

# THE DISMANTLING OF JUDICIAL INDEPENDENCE IN TUNISIA: DECREE 11 ON THE TEMPORARY HIGH JUDICIAL COUNCIL

QUESTIONS  
AND ANSWERS

*May 2022*



This Question and Answer briefing by the International Commission of Jurists (ICJ) aims to provide Tunisians, civil society actors and other stakeholders with a user-friendly guide on Decree-law No. 11-2022 dissolving the High Judicial Council (hereinafter ‘HJC’) and creating a “Temporary High Judicial Council”, and to describe the detrimental impact of these developments on the independence of the judiciary in Tunisia. In particular, it seeks to answer the following questions:

- (1) What is the HJC and what is its mandate under the 2014 Constitution;**
- (2) Does the President of the Republic have the power to dissolve the HJC;**
- (3) How Decree 11 undermines the institutional independence of the judiciary;**
- (4) How Decree 11 undermines the individual independence of judges;**
- (5) How Decree 11 overhauls the disciplinary system for judges;**
- (6) How Decree 11 imposes arbitrary restrictions on judges’ fundamental rights; and**
- (7) How to uphold judicial independence in Tunisia.**

# OVERVIEW AND BACKGROUND

The one-party rule of President Zine El Abidine Ben Ali consolidated power in the hands of the executive while simultaneously critically undermining the independence of the judiciary both in law and in practice. [Law No. 67-29 of 14 July 1967](#) governed the organization of the judiciary, the High Judicial Council (*Conseil supérieur de la magistrature*, hereinafter ‘HJC’) and the statute for judges. The HJC was firmly under the control of the executive. The President of the Republic presided over it and the Minister of Justice was its vice-president. The executive appointed most of its members. Political considerations often influenced decisions concerning the career of judges, including their assignment, transfer and dismissal.

Following the popular uprising that toppled President Ben Ali, the National Constituent Assembly approved by an overwhelming majority the [2014 Constitution](#), which provides for strong guarantees for the establishment and enforcement of the rule of law and the separation of powers. The 2014 Constitution also recognizes the institutional independence of the judiciary and its individual members and establishes an independent HJC, empowered to oversee the career of judges, including with respect to disciplinary matters, thereby marking an important step towards ending the executive’s

interference in judicial affairs. [Organic Law No. 2016-34 of 28 April 2016 on the High Judicial Council](#) (hereinafter ‘Organic Law 2016-34’) consolidated the independence of the HJC.

Since 25 July 2021, however, Tunisia’s democratic institutions, the rule of law, the separation of powers and judicial independence are under assault. Invoking article 80 of the 2014 Constitution on “the state of exception”, 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, hereinafter ‘the Parliament’), and stripped its members of their parliamentary immunity. Furthermore, on 22 September 2021, President Saied issued Presidential [Decree No. 2021-117](#) on exceptional measures (hereinafter ‘Decree 2021-117’ or ‘Decree 117’) suspending most of the Constitution, prolonging the suspension of Parliament, and entrusting himself with full executive and legislative powers, including to rule by decree on matters constitutionally excluded from the purview of executive decrees, and reserved instead to organic law or law, such as the functioning of the judiciary, without any possibility of judicial or constitutionality review, as Decree 117 also abolished the provisional body in charge of reviewing the constitutionality of laws.

Over the same period, a social media smear campaign echoing President Saïed’s statements in October 2021 calling for its “purification”, targeted the judiciary, including the HJC and [its president](#). Moreover, on 19 January 2022, President Saïed [adopted Decree-Law No. 2022-4](#) amending Organic Law 2016-34, putting an end to the financial allowances and other privileges provided for the HJC’s members.

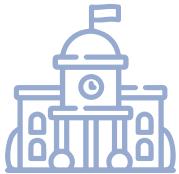
On 6 February 2022, President Saïed [announced](#) his intention to dissolve the HJC by decree. One day later, Tunisia’s police closed down the HJC’s building, thereby preventing its members from carrying out their constitutional duties. On 12 February 2022, the President issued [Decree-Law No. 2022-11](#) (hereinafter ‘Decree 2022-11’ or ‘Decree 11’), declaring the HJC’s dissolution, replacing it with a provisional body (the Temporary High Judicial Council, hereinafter ‘THJC’), and

repealing Organic Law 2016-34. Decree 11 also enables the President of the Republic to interfere with the career and discipline of judges. On 7 March 2022, the members of the THJC were appointed by Presidential Decree No. 2022-217 and took the oath of office.

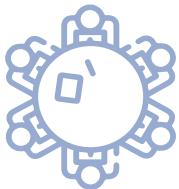
This Q&A examines [Decree 2022-11](#) and its detrimental impact on the independence of the judiciary in light of international and human rights law and standards, including those treaties to which Tunisia is a State party. It highlights the dramatic undermining of judicial independence in Tunisia in comparison to its standing under [Organic Law 2016-34](#) and the [Constitution](#). It further assesses how [Decree 11](#) violates the independence of the judiciary, the rule of law and the separation of powers, and concludes by providing a set of recommendations.



# 1 WHAT IS THE HJC AND WHAT IS ITS MANDATE UNDER THE 2014 CONSTITUTION?



Under the [2014 Constitution](#) and [Organic Law 2016-34](#), the HJC is a constitutional institution mandated to ensure the proper functioning of the judicial system and respect for its independence. It enjoys financial and administrative independence, prepares its own draft budget and shall be self-managing.



The main role of the HJC is to oversee the organization of the judiciary and to manage the career of both judges and prosecutors. The HJC is responsible for the appointment, removal, promotion, and transfer of judges, as well as for ruling on requests for the lifting of judicial immunity, judges' resignations, secondment, early retirement and leave of absence. It assesses the needs of each court and establishes the annual rotation of judges. The HJC also rules on disciplinary cases, sitting as a disciplinary council for judges.



In addition, the HJC's role is to propose reforms and give its opinion on draft legislation concerning the

organization and administration of the judiciary. It also prepares an annual public report that it submits to the President of the Parliament, the President of the Republic and the Prime Minister. Notably, along with the President and the Parliament, the HJC designates a third of the members of the Constitutional Court.

Judicial councils are common in civil law countries. When truly independent and endowed with the necessary authority, they can play a key role in reinforcing the separation of powers and safeguarding the institutional and individual independence of the judiciary from the interference of the executive or legislative branches of the State. By ensuring that the composition and functions of the HJC be consistent with the separation of powers and the independence of the judiciary, the 2014 Constitution and Organic Law 2016-34 represent significant progress toward upholding the rule of law in Tunisia.

## 2 DOES THE PRESIDENT OF THE REPUBLIC HAVE THE POWER TO DISSOLVE THE HJC?

The preamble of [Decree 2022-11](#) refers to the Constitution and [Decree 2021-117](#). Neither the Constitution nor Decree 117 provides any valid legal basis entrusting the President with the power to dissolve the HJC or curtail its independence.

The Constitution does not grant the President of the Republic any power to this effect. On the contrary, by constitutionalizing the HJC's independence, composition and mandate, it effectively excludes any reform running counter to these constitutional provisions other than through a formal constitutional revision.

Even under article 80 of the Constitution on “the state of exception”, the President does not have the power to rewrite the Constitution, including with a view to curtail the independence of the judiciary. In particular, article 80 provides that, when the President takes “exceptional measures”, the Parliament shall be deemed in permanent session and cannot be dissolved; article 80 also requires that the Constitutional Court shall review “the exceptional measures” purported justification. When adopting [Decree 2021-117](#), the President did not respect any of these requirements.

Moreover, according to the UN Human Rights Committee's [General Comment No. 29](#) (hereinafter ‘HRC, GC29’) on states of emergency, before a State moves to invoke article 4 of the International Covenant on Civil and Political Rights (ICCPR) on states of emergency, “two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency” (HRC, GC29, para. 2). When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must “act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers” (*ibid*). Any measures derogating from a State party's obligations under the ICCPR “must be of an exceptional and temporary nature” and be “limited to the extent strictly required by the exigencies of the situation” (*ibid*, paras 2 & 4). Additionally, the Committee has observed that, “the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation” (*ibid*, para. 4).

President Saïed's decrees under the "state of exception", including Decree 117 and Decree 11, fail to comply with these standards. While decree 117 refers to article 80 of the Constitution, it fails to explain how the undefined purported danger from within the Parliament hampering the functioning of the State, to which Decree 117 refers, constitutes a threat to the life of the nation, while other branches of the State and constitutional bodies are somewhat unaffected and continue to function normally.

The ICJ is concerned that the purported danger evoked by the President to justify the adoption of Decree 117, if it exists, does not meet the required threshold under international law and standards for a declaration of a "state of emergency", and that the President has abused the power to take "exceptional measures" entrusted to him under article 80 of the Constitution to undermine, suspend and abolish other branches of the State and those constitutional bodies that would otherwise act as a check on his one-man rule. The ICJ is also concerned that, without any limit in duration, circumstance and scope, the presidential decrees severely infringe upon the separation of powers and the rule of law, and violate the right of the Tunisian people to take part in the conduct of public affairs. Moreover,

these decrees are not subject to any scrutiny, such as parliamentary control or judicial review. The permanent nature of the measures adopted, including the dissolution of constitutional bodies like the HJC and the adoption of decrees undermining the independence of the judiciary, is incompatible with international law requirements that any measures derogating from a State party's obligations under the ICCPR must be exceptional, temporary and strictly limited, as well as with the objective of a return to a state of normalcy as soon as possible.

The [Human Rights Committee](#) has further pointed out that "fundamental requirements of fair trial" must be respected during a state of emergency, in particular, to protect, and ensure an effective remedy for, non-derogable rights under article 4 of the ICCPR (HRC, GC29, paras 11 and 14-16). Decree 11 undermines the independence of the judiciary as a whole and the right to be heard by an independent tribunal in all cases (as set in greater detail below), which, in turn, affects the protection of non-derogable rights. As such, it is inconsistent with the obligation to respect "fundamental requirements of fair trial" at all times under international law.

## 3

# HOW DECREE 11 UNDERMINES THE INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY



Under the Constitution and Organic Law 2016-34, the HJC is made up of three judicial councils: the Judiciary Council, the Administrative Judicial Council and the Financial Judicial Council, as well as a general assembly of the three judicial councils. Under Decree 11, the THJC also comprises three Temporary Judicial Councils, with no general assembly. The [Constitution](#) provides that two-thirds of each of these councils of the HJC be composed of elected and appointed judges, with elected members forming the majority of each council, while the remaining third is to be made up of independent experts. The president of the HJC is to be elected from among its senior judges members. [Organic Law 2016-34](#) specifies that each of the three judicial councils of the HJC is to be composed of 15 members, including four senior judges appointed *ex officio*, six others elected by their peers in rank, and five elected independent experts, who are non-judges.

[Decree 2022-11](#) provides that each of the three temporary judicial councils of the THJC is composed of

seven members, including four senior judges appointed *ex officio*, and three retired judges appointed by the President of the Republic. The President may appoint the retired judges from the list of candidates who applied, or outside that list. Furthermore, pursuant to article 19 of Decree 11, he is to appoint senior judges – who are *ex officio* members – upon a proposal of the THJC and, in case he opposes these proposals, he may appoint whoever meets the criteria for the position. The President, therefore enjoys wide discretion in the designation of THJC members, including *ex officio* members, thus placing the THJC under the full and direct influence of the executive.

As pointed out by the UN [Human Rights Committee's General Comment No. 32](#) (hereinafter 'HRC, GC32') on the right to a fair trial, “[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal” (HRC,



GC32, para. 19). The composition of judicial councils like the HJC matters greatly in so far they are in charge of ensuring the institutional independence of the judiciary, and the individual independence of judges. Any control the executive may exercise over their composition or functioning undermines their independence and the independence of the judiciary. Pursuant to article 14 of the ICCPR, the [Human Rights Committee](#) has also underscored the need for bodies responsible for the recruitment and discipline of judges to be independent (Concluding Observations of HRC on the Congo, CCPR/C/79/Add.118, para. 14). In the same vein, international standards require that judicial councils be bodies that are independent of the executive and legislative powers and that a significant proportion of their membership should be judges chosen by their peers. [The Special Rapporteur on the independence of judges and lawyers](#) has

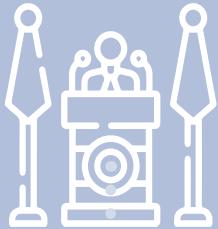
recommended that “[t]he selection and appointment of the members of a judicial council should take place in an open and transparent way in order to eliminate the risks of political interference and appropriation of the process by the de facto powers,” and that “[t]he judge members of a council should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels.” [The Committee of Ministers of the Council of Europe](#) has also recommended that “[w]ith a view to guaranteeing its independence, at least half of the members of the [judicial] authority should be judges chosen by their peers”.

In light of the above, the composition of the THJC runs counter to international standards, including Tunisia’s obligations under article 14 of the ICCPR.

## 4



# HOW DECREE 11 UNDERMINES THE INDIVIDUAL INDEPENDENCE OF JUDGES



Organic Law 2016-34 provides that “each [of the three] judicial council[s] oversees the career of judges falling under its competence, in terms of nomination, promotion, and transfer” and rules on requests for the lifting of judicial immunity and judges’ resignations, secondment, early retirement and leave of absence. It assesses the needs of each court and establishes the annual rotation of judges (art. 45).

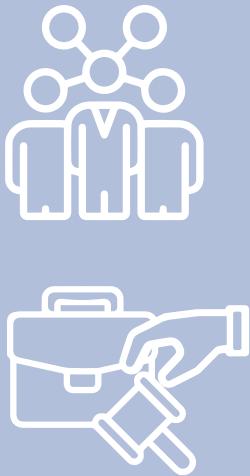


However, [Decree 2022-11](#) allows the executive power to directly interfere with the career of judges. Each of the three temporary judicial councils of the THJC is responsible for preparing the annual rotation of judges, their “appointments, assignments, transfers, promotions and dismissals, as well as requests for lifting of judicial immunity and resignation” [sic], and for revising the appointments of judges and deciding partial rotations of judges (art. 15). It empowers the President of the Republic to request: the revision of appointments; the partial rotation of judges (art.



15); and the review of the annual rotation of judges submitted to him by each temporary council (art. 18). In this regard, the President may “object to the appointment, assignment, promotion or transfer of any judge” following which the council shall revise its proposal (art. 19).

The [UN Human Rights Committee’s General Comment No. 32](#) underscores that “[t]he requirement of independence [in the sense of article 14, paragraph 1 of the ICCPR] refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature” (HRC, GC32, para. 19). With respect to this, the [Human Rights Committee](#) recommended the establishment of an independent



body to this effect (Concluding Observations of HRC on Honduras, CCPR/C/HND/CO/1, para. 16).

The Human Rights Committee has further noted that leaving the decision to promote judges at the discretion of administrative authorities may “expose judges to political pressure and jeopardize their independence and impartiality” (Concluding Observations of HRC on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14). The Committee has also emphasized that the exercise of power by the Ministry of Justice over judicial matters, including powers of inspection of courts, constitutes interference by the executive and a threat to the independence of

the judiciary (Concluding Observations of HRC on Romania, UN Doc. CCPR/C/79/Add.111, para. 10). The fact that Decree 11 endows the executive with the power to directly influence all aspects of a judge’s career amounts to a direct and clear threat to the independence of the judiciary.

Because it allows for wide interference by the President in the management of the career of judges, and because it provides for the subordination of individual judges to the executive, Decree 2022-11 runs counter to Tunisia’s obligations under international law and relevant international standards.

# 5 HOW DECREE 11 OVERHAULS THE DISCIPLINARY SYSTEM FOR JUDGES

Article 107 of the 2014 [Constitution](#) provides that judges could not be subject to dismissal, suspension, termination or any disciplinary sanction except for those cases in which the HJC had rendered a reasoned decision to this effect, and per those guarantees set out in law. The Constitution, as complemented by Organic Law 2016-34, does not provide for any direct role of the executive in the discipline of judges.

However, [Decree 2022-11](#) provides, in its article 16, that “the Minister of Justice may, in case of failure to obtain information about the outcome of investigations into the complaints undertaken by the by the General Inspection Service [GIS] within seven days from the date of the request for information, entrust the Temporary Judiciary Council to carry out the necessary investigations, after deciding to withdraw the case from the [GIS].” The GIS is a body that is under the direct authority of the Minister of Justice and is responsible for inspecting the functioning of the jurisdictions. Moreover, the Head of Government may entrust both the Temporary Administrative and the Temporary Financial Judicial Councils with investigating complaints against administrative and financial judges.

Furthermore, article 20 of Decree 11 empowers the President of the Republic to request the dismissal of “any judge who violates their professional duties based on a reasoned report from the Prime Minister or the Minister of Justice,” following which the competent temporary judicial council shall immediately suspend the concerned judges pending adjudication of their case. In the event that the council does not rule within a month, the Prime Minister and the Minister of Justice may investigate the case within 15 days, before referring it to the President of the Republic, who then has the power to make the decision to remove the concerned judge.

To sum up: Decree 2022-11 allows for direct interference of the executive in investigating and initiating disciplinary proceedings against judges, and in requesting their immediate suspension, in violation of the right to the presumption of innocence and due process rights. Decree 11 even allows the President to act as a disciplinary body in ruling on removal of judges. In so doing, the Decree makes each individual judge subservient to the President, and ends any semblance of judicial independence.

Moreover, in the absence of a judicial code of conduct established in law, the executive has broad discretionary powers to determine what acts or omissions by judges might amount to violations of professional duties warranting dismissal. The ICJ has documented [instances](#) in Tunisia's recent history in which promoting judicial independence was deemed a violation of professional duties necessitating removal, such as the case of Judge Mokhtar Yahyaoui. Also, the disciplinary system under Decree 2022-11 fails to provide for any meaningful due process guarantees, including by curtailing the right to adequate time and facilities to prepare a defence. The deadlines provided for investigations and referrals do not take into account the complexity of cases, and arbitrarily limit the rights of the concerned judges to be presumed innocent, to a defence, and to equality of arms in challenging accusations against them.

[International standards](#) make clear that any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly and adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge's due process rights are respected. The disciplining of judges must be based on

established standards of judicial conduct. Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.

In particular, the UN [Human Rights Committee's General Comment No. 32](#) on the right to a fair trial states that: "[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law" (HRC, GC32, para. 20).

The disciplinary system under Decree 11 runs counter to these standards and thus violates Tunisia's obligations under article 14 of the ICCPR.

## 6

# HOW DECREE 11 IMPOSES ARBITRARY RESTRICTIONS ON JUDGES' FUNDAMENTAL RIGHTS



Tunisian law guarantees the right to strike and collective action for judges. Article 36 of the [2014 Constitution](#) guarantees the right to organize in unions, including the right to strike without restrictions, to all except for individuals employed in the army, members of the security forces and customs officers.



Yet, article 9 of [Decree 2022-11](#) imposes a blanket ban on all judges' right to strike, and prohibits any collective organized action that "risks disturbing or impeding the regular functioning of courts".



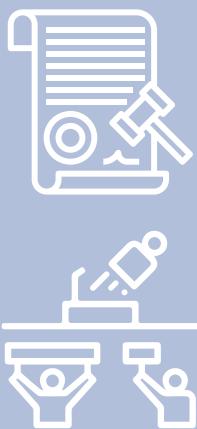
Like other people, judges and prosecutors are entitled to exercise their rights to freedom of expression, belief, association and peaceful assembly on an equal basis with others.

As highlighted by the [Special Rapporteur on the independence of judges and lawyers](#), however, "judges and prosecutors have special duties and responsibilities that justify the introduction of specific restrictions on their fundamental freedoms." However,

such restrictions "are only legitimate when provided by law and when they are necessary in a democratic society to pursue a legitimate aim, such as the protection of the independence, impartiality and authority of their institutions." The Special Rapporteur has further emphasized that "[t]he jurisprudence of regional courts has established that in situations where there is a breakdown of constitutional order, judges may even have a duty to speak out in favour of the restoration of democracy and the rule of law."

In the same vein, the [Commentary on the Bangalore Principles of Judicial Conduct](#) reiterates that judges have the right to join or form a trade union or professional association in the exercise of the freedom of association. However, "[g]iven the public and constitutional character of the judge's service," "restrictions may be placed on the right to strike."

Judges' right to strike is therefore not absolute, and restrictions on their right to strike may be justified, for instance, to ensure that individuals have continuous



access to the courts (including in order to provide effective remedies and guarantees in relation to human rights). However, such limitations must be lawful, reasonable and justifiable. In particular, any limitation must be necessary and capable of being demonstrably justified in a free and democratic society. Instead of providing for such limitations, including a procedure for allowing for partial work stoppages that nevertheless ensure maintenance of essential judicial services in all circumstances, Article 9 of Decree 11 imposes a blanket prohibition on judges' exercise

of the right to strike. Such blanket prohibition falls short of international standards guaranteeing judges' exercise of their rights to freedom of expression, belief, association and peaceful assembly, and violates Tunisia's obligations under the Constitution (art. 36 and 80). This is all the more worrying that it may be used by the executive to arbitrarily suspend or remove judges at a time when they may consider that they have a duty protected under international human rights law to speak out in favour of the restoration of democracy and the rule of law.

# 7 HOW TO UPHOLD JUDICIAL INDEPENDENCE IN TUNISIA

Decree 2022-11 ends any semblance of judicial independence and separation of powers in the country and has the potential to bring Tunisia back to its darkest days when judges were transferred and dismissed at the whim of the executive. In light of the above, and with a view to upholding judicial independence, the ICJ urges the Tunisian authorities to:

- (i) Revoke Presidential Decree No. 2021-117 and reinstate the constitutional order, including the Constitution and the constitutional bodies that were suspended or abolished under the “state of exception”**
- (ii) Revoke Decree-Law No. 2022-11, reinstate the HJC, and fully comply with Organic Law No. 2016-34, including by ensuring that all matters relating to judges’ careers, such as their selection, appointment, training, assessment, transfer, promotion, disciplining and termination of tenure, be overseen by the HJC, excluding any interference of, or substantive oversight role by the executive and legislative branches of the State;**

- (iii) 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, merit-based criteria, and transparent procedures, guaranteeing the security of tenure of members of the judiciary until a set retirement age or for an adequate fixed term, and adequately protecting the fundamental freedoms of judges;**
- (iv) Halt attacks counter the judiciary as an institution and against individual judges, and ensure that they are able to act independently and impartially in defence of the Rule of Law, the separation of powers and human rights and as a check on the President’s powers during the “state of exception”.**

# FURTHER RESOURCES

ICJ, [\*Attacks on Justice – Tunisia\*](#), 2005.

ICJ, [\*The Reform of the Judiciary in Tunisia\*](#), September 2012

ICJ, [\*Enhancing the Rule of Law and Guaranteeing Human Rights in the Constitution\*](#), February 2013

ICJ, [\*The Independence and Accountability of the Tunisian Judicial System\*](#), May 2014.

ICJ, [\*Tunisia - The New Draft Law on the High Judicial Council in Light of International Law and Standards\*](#), September 2015

ICJ, [\*The Tunisian Draft Law on the Constitutional Court in light of international law and standards\*](#), November 2015

ICJ, [\*Tunisia: Judicial Conduct and the Development of a Code of Ethics in light of international standards\*](#), November 2019

ICJ, [\*Tunisia: Upholding the Recommendations of the Truth and Dignity Commission on Justice Reform\*](#), December 2021

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Questions and Answers

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**International Commission of Jurists  
P.O. Box 1270  
Rue des Buis 3  
1211 Geneva 1  
Switzerland**