

# Tunisia: Upholding the Recommendations of the Truth and Dignity Commission on Justice Reform



International  
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A Briefing Paper

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## I. Introduction

Organic Law No. 2013-53 of 24 December 2013 on Establishing and Organizing Transitional Justice (the 2013 Law) provides for the setting up of a Truth and Dignity Commission ("Instance Vérité et Dignité", IVD).<sup>1</sup> The IVD was mandated to: (i) hold public or private hearings for victims of gross human rights violations committed between 1955 and 2013; (ii) document these violations; (iii) determine responsibilities; (iv) propose remedies to avoid their recurrence; and (v) develop a comprehensive reparations program.<sup>2</sup>

In addition, article 43 of the 2013 Law tasked the IVD with the formulation of recommendations for reform, including within the justice sector, to prevent the recurrence of human rights violations, protect human rights and promote the rule of law.<sup>3</sup>

The IDV began its work in June 2014. Pursuant to article 67 of the 2013 Law, on 31 December 2018, it submitted its final report to the authorities, which was eventually made public on 26 March 2019.<sup>4</sup> As mandated by the 2013 Law, a section of the IVD's report is dedicated to recommendations of reforms of, *inter alia*, the justice sector.<sup>5</sup> In order to understand the rationale behind these recommendations, it is important to note that the IVD documented extensively how the former regimes used and abused the judiciary to perpetrate gross human rights violations.<sup>6</sup> Reforming the justice sector, as a pillar of the rule of law, is thus meant to guarantee the non-repetition of human rights violations in Tunisia.

Pursuant to article 70 of the 2013 Law, the government had one year to prepare an action plan to implement the IVD's recommendations. Yet, to date, no action plan seems to have been adopted, and several of the IVD's recommendations, including concerning the reform of the justice sector, remain unimplemented.

With a view to promoting this important aspect of the work of the IVD, this Briefing Paper provides an analysis of some of the IVD's recommendations aimed at reforming justice institutions,<sup>7</sup> and formulates additional recommendations with regard to their implementation in accordance with international human rights law and standards.

## Suspension of the rule of law, the constitutional order and the separation of powers

On 25 July 2021, invoking article 80 of the Constitution on exceptional measures, President Kais Saied dismissed the government, declared himself the head of the executive branch and the Public Prosecution Office, suspended the country's legislature (the Assembly of the People's Representatives, ARP), and stripped the ARP's members of their parliamentary immunities.<sup>8</sup> Furthermore, Presidential Decree No. 117 of 22 September 2021 suspended most of the Constitution and entrusted the President with full executive and legislative powers, including to rule by decree on the functioning of the judiciary; the military; the security forces; political parties; unions and associations, without any possibility of judicial and/or constitutional review.<sup>9</sup>

1. 2013 Law, Title II.

2. 2013 Law, art. 39.

3. See also 2013 Law, art. 67.

4. The IVD's Final Comprehensive Report is 1869 pages long and is available in Arabic only. An Executive Summary of 644 pages has been translated into English and is available at [http://www.ivd.tn/rapport/doc/TDC\\_executive\\_summary\\_report.pdf](http://www.ivd.tn/rapport/doc/TDC_executive_summary_report.pdf) (last accessed on 28 October 2021).

5. IVD Final Comprehensive Report, Part V, pp. 203-217 and pp. 236-239. See also Executive Summary, pp. 565-579, pp. 594-597 and pp. 606-608.

6. Executive Summary, pp. 175-199.

7. This Briefing Paper focuses on the recommendations aimed at ensuring the independence of the judiciary as a whole. As such, it does not address the recommendations specifically related to the Court of Auditors, administrative courts and the Specialized Criminal Chambers.

8. See <https://www.icj.org/tunisia-presidents-power-grab-is-an-assault-on-the-rule-of-law/>. See also <https://www.icj.org/tunisia-president-must-reestablish-the-rule-of-law/> on the renewal of these measures.

9. See <https://www.icj.org/tunisia-reverse-the-presidents-power-grab/>. In particular, Decree 117 also abolishes the body in charge of reviewing the constitutionality of laws.

On 30 July, Yassine Ayari, a member of Tunisia's Parliament, who had called Saied's power grab a coup d'état, was arrested and imprisoned on the basis of a verdict rendered by a military court three years earlier for "defaming the army," following the lifting of his parliamentary immunity. He is currently being investigated by the military prosecutor's office for his Facebook posts virulently criticizing the President of the Republic's measures of 25 July.<sup>10</sup> A significant increase of the number of civilians facing military courts has been documented since 25 July, including a journalist, a blogger and another member of Parliament, simply for criticizing the President.<sup>11</sup>

At a time when the President has placed both the rule of law and the separation of powers in abeyance in Tunisia, the relevance of the IVD's recommendations aimed at ensuring the independence of the judiciary, as a critical safeguard against the return of authoritarianism and the recurrence of human rights violations, could not be overemphasized.

In furtherance of the transitional justice process, action must be taken to ensure the full implementation of the IVD's recommendations as soon as the constitutional order returns.

10. See <https://www.icj.org/tunisia-judiciary-must-act-as-a-check-on-presidents-power-grab/>; see also <https://inkyfada.com/en/2021/09/28/how-can-military-courts-judge-civilians/>.

11. See <https://www.amnesty.org/en/latest/news/2021/11/tunisia-alarming-increase-in-number-of-civilians-facing-military-courts/>.

## II. Reforming the judiciary to ensure its independence and accountability

To prevent any further abuse of the judiciary for political or personal ends, the IVD formulated several recommendations to strengthen the independence of the judiciary, emphasizing that:

"[t]he reform of the judiciary requires, essentially, the completion of its independence so that it can fulfil its constitutional role as an authority that ensures the administration of justice, the rule of law, the protection of rights and freedoms through working to introduce a set of reforms in accordance with the international standards on judicial independence."<sup>12</sup>

It is the duty of all governmental and other institutions "to respect and observe the independence of the judiciary".<sup>13</sup> An independent judiciary is the foundation of the rule of law and democratic governance. Tunisia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1969. Article 14 of the ICCPR guarantees to everyone the right to equality before courts and tribunals and to a fair and public hearing by a competent, independent and impartial tribunal established by law. This is "an absolute right that is not subject to any exception".<sup>14</sup> As a party to the ICCPR, Tunisia is obligated to respect this right, as well as to ensure the adoption of legal and other measures as necessary to give effect to this right, including by providing the necessary safeguards to secure its realization.<sup>15</sup>

The independence of the judiciary under article 14 of the ICCPR comprises not only actual judicial independence from interference by the other branches of the State, namely, the executive and the legislature, but extends also to the procedures governing the status of judges (e.g., their appointment, remuneration, tenure, promotion, suspension, dismissal and disciplinary sanctions).<sup>16</sup> Accordingly, the IVD's recommendations address multiple aspects that affect the independence of the judiciary, including the role of the High Judicial Council with regard to the status of judges; the means to effectively achieve independence; the status of the Public Prosecution; and the military justice system. Each of those aspects is explored, in turn, in greater detail below.

### i. Strengthening the role of the High Judicial Council

Pursuant to article 114 of the Constitution and article 1 of the Organic Law No. 2016-34 of 28 April 2016 on the High Judicial Council (HJC), the HJC ensures the sound functioning and the independence of the judiciary. The IVD recommended that the HJC "be strengthened by providing all possible resources to ensure the proper functioning of its work and its independence."<sup>17</sup> It further formulated several recommendations on the role the HJC ought to play with regard to the career and discipline of judges to enhance their independence.

#### A. Career of judges

The IVD recommended that the appointment of judges and all other judicial employees be placed under the auspices of the HJC, and be based on competence and ethical considerations.<sup>18</sup> Such an approach is in line with principle 10 of the UN Basic Principles on the Independence of the Judiciary according to which, "[p]ersons selected for judicial office shall be individuals of integrity and ability" (emphasis added).

Certain legislative reforms have been adopted to this effect. For example, pursuant to article

12. Executive Summary, p. 594.

13. 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 held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of November 1985 and 40/146 of 13 December 1985 ("UN Basic Principles on the Independence of the Judiciary"), Principle 1.

14. Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial ("General Comment No. 32"), UN Doc. CCPR/C/GC/32, para. 19.

15. ICCPR, article 2.

16. General Comment No. 32, paras. 19-20.

17. Executive Summary, p. 594.

18. Executive Summary, pp. 594-595.

45 of Organic Law No. 2016-34, the HJC decides on the appointment, promotion and transfer of members of the judiciary, both judges and prosecutors, including those of the highest ranks, based on competence, impartiality and independence.

However, article 4 of Government Decree No. 2020-28 of 10 January 2020 on the attributions of the High Judicial Institute,<sup>19</sup> which is in charge of initial and on-going training of judges, provides that jury members in charge of the competitive examination for the recruitment of trainee judges shall be appointed by a decision of the Head of Government upon proposal of the Minister of Justice. As detailed in the ICJ's report, "The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future", on the independence of the judiciary in Tunisia, while international standards do not require that the executive and legislative branches be absolutely precluded from playing a role in judicial appointments, they emphasize the necessity of ensuring that the selection process be free of political taint.<sup>20</sup>

Moreover, article 42 of Organic Law No. 2016-34 merely entrusted the HJC with a consultative role concerning the training of judges at the High Judicial Institute, which remains under the control of the Ministry of Justice.<sup>21</sup> With respect to this, international standards require that all aspects of the career of judges, including their training, should be free from any undue or improper influence of the executive or legislative branches.<sup>22</sup>

Therefore, the ICJ considers that Decree No. 2020-28 and related laws should be amended to prevent any influence of the executive branch in the selection of judges and, more generally, to ensure that the High Judicial Institute<sup>23</sup> be transferred under the supervision of the HJC

The IVD further recommended that all judges, including administrative judges and judges of the Court of Auditors, receive a common, standard training by the High judicial Institute. It further stated that judges' training programs "should be reviewed to ensure more effective fulfilment of the new role entrusted to them pursuant to the Constitution,"<sup>24</sup> namely, "ensuring the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms."<sup>25</sup>

In this respect, the ICJ considers that the law should ensure that judges be provided with adequate and appropriate initial and on-going training, including training on international human rights law.

## B. Disciplinary regime and accountability

The IVD recalled that "[t]he principle of immunization [sic] [of judges] against dismissal should be upheld as a fundamental guarantee for the independence of judges, while respecting the competence of the [HJC] concerning discipline, promotion and shift in judgeships in accordance with the law and the international standards for the independence of the judge."<sup>26</sup>

This principle is enshrined in article 107 of the Constitution. The ICJ notes, however, that article 107 does not fully guarantee the principle of security of tenure, as it does not include a

19. Full title is Government Decree No. 2020-28 of 10 January 2020 on the attributions of the High Judicial Institute and the judicial studies and training regime

20. ICJ report, The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, 13 May 2014, pp. 29-30, available at <http://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 6 October 2021.

21. As per art. 2 of Law No. 85-80 of 11 August 1985 creating the High Judicial Institute and defining its mission, as amended by Law No. 92-70 of 27 July 1992.

22. ICJ report, The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, 13 May 2014, p. 34, available at <http://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 6 October 2021. See in particular Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para. 14, with particular attention given to the training of judges; Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities (hereafter "CoM Recommendation (2010)12"), para. 57; European Charter on the Statute for Judges, para 2.3, which refers to para 1.2.

23. Executive Summary, p. 595, with regard to the Court of Auditors and Administrative Courts.

24. Executive Summary, p. 596.

25. Constitution, art. 102.

26. Executive Summary, p. 596.

guarantee of security of tenure until a stated retirement age or the expiry of their term of office, as required by international standards.<sup>27</sup>

The IVD further observed that the HJC, through its three components, namely, the judicial, administrative and financial councils, is competent to rule on disciplinary actions against judges, but that it remained to be seen whether future reforms would include procedural safeguards to ensure the presumption of innocence and make sure that the General Inspection Service (GIS), which is placed under the direct authority of the Minister of Justice,<sup>28</sup> be moved under the authority of the HJC.<sup>29</sup> Indeed, international standards require that the disciplining of judges, and any decisions concerning suspension or removal, should only be made following a fair hearing by an independent body on the basis of established standards of judicial conduct and should be subject to review.<sup>30</sup>

While Organic Law No. 2016-34 entrusts disciplinary decisions concerning judges to each competent council of the HJC,<sup>31</sup> it still confers important prerogatives to the GIS, which continues to be under the Ministry of Justice's control. While complaints against a judge can now be directed to either the HJC or the Minister of Justice, who shall forward them without delay to the GIS for investigation, the Inspector General may also act on their own initiative. Upon completion of the investigation, the Inspector General may either dismiss the case or refer it to the HJC. The plaintiff may submit a request for reconsideration of dismissal decisions to the Inspector General.<sup>32</sup> The GIS therefore entirely controls the referral of disciplinary cases to the HJC.

This is a source of concern because as confirmed by the provisional authority in charge of determining the constitutionality of laws, the intervention of the Executive power in disciplinary actions against magistrates undermines the independence of the judiciary.<sup>33</sup>

Therefore, in order to fully implement the IVD's recommendation in line with the Constitution and international standards, the ICJ considers that the structural ties between the GIS and the executive power should be rescinded and that the GIS should be placed under the supervision of the HJC. Its inspection powers could be expanded to cover administrative and auditors' courts and judges, something that has not been possible until now as neither falls under the authority of the Ministry of Justice.

As regards the fairness of disciplinary proceedings against judges, the ICJ notes that Organic Law No. 2016-34 has brought about significant improvements, including the right of the concerned judges to be assisted by a lawyer, to have adequate time and facilities to prepare a defence, and to an independent judicial review.<sup>34</sup> The ICJ recalls, however, that the law should be improved further by ensuring that the sanctions that are imposed following a finding of misconduct be proportionate and by ensuring that judges may be dismissed only on serious grounds of misconduct or incompetence.<sup>35</sup>

27. UN Basic Principles on the Independence of the Judiciary, Principle 12; ACHPR Principles and Guidelines, Section A, Principle 4(l); CoM Recommendation (2010)12, para. 49.

28. As per art. 24 of Decree No. 2010-3152 of 1 December 2010 on the organization of the Ministry of Justice, Official Gazette No. 99 of 10 December 2010, as amended by Government Decree No. 2018-334 of 6 April 2018.

29. Executive Summary, p. 571 and French translation of the Executive Summary, at p. 566.

30. UN Basic Principles, Principles 17 & 20; ACHPR Principles and Guidelines, Section A, Principle 4(q); CoM Recommendation (2010)12, para. 69; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, paras. 60-61.

31. Art. 58.

32. Art. 59.

33. See Decision No. 02/2015 of the provisional authority in charge of determining the constitutionality of laws of 8 June 2015 on the draft Organic Law on the HJC (Official Gazette of the Republic of Tunisia, 12 June 2015, Issue 47): "... The Minister of Justice having the authority, upon the decision of the Inspector General, to re-examine the complaints, reports and grievances attributed to a judge, puts him in a privileged position vis-à-vis the decision to dismiss the case made by the Inspector General in a field related to discipline, which prejudices the independence of the Judiciary provided for under articles 102 and 114 of the Constitution, which entails that article 60 of the Draft Law is declared anti-constitutional."

34. Art. 60-67.

35. CoM Recommendation (2010)12, para. 69; ACHPR Principles and Guidelines, Section A, Principle 4(p); General Comment No. 32, para. 20.

Moreover, the IVD recommended that “[a] code of ethics [...] be enacted [...] and should be applied to all judicial bodies.”<sup>36</sup> This is necessary in several respects: to ensure judicial accountability, and that judges hold themselves to the highest standards of integrity so as to regain people’s trust; and to ensure that all disciplinary, suspension or removal proceedings be determined in accordance with established standards of judicial conduct<sup>37</sup> and due process.

Article 42 of Organic Law No. 2016-34 entrusts the HJC with the drafting of such code. Yet, it has been under preparation for several years.

The ICJ considers that the HJC should expedite the drafting of a sufficiently detailed and comprehensive code of conduct, in close consultation with judges, and in accordance with international standards, including the UN Basic Principles on the Independence of the Judiciary and the Bangalore Principles on Judicial Conduct.<sup>38</sup> This code of conduct should be established in law as the basis on which judges will be held to account professionally.

In order to further ensure judicial accountability, the IVD also recommended strengthening the HJC’s role in enforcing the obligation incumbent on judges to declare their assets.<sup>39</sup> Law No. 2018-46 of 1 August 2018 on the declaration of assets and interests and the fight against illicit enrichment and conflict of interest stipulates that, within a 60-day maximum period from the date of their appointment, judges must declare their assets and interests; they must also renew this declaration every three years, and declare any substantial modification to their assets and interests. This is an important oversight tool to detect, address and prevent corruption.

*In light of the above, the ICJ endorses the IVD’s recommendations and, in particular, urges the Tunisian authorities to:*

- I. Adopt a new statute for judges consistent with international standards, including by ensuring that all aspects related to their selection, appointment, transfer and disciplining be based on objective, merits-based criteria, and transparent procedures;**
- II. Adopt a consolidated law on the HJC that abrogates outdated provisions from laws and decrees that do not comply with the Constitution and international standards; in particular, such law should:**
  - (i). Empower the HJC in all matters relating to judges’ career, including their selection, appointment, training, assessment, transfer, promotion, disciplining and termination of tenure, excluding any substantive role in the same for the executive and legislative branches;**
  - (ii). Mandate the HJC to oversee the procedures for trainee judges’ selection, as well as the judges’ initial and on-going training, and to ensure that the High Judicial Institute be placed under the supervision of the HJC;**
  - (iii). Grant oversight of all aspects of disciplinary procedures to the HJC, including over the appointment and functioning of members of the judicial inspection body of the GIS, and over the commencement of disciplinary proceedings;**
  - (vi). Provide that the code of conduct adopted by the HJC be the basis on which judges will be held to account professionally;**
  - (v). Guarantee members of the judiciary’s security of tenure until a set retirement age or for an adequate fixed term;**
  - (vi). Limit the instances in which a judge may be removed from office to the following events: reaching retirement age, if applicable, or the end of a fixed period of tenure; resignation; being medically certified as unfit; or as a result of the imposition of a lawful and proportionate sanction of dismissal imposed following a full and fair disciplinary procedure.**
- III. Guarantee adequate, appropriate, effective initial and on-going training for judges at the expense of the State.**

36. Executive Summary, p. 596.

37. UN Basic Principles on the Independence of the Judiciary, Principle 17.

38. See ICJ, Tunisia: Judicial Conduct and the Development of a Code of Ethics in Light of International Standards, November 2019, <https://www.icj.org/wp-content/uploads/2019/11/Tunisia-Code-of-Ethics-Advocacy-Analysis-Brief-2016-ENG.pdf>, last accessed on 31 October 2021.

39. Executive Summary, p. 596.

In addition, the ICJ notes that the IVD’s recommendations aimed at strengthening the role of the HJC, some of which are already enshrined in the Constitution and Organic Law No. 2016-34, highlight the need to further consolidate the status of the HJC as a guarantor of judicial independence and to preserve the progress made in enhancing independence of the judiciary. This requires not only the adoption of reforms, but also the effective implementation of those reforms that have already been adopted. In this regard, the HJC itself bears an important responsibility and must play its role to the fullest to ensure that independence goes along with accountability, including by adopting a sufficiently detailed and comprehensive code of conduct, in close consultation with judges, and in accordance with international standards.

## ii. Providing means to achieve the judiciary’s independence in practice

The IVD recommended that “[j]ustice should be reorganized in such a way as to ensure the administrative and financial independence of [...] courts, to free the administration of justice from subordination to the executive power as one of the most important [avenues] that enabled the executive power during the tyranny period to interfere in the functioning of the judiciary and prevent it from guaranteeing the rule of law, to enforce it towards all and to protect rights and freedoms.”<sup>40</sup>

The IVD specifically recommended that the judiciary be provided with sufficient resources to allow it to fulfil its constitutional duty to ensure the administration of justice,<sup>41</sup> insisting that strengthening its human resources is necessary to accelerate the adjudication of cases while ensuring fair trial rights.<sup>42</sup> The IVD added that, “judges should be provided with a decent level of pay and working conditions that will enable them to perform their job to their best and that will immunize the independence of their decision.”<sup>43</sup> This is in line with international standards on the independence of the judiciary.<sup>44</sup>

With regard to the financial independence of the judiciary, international standards require that the judiciary be involved in the drafting of its own budget.<sup>45</sup> While article 113 of the Constitution and article 1 of Organic Law No. 2016-34 guarantee the financial independence of the HJC, the ICJ considers that in addition, the HJC should be empowered to develop the budget for the judiciary, in consultation with parliament, and should be granted oversight over the budget for the judiciary.

Several specific recommendations of the IVD aim to prevent interference with judicial decisions and their implementation. For example, among other things, the IVD recommended that: “[c]ourt protection should be provided through imposing appropriate penal and administrative sanctions on anyone proven to be involved in exerting pressure on judges and witnesses and keeping documents and evidence.”<sup>46</sup> The IVD also recommended the creation of a “judicial police body, under the supervision of the Ministry of Interior, working under the authority and supervision of the presidents of courts and public prosecutors, responsible for securing courts, notifying summons, executing the judicial warrants and enforcing orders.”<sup>47</sup>

40. Executive Summary, p. 595.

41. Executive Summary p. 597.

42. Executive Summary, p. 595.

43. Executive Summary, p. 596.

44. Principle 7 of the Basic Principles on the Independence of the Judiciary stipulates that “[i]t is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.” Similarly, the Bordeaux Declaration states: “Adequate organisational, financial, material and human resources should be put at the disposal of justice.” (Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Judges and Prosecutors in a Democratic Society, CM(2009)192). The ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, specify the need for “adequate remuneration” for judicial officers and prosecutors (Section F, principle b and Section A, Principle 4(m)).

45. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 39; ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 (hereafter “ACHPR Principles and Guidelines”), Section A, Principle 4(v); Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities (hereafter “CoM Recommendation (2010)12”), para. 40; International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioners’ Guide No. 1, International Commission of Jurists, Geneva, 2007, p. 33.

46. Executive Summary, p. 596.

47. Executive Summary, p. 596. See also p. 594, where the IVD recommended placing judicial police officers under the supervision of the public prosecution.

In this regard, the ICJ endorses the need to adequately address and sanction, as appropriate, instances of interference with the judiciary, including acts that disrupt the enforcement of judicial decisions. At times, resort to the criminal law may be warranted by the gravity of such conduct. Moreover, the ICJ recalls that it has repeatedly denounced the lack of implementation by law enforcement officers of court orders handed down by the Specialised Criminal Chambers (SCC).<sup>48</sup> In particular, accused persons have failed to appear for trial before the SCC, and law enforcement officials have failed to execute court summons and related court orders to compel their attendance. Such a failure constitutes an obstruction of justice and denies victims of human rights violations access to justice and effective remedies. As such, it is not only a blow to the transitional justice process and the fight against impunity for serious human rights violations, but also a manifest breach of the rule of law: it strikes at the heart of the proper functioning of the separation of powers by voiding the judiciary's decisions of any effect.

*In furtherance of these IVD's recommendations, the ICJ urges the Tunisia authorities to:*

- I. Empower the HJC to consult directly with the legislative branch in setting the budget for the judiciary and grant the HJC oversight of the judiciary's budget;**
- II. Guarantee sufficient human and financial resources and financial autonomy for the judiciary and ensure adequate working conditions and remuneration for judges, as well as by guaranteeing health and other social security benefits and a pension on retirement to them;**
- III. Prohibit any undue or improper influence or interference from any source and sanction any such conduct appropriately as well as any attempts to undermine the independence and impartiality of judges;**
- IV. Ensure that judicial decisions and orders be fully implemented, and adequately address and punish attempts to obstruct the course of justice.**

### iii. Ensuring the independence of the Public Prosecution

Within the Tunisian criminal justice system, the Public Prosecution is the authority responsible for and empowered to initiate and carry out public prosecutions. Pursuant to the Code of Criminal Procedure, the Public Prosecution is also responsible for ensuring the enforcement of the law, including of judicial rulings.<sup>49</sup> As detailed in the above-mentioned ICJ's report on the independence of the judiciary in Tunisia, international standards aim to ensure that prosecutors play an effective role in the administration of justice, including by ensuring the right of the accused to a fair trial, the protection of human rights and the rule of law. In this context, the ICJ underscores that under international standards the independence or autonomy of the prosecutor's office is not as imperative in nature as that of the courts. International standards recognize and cater for the fact that the status and role of prosecutors differ in some national legal systems, and that their role bears upon the State's prosecution policy. At the very least, however, prosecutors are required to act with impartiality and objectivity, although there is a growing tendency towards a requirement of independence.<sup>50</sup>

The 2014 Constitution changed the status of the Public Prosecution by emphasizing in article 115 that it "is part of the judicial justice system, and benefits from the same constitutional protections," including independence.<sup>51</sup> However, the same provision specifies that the magistrates of the public prosecution service exercise their functions "within the framework of the penal policy of the State."

The IVD recommended that "[a]n organic law should be enacted to guarantee the independence of the judiciary in accordance with article 115 of the Constitution, especially the independence of the Public Prosecution from the Ministry of Justice,"<sup>52</sup> thus emphasizing the need to incorporate

48. See e.g. <https://www.icj.org/tunisia-prosecutors-are-failing-victims-of-serious-human-rights-violations/>; <https://www.icj.org/tunisia-joint-paper-on-the-specialized-criminal-chambers-published/>; <https://www.icj.org/wp-content/uploads/2021/03/Tunisia-Special-Procedures-Joint-Submission-2021-FRE.pdf>.

49. Art. 20 and 22 of the Code of Criminal Procedure.

50. ICJ report, The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, 13 May 2014, pp. 68-72, available at <http://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 6 October 2021.

51. As enshrined in art. 102 of the Constitution.

52. Executive Summary, p. 595.

these constitutional principles into the laws governing the Public Prosecution. Indeed, the Statute for judges and the Code of Criminal procedure are yet to be amended to ensure compliance with the Constitution in this regard.

While, as described above, Organic Law No. 2016-34 now subjects the career and discipline of all magistrates, including prosecutors, to the overall authority of the HJC, the Law No. 67-29 of 14 July 1967 on the organisation of the Judiciary<sup>53</sup> remains in force in so far as it has not been amended by subsequent laws.<sup>54</sup> In particular, pursuant to article 15 of that Law, Public Prosecution magistrates remain subject to the authority and supervision of their direct superiors and the authority of the Minister of Justice. This further illustrates the need for a new consolidated statute for judges that comply with international standards and abrogates outdated laws, as the ICJ recommended above.

Moreover, articles 21 to 23 of the Code of Criminal Procedure<sup>55</sup> allow for the Ministry of Justice to give instructions to the Prosecutors General, including to initiate prosecution in individual cases, that the latter are bound to follow in their written submissions, although they can freely develop oral submissions during hearings. The ICJ considers that the draft reform of the Code of Criminal Procedure should amend these provisions in compliance with international standards.

*In furtherance of this IVD's recommendation, the ICJ urges the Tunisian authorities to:*

- I. Amend Law No. 67-29, in particular article 15, to remove the hierarchical authority of the Minister of Justice over the Public Prosecution, including the ability to control and direct prosecutors.**
- II. Reform the Code of Criminal Procedure to ensure its full compliance with the Constitution and international standards; in particular, by removing any reference therein to the Minister of Justice having authority over the Public Prosecution and the power to issue instructions in individual cases, and by limiting any role of the Minister of Justice to the possibility to inform the competent Public Prosecutor of the commission of a crime and to coordinate with the heads of the Public Prosecution regarding the implementation of the State's criminal policy.**

### iv. Reforming the military justice system

Article 110 of the Constitution reads:

"The different categories of courts are established by law. No special courts may be established, nor any special procedures that may prejudice the principles of fair trial. Military courts are competent to deal with military crimes. The law shall regulate the mandate, composition, organization, and procedures of military courts, and the statute of military judges."

The IVD formulated the following recommendations:

"Specialized judicial chambers in the first instance courts should be established to try crimes committed in or around the barracks by military personnel. Civilians should not be referred to [the military justice system] in accordance with the provisions of the constitution and the international standards. As a transitional step, the Military Justice Code should be amended to fix the substantive jurisdiction of the military courts and to make them exclusively competent in crimes committed by military personnel within and around the barracks, in accordance with the provisions of the article 110 of the Constitution."<sup>56</sup>

53. Law No. 67-29 on the organisation of the Judiciary, the High Judicial Council and the status of magistrates.

54. Pursuant to art. 20 of Organic Law No. 2013-13 of 2 May 2013, the provisions of Law No. 67-29 that have not been amended or abrogated by the said Organic Law remain in force. Similarly, art. 78 of Organic Law No. 2016-34 provides that unless contradictory to the said Organic Law, the provisions of Law No. 67-29 shall remain applicable.

55. Law No. 68-23 of 24 July 1968, as amended by Law No. 2016-5 of 16 February 2016.

56. Executive Summary, p. 595. See also p. 577, where the IVD regretted that the reforms adopted following the revolution did not prohibit military courts from trying civilians and that "many civilians continue to be tried and brought before military courts for crimes including, for example, the exercise of freedom of expression."

The Code of Military Justice (CMJ)<sup>57</sup> is yet to be reformed as required by article 110 of the Constitution. The ICJ considers that the CMJ fails to comply with international standards on judicial independence and that both the Constitution and the IVD's recommendation are insufficient in this regard.

As set out in more detail in the above-mentioned ICJ's report on the independence of the judiciary in Tunisia,<sup>58</sup> although military judges are said to be independent from the military hierarchy,<sup>59</sup> military courts cannot be considered independent and impartial, as required by, among others, the right of everyone accused of a criminal offence to "a fair and public hearing by a competent, independent and impartial tribunal established by law" guaranteed by article 14 of the ICCPR, for the following reasons. First, the executive and, in particular, the Minister of Defence controls the recruitment and appointment process of military judges.<sup>60</sup> Second, members of the Ministry of Defence, including the Minister of Defence who sits as President, dominate the Military Judicial Council (MJC), which is entrusted with the military judges' disciplinary process.<sup>61</sup> Third, prosecutors and investigating judges operating in military courts remain members of the military and therefore remain subsumed within the military chain of command. They therefore lack the required independence and impartiality, as per international standards.<sup>62</sup>

Moreover, as detailed in ICJ's report on the rights of victims of human rights violations in Tunisia,<sup>63</sup> the provisions of the CMJ and Decree-Law No. 82-70 of 6 August 1982 on the Internal Security Forces (ISF) that grant military courts jurisdiction over non-military offences, including gross human rights violations and offences committed by civilians, run counter to international law and standards.<sup>64</sup> According to article 1 of the CMJ, the subject-matter jurisdiction of military courts covers the potentially broad scope of "cases of a military character". Article 5 of the CMJ specifies that military courts have jurisdiction over both ordinary crimes committed by military personnel and ordinary crimes committed against military personnel, while article 8 expressly provides that military courts may try civilians accused of such offences.

In addition, according to article 22 of Decree-Law No. 82-70, military tribunals have competence over cases involving "agents of the ISF for acts that took place in, or on the occasion of, the exercise of their functions when the alleged facts are related to their responsibility in the areas of internal and external security of the State, or to the maintenance of order on the public roads and in public places and in public or private businesses, and, during or following public meetings, processions, parades, demonstrations and gatherings". This provision allows for civilians to be brought before the military justice system.

In his report on Tunisia, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence recommended that the Tunisian authorities should "ensure that the jurisdiction of military tribunals is limited to military personnel who have committed

57. As established by Decree No. 9 of 10 January 1957 and amended by Decree-Laws No. 2011-69 and 2011-70 of 29 July 2011.

58. ICJ report, The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, 13 May 2014, available at <http://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>, last accessed 6 October 2021.

59. Art. 5 of the CMJ.

60. The list of candidates authorized to sit for the examination is established by a commission set up by an order of the Minister of Defence and chaired by the General Prosecutor Director of Military Justice (Decree-Law No. 2011-70, art. 10). The modalities and programme of the examination are also fixed by an order of the Minister of Defence (Decree-Law No. 2011-70, art. 11). However, the Judicial Council of the HJC issued a decision on 14 July 2020, according to which the designation of judicial judges in military courts shall fall within its competence, thereby excluding the role of the executive in the appointment of judicial magistrates provided by art. 2 of Decree-Law No. 2011-70.

61. The composition of the MJC is set out at art. 14 of Decree-Law No. 2011-70.

62. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/20/19 (2012), para. 57.

63. ICJ report, Illusory Justice, Prevailing Impunity Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia, 13 May 2016, available at <https://www.icj.org/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf>, last accessed 6 October 2021.

64. See e.g. Draft Principles Governing the Administration of Justice through Military Tribunals (the Decaux Principles), UN Doc. E/CN.4/2006/58 (2006), Principles 5 and 9; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle L(a); Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 2005, Principle 29. See also ICJ, Military

military offences".<sup>65</sup> Military courts lack impartiality to conduct investigations of gross human rights violations. This is particularly the case where the alleged perpetrators of human rights violations under investigation are themselves members of the military.<sup>66</sup>

In this regard, the ICJ considers that the above-mentioned IVD's recommendation to make, as a transitional step, military courts exclusively competent for crimes committed by military personnel within and around the barracks falls short of the international human rights standards set out above – as does article 110 of the Constitution – because they both fail to exclude serious human rights violations from the jurisdiction of military courts, and to restrict the jurisdiction of the latter to military offences only. For example, "[c]rimes committed in or around the barracks by military personnel" may include human rights violations, as well as ordinary crimes, neither of which would constitute purely military offences. Therefore, the ICJ considers that this IVD recommendation is unacceptable, even as a temporary, transitional measure.

Moreover, it is unclear whether the "specialized judicial chambers in the first instance courts" that the IVD proposes to establish in the longer term to try such crimes would meet the standards of an independent and impartial tribunal. Nor is it explained what would require the establishment of specialized chambers, even within ordinary civilian courts, for such crimes committed by the military, especially if these encompass human rights violations.

*In light of the above, the ICJ recommends that the military justice system be reformed so as to:*

- I. Guarantee the independence and impartiality of military tribunals;**
- II. Limit the jurisdiction of military tribunals to military personnel and ensure that military courts do not have jurisdiction over civilians even where the victim is a member of the armed or security forces or the accused is alleged to have committed the offence together with a member of the military;**
- III. Explicitly restrict the jurisdiction of military tribunals to cases involving members of the military for alleged military offences (ensuring the perpetration of grave human rights violations be explicitly excluded from any such offences) and to this end:**
  - (i). Limit the offences set out in article 5 of the CMJ accordingly;**
  - (ii). Explicitly exclude the jurisdiction of military courts in cases involving human rights violations and crimes under international law such as genocide, enforced disappearance, extrajudicial executions or torture, war crimes and crimes against humanity;**
  - (iii). Ensure that allegations of violations of human rights committed by the military or armed forces are investigated by civilian authorities; and**
  - (iv). Amend article 22 of Decree-Law No. 82-70 on the ISF such that all crimes committed by the ISF or by civilians are heard before ordinary courts.**
- IV. Ensure that judges who sit on military tribunals are independent and impartial and that they have a status guaranteeing their independence and impartiality. In particular, to this end ensure that:**
  - (i). The selection of judges to sit on military courts be based on clear criteria, including legal qualifications, experience and integrity;**
  - (ii). The HJC play a role in the selection of judges for military courts and that the selection process be independent and impartial and as consonant with the required independence and impartiality of the judiciary;**
  - (iii). Judges sitting on military courts have security of tenure and be accountable in fair proceedings for breaches of a clearly defined code of ethics, in accordance with international standards on judicial conduct; and**
  - (iv). Judges on military courts remain outside the military chain of command and military authority in respect of matters concerning the exercise of any judicial function.**

65. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mission to Tunisia (11-16 November 2012), UN Doc A/HRC/24/42/Add.1 (2013), para 85(c).

66. See e.g. European Court of Human Rights, Voiculescu v. Romania, Application No. 5325/03, Judgement of 3 February 2009. See also Concluding Observations on Colombia, UN Doc. CCPR/C/79/Add.76, 5 May 1997, paras. 19, 23, 32,34; Concluding Observations on Venezuela, 26 April 2001, UN Doc. CCPR/CO/71/VEN, para.8; Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 7; Concluding Observations on Chile, 30 March 1999, UN Doc. CCPR/C/79/Add.104, para.10; Concluding Observations on Belarus, 19 November 1997, UN Doc. CCPR/C/79/Add.86, para. 9; Concluding Observations on Macedonia, 18 August 1998, UN Doc. CCPR/C/79/Add.96, para. 10; Concluding Observations on France, 4 August 1997, UN Doc. CCPR/C/79/Add.80, paras. 16 et seq; and Report of the HRC to the General Assembly, 35th period of session, UN Doc. A/35/40 (1980), paras. 249 et seq.

III. Conclusion

The 2014 Constitution and Organic Law 2016-34 constitute significant progress in limiting the influence of the Executive power over the judiciary and in ensuring its independence through the HJC. Yet, the analysis of the laws in force in light of the IVD’s recommendations illustrates the need for a comprehensive reform of the laws contrary to the Constitution and to international standards, as well as the adoption of additional measures called for by the IVD, as further important steps in establishing and maintaining the independence and integrity of the judiciary.

The ongoing power-grab by the President and the abusive use of exceptional measures show that it is more important than ever that the judiciary be able to act as a check on the other branches of the State and be properly empowered to curb their abuse of power. This highlights the relevance of the IVD’s recommendations for reforms as guarantees of non-recurrence. Along with the long overdue establishment of the Constitutional Court, the reforms required to fully ensure the independence of the judiciary, as outlined in this Briefing Paper, must be promptly adopted by the legislature once the constitutional order is back in place.

However, reforms alone do not suffice: there is also a need to change mind-sets among justice actors to preserve their independence and regain the trust of the public, which can only be achieved through full empowerment along with enhanced accountability. In this regard, as the guardian of the independence of the judiciary, the HJC must play its mandated role to the fullest. This is all the more important in the current political circumstances.

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