportunity to examine and cross-examine witnesses, including by directing questions at witnesses as requested and where appropriate, and providing reasons where such requests are refused;
  - ix. With respect to the presumption of innocence and the right not to be compelled to incriminate oneself, SCC judges should ensure accused persons have the right to remain silent and exercise their discretion not to hold accused persons in contempt if they exercise such right;
  - x. With respect to the right to appeal, SCC judges should ensure all parties have the right to appeal interlocutory decisions, including on procedural matters discussed above, and final convictions or acquittals to a higher court, where feasible within its authority to do so;
- iv. With respect to the rights of victims to participate in proceedings and to an effective remedy:

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- a. SCC judges should give due regard to applicable international law and standards governing the right of victims of crimes and their family members and dependents and individuals who have suffered harm when intervening to assist victims to an effective remedy and the accordance right to have broad procedural standing in criminal proceedings;
  - b. SCC judges and any other authorities involved in additional investigations of SCC cases should ensure that victims 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 for exercising these rights;
  - c. SCC judges and any other authorities involved in additional investigations of SCC cases should ensure victims and their family members are able to exercise rights under Tunisian law to request to examine or cross-examine witnesses, directly or indirectly, where appropriate, and that victims and family reasons are provided with reasons where such requests are refused;
  - d. SCC judges and any other authorities involved in additional investigations of SCC cases should ensure victims and their family members have the opportunity to participate in such investigations, including by considering granting requests by victims to introduce evidence by independent experts, including medical examiners, to attend any hearings conducted in pursuit of such further investigations and to make relevant submissions; and
  - e. SCC judges should use all means at their disposal, including legal powers to order coercive measures, to ensure the accused is present at trial, in order to facilitate victims' right to an effective remedy.

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October 2020 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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