

Legal memorandum

The Reform of the Judiciary in Tunisia

Introduction

Under general international law, States must guarantee the independence of the judiciary as a cornerstone of the rule of law. This principle is affirmed in the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), which provide that it is the responsibility of all institutions, governmental and others, to respect the independence of the judiciary.¹ It is also reflected in article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Tunisia is a party, which guarantees the right to a fair trial by a competent, independent and impartial tribunal established by law. In Tunisia, despite the consecration of the principles of separation of powers and the independence of the judiciary in the 1959 Constitution, judicial independence has been undermined for many years by the executive's systematic and arbitrary interference in judicial matters. Such interference, combined with the absence of legal provisions that guarantee the independence of the judiciary in accordance with international standards, has had an adverse impact on the administration of justice. Independent judges, who have challenged the subordination of the judiciary to the executive branch, have long been exposed to pressure, intimidation and reprisals, such as being subject to abusive transfers of jurisdiction.

The popular uprising that put an end to the rule of President Ben Ali and that led to the election of a National Constituent Assembly (ANC), in October 2011, represents a historic opportunity for the Tunisian authorities to break with the practices of the former regime, set up an independent and impartial judiciary and establish and strengthen the rule of law in Tunisia. In this context, the ANC adopted a provisional Constitution on 11 December 2011. Article 22 requires the ANC to adopt a "basic" law establishing a temporary judicial authority to serve as the High Judicial Council (HJC). The establishment of this body, as well as the reform of Law No. 67-29 on the Judiciary, the High Judicial Council and the Statute of Magistrates, is essential for reforming the judiciary and for putting an end to its subordination to the executive.

¹ 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 29 November 1985 and 40/146 of 13 December 1985, Principle 1

The International Commission of Jurists (ICJ) remains concerned that the Tunisian authorities, instead of taking urgent and necessary reforms, have resorted to certain problematic policies and practices of the old regime. In July 2012, the Minister of Justice dismissed 70 judges suspected of corruption and “loyalty” to the old regime, without any guarantee of due process, including the right of defence. This decision perpetuates the improper interference of the executive in judicial affairs and shows a lack of political will to put an end to the practices of the past.

Moreover, the Tunisian authorities, in contravention of international standards, are exclusively resorting to military courts to adjudicate cases of human rights violations, alleged to have been committed before and during the popular uprising and involving officials of the former regime and/or law enforcement officers. Despite some amendments to the Code of Military Justice (CJM) on 29 July 2011, the use of these courts violates international standards of fair trial, including the obligation to prosecute persons for crimes under international law through the fair administration of justice. Under these standards, which are essential for effectively addressing impunity, military courts can only have jurisdiction over military offences committed by military personnel.

In addition, credible allegations of gross violations of human rights require prompt, thorough, independent and impartial investigations and, where warranted, criminal proceedings. Prosecutors must be allowed to perform their professional duties independently, impartially and objectively. They must not be under the direct or effective control of the Minister of Justice.

In this legal memorandum, the ICJ examines the extent to which the current legal framework governing the judiciary complies with international standards of independence and impartiality. In particular, the memorandum analyses the situation regarding the HJC, the statute of magistrates, the independence of the Office of the Public Prosecutor (OPP) and the use of military tribunals. The Memorandum provides a number of recommendations aimed at aligning the legal framework of Tunisia, including the Constitution, with international law and standards of independence, impartiality and accountability of the judiciary.

The High Judicial Council

The competences of the former HJC were governed by Article 67 of the 1959 Constitution and Law No. 67-29 of 14 July 1967. This law, long opposed by many judges and other members of the legal profession, determines the functioning and composition of the HJC, including the disciplinary council of the HJC,² and the rules applicable to judges regarding recruitment,³ promotion⁴ and discipline.⁵

The composition of the former HJC reflected the control of the executive over the council. Pursuant to Article 6, of Law No. 67-29, the President of the Republic served as the president of the HJC and the Minister of Justice served as the vice president.⁶ In

² *Ibid*, articles 55 – 61

³ Chapter 4 of Law n°67-29, articles 29 - 32

⁴ Chapter 5 of Law n° 67-29, articles 33 - 36

⁵ Chapter 7 of Law n° 67-29, articles 50 - 54

⁶ Article 6 of Law n° 67-29

total, no less than eleven of its 15 members were representatives of the executive or appointed to their positions by presidential decree.⁷ As the president and vice president of the HJC, the executive was able effectively to control the functioning of this body, including the convening of meetings and, through the casting of votes by the president and vice president, in decision-making.

Moreover, even though the HJC had sole competence to discipline judges, pursuant to Article 56 of Law No. 67-29, the power of referral was given to the Minister of Justice. This paved the way for political interference in judicial matters and was used as a means of putting pressure on judges, since a referral could, depending on the gravity of the charges, result in a disciplinary sanction under Article 52 of the law. Under President Ben Ali, many judges were subject to disciplinary transfer and in some cases they were simply dismissed for having expressed their views on the lack of independence of the judiciary, or for having publicly denounced the lack of proper administration of justice.⁸

Only an independent HJC can guarantee the independence of the judiciary. Therefore, to ensure that the HJC does not become an instrument in the hands of the executive by which the judiciary is subjugated, its composition, structure and functioning must guarantee the independence of the institution and enable it to fully exercise its functions and duties.

Following the adoption of the Constitutional Law on the temporary organization of public powers, on 11 December 2011 (the Provisional Constitution), the HJC was suspended in order to pave the way for the establishment of the temporary judicial authority, as provided for by Article 22 of the Provisional Constitution.⁹

Since the suspension of the HJC, and despite repeated calls from organizations representing the judiciary and civil society for the implementation of Article 22 of the Provisional Constitution, no temporary judicial authority has been created.

The establishment of this body must be a priority in order to ensure the proper administration of justice, particularly as regards the independence of judges and their appointment, promotion, conditions of tenure and discipline. In the absence of such a

⁷ Article 7 bis, *Ibid*

⁸ International Commission of Jurists, *Attack on Justice*, 2005, available at: <http://www.icj.org/IMG/TUNISIA.pdf>. In this report, the ICJ documented the case of former judge Mokhtar Yahyaoui, then president of the 10th Civil Chamber of the Tribunal of First Instance of Tunis, who was dismissed as a judge on 29 December 2001 for having written an open letter to President Ben Ali lamenting executive interference in the work of the judiciary. Similarly, in July 2004 the executive board of the Association of Tunisian Magistrates (AMT) planned a press conference in Tunis to discuss judges' right to improved working conditions (including improved status, fairer representation of judges on the HJC and security of tenure). However, the authorities banned it and the police dispersed the journalists who had been invited and were attending. Following condemnation by the AMT for police raids on the Tunis law Courts in March 2005, the offices of AMT were also raided by police with Justice Kalthoum Kennou, a member of the AMT and present at the time, subjected to intimidation and telephone harassment.

⁹ Article 22 provides for the NCA to adopt an organic law establishing a temporary judicial authority to supervise the judiciary and to act as the HJC

body, the executive is likely to fill the vacuum, as demonstrated by the recent dismissal of 70 judges by a unilateral decision of the Minister of Justice.

In addition, Tunisian authorities should also ensure that the HJC oversees the Judicial General Inspection Service. Indeed, one of the various forms of the subordination of the judiciary to the executive is the situation concerning this Service. In Tunisia, the inspection of the judicial system is delegated to the Ministry of Justice and not to an independent body. Indeed, the Ministry of Justice has the power to *"organize and inspect judicial public services by ensuring their proper functioning, to undertake all necessary actions to improve and promote them, and control the organs placed under its guardianship"* and also *"to ensure control over the activities of the legal profession and court staff."*¹⁰ In addition, the General Inspection of the Justice Sector Service is a body under the direct authority of the Minister of Justice and has *"a permanent inspection mission over all courts except the Cassation Court and the institutions under guardianship [of the Ministry of Justice]"*.¹¹ The control exercised by the Ministry of Justice over the General Inspection Service allows it to influence every aspect of the justice system. In this connection, the UN Human Rights Committee has emphasized that the exercise of power by the Ministry of Justice over judicial matters, including the disciplinary appeal process and its powers of inspection of the courts, constitutes an interference by the executive and a threat to the independence of the judiciary.¹²

Therefore, if the General Inspection Service is to continue to exist, it should be overseen by an independent HJC to ensure that an independent and impartial monitoring procedure is in place.

To stop any improper interference by the executive over judicial issues and to consolidate the independence of the judiciary, the Tunisian authorities should:

- **Ensure, in the Constitution and the law, the institutional, administrative and financial independence of the HJC vis-à-vis the executive, including financial autonomy over budgetary matters, and ensure that the HJC is involved in any decision on the budget allocated to the courts, to better ensure their organization and guarantee the performance of their duties;**
- **Give the HJC competence to oversee fully the judiciary, in particular as regards the selection, appointment, promotion, transfer and discipline of judges and any other decision regarding the career of judges; and establish a disciplinary council with an appeal process in cases of disciplinary proceedings;**
- **Ensure that at least half the members of the HJC are judges and/or members of the legal profession elected by their peers, using a mechanism that guarantees the widest representation;**
- **Ensure that the HJC is consulted by members of the government and the parliament on draft laws relating to the functioning and administration of justice and other matters relating to access to justice;**

¹⁰ Article 1 para. 4 and 5 of Decree No.74/10/62 of 28 November 1974

¹¹ Article 13 of Decree No.92/13/30 of 20 July 1992

¹² *Concluding Observations of the Human Rights Committee on Romania*, CCPR/C/7/9/Add.111, para. 10

- **Attach the General Inspection of Judicial Services to the HJC and ensure that the General Inspector and other inspectors are appointed by the HJC; and**
- **Set up the temporary judicial authority as soon as possible.**

Reform of the Statute of Magistrates

Appointment and Promotion

The UN Basic Principles provide that "*Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.*"¹³ On a number of occasions, the UN Human Rights Committee has expressed concern at the manner in which judges were appointed and recommended a more transparent procedure. The Committee has recommended that States establish an independent mechanism responsible for the recruitment and disciplining of judges to ensure judicial independence.¹⁴

States must also ensure that the promotion of judges in their career proceeds according to objective criteria determined by an independent body. The UN Basic Principles stipulate that: "*Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.*"¹⁵ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the African Union Principles) reiterate this requirement and, in addition, require that: "*No person shall be appointed to judicial office unless they have appropriate training or learning that enables them to adequately fulfil their functions.*"¹⁶ Furthermore, Article 9 of the Universal Charter of the Judge provides that: "*The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.*"¹⁷

In Tunisia, Article 66 of the 1959 Constitution provided that judges were to be appointed by presidential decree on the recommendation of the HJC. In addition, the selection process for admission to the High Magistrates Institute (HMI) is controlled by the Ministry of Justice, as the criteria for selection as well as the programme of studies at the HMI are fixed by a decree of the Minister of Justice.¹⁸ The HMI is also directly

¹³ 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 29 November 1985 and 40/146 of 13 December 1985; Principle 10.

¹⁴ Concluding Observations of the Human Rights Committee on the Congo, UN document CCPR/C/79/Add.118, para. 14.

¹⁵ Basic Principles on the Independence of the Judiciary, *op. cit.*, Principle 13

¹⁶ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), Principle 4(o) and 4(k)

¹⁷ The Universal Charter of the Judge, approved by the International Association of Judges, 17 November 1999

¹⁸ Article 29 of Law No. 67-29

attached to the Ministry of Justice.¹⁹ According to Decree No. 99-12090 of 7 June 1999 on the organisation of the HMI, the latter is responsible for the training of magistrates, clerks of the courts and judicial officers. Furthermore, after completion of their training at the HMI, the Minister presents a list of graduates that can be appointed as a judge to the HJC and the President.²⁰ This procedure gives the Minister of Justice broad powers over the selection, training and appointment of judges and reduces the role of the HJC in this area, which paves the way for improper appointments contrary to the UN Basic Principles.

Moreover, the promotion of judges is also under the indirect control of the executive through the HJC. Indeed, no judge can be promoted without appearing on a shortlist, which is drawn up by the HJC. In addition, despite the objective factors set out in the UN Basic Principles and the African Union Principles of "*ability, integrity and experience*", Law No. 67-29 refers only to seniority as a criterion for promotion.²¹

Removal and Security of Tenure

In Tunisia, neither the 1959 Constitution nor the statute of magistrates, governed by Law No. 67-29, guarantees the principle of security of tenure, also known as irremovability. Article 42 of Law No. 67-29 provides that "*The rules applicable to civil servants regarding leave, secondment, redundancy, and termination of service shall apply to magistrates, when they are not inconsistent with the provisions of this law*". This provision establishes a system under which judges are considered to have an equivalent status to civil servants for certain purposes and are therefore subject to the supervision and authority of their hierarchical superior, the Minister of Justice. This subordination of the judiciary to the executive represents a flagrant violation of the principle of separation of powers and a continuous threat to the independence of judges as they carry out the administration of justice.

Indeed, judges must enjoy full protection when exercising their duties, particularly in terms of tenure. The UN Basic Principles state that "*Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists*" and that "*The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law*".²² Similarly, the African Union Principles provide that "*Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office*" and require that "*tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers, shall be prescribed and guaranteed by law*".²³ The Universal Charter of the Judge offers additional requirements. It states at Article 8: "*A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure. A judge must be appointed for life or for such other*

¹⁹ Article 2 of Law of Law No. 85-80 of 11 August 1985

²⁰ Article 31, *Ibid*

²¹ Article 13, of Law No. 67-29

²² *Ibid*, Principles 12 and 11

²³ Principles and Guidelines on the right to a fair trial and legal assistance in Africa, article 4(I) and (m)

period and conditions, that the judicial independence is not endangered. Any change to the judicial obligatory retirement age must not have retroactive effect."

According to international standards, suspensions and dismissals of judges may be imposed only after a fair, transparent and impartial procedure, guaranteeing the rights of judges to the presumption of innocence, the right of defence and the right to appeal the decisions taken against them. Any decision to dismiss a judge must be subject to judicial review.

Conditions of Tenure and a Code of Ethics

Although the 1959 Constitution provided that judges were subject to the sole authority of the law when exercising their functions,²⁴ the independence of the judiciary has long been undermined by other provisions of the Constitution and laws governing the judiciary. For example, Article 14 of Law 67-29 gives the Minister of Justice the power to decide, during the judicial year, to transfer a magistrate "for necessity of service" and, under Article 20, to control short-term assignments.²⁵ According to Article 20 bis, these decisions may be appealed before the HJC. However, as outlined above, the HJC itself is not independent from the executive. Therefore, this procedure is not compliant with the essential guarantees of independence.

The control of the Minister of Justice over the judiciary also takes other forms, including through the many restrictions imposed on judges. For example, the right of judges to leave Tunisia during their period of leave is strictly controlled by the Minister of Justice and requires prior approval from the latter.²⁶ These requirements may give rise to impermissible limitations on and impediments to the exercise of the right to freedom of movement guaranteed under article 12 of the ICCPR.

Moreover, although disciplinary proceedings and the dismissal of judges are generally overseen by the disciplinary council of the HJC, the Minister of Justice can intervene and influence these processes in several ways: the Minister may seize the disciplinary council,²⁷ issue warnings to judges²⁸ and, upon receiving a complaint, suspend a judge pending a disciplinary hearing.²⁹

Through these provisions the executive maintains overwhelming control over the careers of judges. The Human Rights Committee has pointed out that the lack of an independent mechanism responsible for the appointment and discipline of judges limits the independence of the judiciary.³⁰ In addition, the UN Basic Principles provide that decisions in disciplinary, suspension and removal proceedings should be subject

²⁴ Article 23 of the 1959 Constitution

²⁵ Article 14 stipulates that "*nécessité de service*" is the necessity that arises from the need to deal with a vacancy, appoint judges to new judicial functions, to cope with an apparent rise in the volume of work in a court or fill new courts with judges.

²⁶ Article 39 of Law No.67-29. See also Article 21, which requires judges to reside in the seat of their jurisdiction to which they have been assigned. Exemptions to this requirement must be obtained from the Minister of Justice.

²⁷ Article 56 of Law No. 67-29

²⁸ Article 51, *Ibid*

²⁹ Article 54, *Ibid*

³⁰ Concluding Observations of the Human Rights Committee on the Congo, UN document CCPR/C/79/Add.118, para. 14.

to independent review.³¹ The African Union Principles provide that "*Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings*".³²

The control exercised by the executive over the judiciary, combined with the absence of a code of ethics regulating judicial conduct, contributes to a weakening of the status of judges. The only legislation regulating judicial conduct is contained in two articles of Law No. 67-29, which stipulate, respectively: "*judges must render justice impartially, without regard to persons or interest. They cannot decide based on personal knowledge they may have of the case. They cannot defend either verbally or in writing, even as a consultation, causes other than those that concern them*"; and "*the judge should refrain from any action or behaviour likely to harm the honour of the profession*".³³

In the absence of a code of ethics defining in very specific terms the rules of judicial conduct and the elements that constitute a disciplinary offence, the Minister of Justice can continue to initiate disciplinary proceedings against "*any failure by a magistrate of duties, honour or dignity*", while having a discretionary power to determine what conduct constitutes a breach of duty, honour or dignity.³⁴ The adoption of a code of ethics would also restore, in part, trust in the judicial system against allegations of corruption; limit the excesses of certain behaviour and practices characteristic of the old regime; and would require judges to act in accordance with this code or face a penalty.

Another essential safeguard to enable judges to carry out their judicial functions is the guarantee of freedom of expression and freedom of association. As guarantors of the rule of law and as part of the legal community, judges must necessarily participate in the debate on judicial reform and other legal issues. Principle 8 of the UN Principles states: "*In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.*"

To end the control that the Minister of Justice exercises over the career of judges, and in order to adopt a statute of magistrates in line with international standards, the Tunisian authorities, should:

- **Guarantee, in the Constitution and the law, the principle of security of tenure for judges;**
- **Adopt a Statute of Magistrates that ensures the independence and impartiality of judges and guarantees their conditions of service,**

³¹ UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principle 20

³² Principles and Guidelines of the African Union on the right to a fair trial and legal assistance in Africa (2003), Principle 4(q)

³³ Articles 23 and 24 of Law No. 67-29

³⁴ Article 50, *Ibid*

- appointment, mandate, promotion and discipline, in accordance with international standards;**
- **Grant the HJC oversight of judges' careers from the moment of selection, and to this end, put an end to all forms of control and undue influence that the Minister of Justice has over the careers of judges;**
 - **Give the HJC the authority to determine and implement general guidelines for the training of judges, including by ensuring that the High Magistrates Institute in charge of the training of judges is supervised by the HJC and not the Ministry of Justice;**
 - **Define the standards of misconduct subject to disciplinary action and ensure, where appropriate, that the HJC is the body responsible for the initiation and conduct of any disciplinary proceedings against judges;**
 - **Ensure that any charge or complaint made against a judge in the exercise of his or her functions be heard by the disciplinary council of the HJC in a fair, transparent and impartial procedure, ensuring international standards on due process and the right to a fair hearing, including the rights of judges to the presumption of innocence, the right of defence and the right to appeal the decisions of the disciplinary council;**
 - **Put an end to the Minister of Justice's power to suspend and dismiss judges;**
 - **Guarantee the right of judges to form associations or other organizations to represent their interests, promote their professional training and defend the independence of the judiciary; and**
 - **Give the HJC the competence to define standards of judicial conduct, particularly through the adoption of a code of ethics and judicial conduct that conforms to international standards, which can further guarantee the independence, impartiality, probity and integrity necessary for the exercise of judicial office and strengthen public confidence in the judiciary.**

The Independence of the Office of the Public Prosecutor

Prosecutors play a crucial role in the administration of justice and in the proper functioning of the criminal justice system. They must ensure that public order is protected while fully respecting the rights of the accused and victims in all stages of criminal proceedings. Only an independent and impartial prosecution may perform such duties fairly. The UN Guidelines on the Role of Prosecutors encourage States to *"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"*.³⁵

In Tunisia, the Office of the Public Prosecutor (OPP) has always been under the authority of the Minister of Justice. Furthermore, as noted above, the executive has

³⁵ Guidelines on the Role of Prosecutors, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August – 7 September 1990, Guideline 4, available at: <http://www2.ohchr.org/english/law/prosecutors.htm>.

overall control over the careers of judges and prosecutors either directly or through its control of the HJC.

Under Article 15 of Law No. 67-29, "*public prosecutors are placed under the direction and control of their superiors and under the authority of the Minister of Justice*". The Code of Criminal Procedure (CCP) also states that the Minister of Justice exercises control over the OPP. According to Article 21 of the CCP: "*The public prosecutor is required to make written submissions in accordance with instructions given to him under the conditions set out in Article 23.*" Article 23 provides that "*The Minister of Justice may report to the Public Prosecutor the violations of criminal law within his knowledge, may require him to initiate, or ask someone to initiate, the prosecution or to seize the competent jurisdiction with the written submissions considered desirable*".

These provisions establish a system under which prosecutors are subordinated to the executive. This subordination also assumes other forms by virtue of various provisions of Law No. 67-29 relating to the recruitment, promotion, discipline and transfer of prosecutors.

The structure of the Tunisian OPP is modelled on the French system. In this respect, it is important to note that the European Court of Human Rights criticized this system by stating that: "*the public prosecutor was not a "competent legal authority" within the meaning the Court's case-law gave to that notion [...] he lacks the independence in respect of the executive to qualify as such.*"³⁶ The Inter-American Commission on Human Rights has stressed the need to ensure the independence of public prosecutors: "*the Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch.*"³⁷ The UN Guidelines on the Role of Prosecutors also encourage States in "*securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings*".³⁸

Under President Ben Ali, the lack of independence of the OPP in Tunisia led to an almost total absence of investigations and prosecutions in cases of gross violations of human rights. As regards cases of torture and ill treatment, the UN Special Rapporteur on Torture reported "*a pattern of a lack of timely and adequate investigation of torture allegations by prosecutors or investigative judges*", and stressed that: "*complaints of torture were rarely investigated under the Ben Ali regime. [...] In the majority of cases, the investigating judge would refuse to register complaints of torture out of fear of reprisals, and complaints lodged by victims to the prosecutors were almost always*

³⁶ *Case of Medvedyev and Others v. France*, European Court of Human Rights, Request No. 3394/03, Judgement of 10 July 2008, § 61.

³⁷ Inter-American Commission on Human Rights, Report on the situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998, § 372.

³⁸ Guidelines on the Role of Prosecutors, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August – 7 September 1990, Preamble, available at: <http://www2.ohchr.org/english/law/prosecutors.htm>

*dismissed immediately.*³⁹ It is important to note that, in Tunisia, the Prosecutor has a discretionary power to assign the files to the investigating judge of his choice.⁴⁰

Moreover, when deciding how to proceed in relation to complaints and allegations, the Tunisian OPP has tended, in cases of corruption and other offences and crimes involving State officials, to systematically file the cases without pursuing them. According to international standards and practices, decisions by prosecutors to close a case should be subject to judicial review. In addition, the UN Guidelines provide that *“Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences”*.⁴¹

In order to reform the status and structure of the OPP in Tunisia, consolidate its powers in protecting the rights of defendants and victims, and strengthen its role in the fight against impunity for serious violations of human rights, the Tunisian authorities should:

- **Guarantee, in the Constitution, in law and in practice, the principle of the irremovability of prosecutors;**
- **Recognise, in the Constitution and in law, the OPP as an independent body from the executive;**
- **End the authority and the control of the Minister of Justice over the OPP;**
- **Ensure that the Minister of Justice does not have, in law or in practice, the authority to intervene in the decision to prosecute or during criminal proceedings;**
- **Ensure that decisions regarding the selection, promotion and careers of prosecutors and their security of tenure, including transfers and disciplinary proceedings, are made in conformity with the law and through the HJC;**
- **Ensure that the decision of a prosecutor to close a case is subject to review by a judge; and**
- **Guarantee the independence of investigative judges from interferences by the Prosecutor and the Minister of Justice.**

The Use of Military Tribunals in Tunisia

³⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, A/HRC/19/61/Add.1, §§ 29, 32, available at <http://daccess-ods.un.org/TMP/8137105.70335388.html>.

⁴⁰ Article 28 of the Code of Criminal Procedure, Law No. 68-23 of 24 July 1968

⁴¹ Guidelines on the Role of Prosecutors, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August – 7 September 1990, Guideline 15, available at: <http://www2.ohchr.org/english/law/prosecutors.htm>.

Under the rule of President Ben Ali, military tribunals were used to try political opponents as well as suspected "terrorists".⁴² The use of military tribunals in Tunisia has increased since the toppling of Ben Ali. This is largely due to the fact that the Code of Military Justice of 1957 (CMJ), amended by two decrees adopted on 29 July 2011, grants military courts jurisdiction beyond that permissible under international law and standards.

According to these standards, the jurisdiction of military tribunals should be limited to military personnel and military offences only, which predominantly includes disciplinary proceedings. These tribunals must not try civilians. As affirmed by the UN Principles Governing the Administration of Justice through Military Tribunals (the Decaux Principles): "*Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.*"⁴³ In its General Comment 32 on the right to a fair trial under article 14 of the ICCPR, the UN Human Rights Committee "*notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.*"⁴⁴

Military courts must equally not try military and other law enforcement officers for violations of human rights. As the Decaux Principles confirm, "*In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.*"⁴⁵

Law-Decree No. 2011-69 of 29 July 2011, amending and supplementing the CMJ, has maintained, and even expanded, the broad jurisdiction of military tribunals. This Decree provides the possibility for victims to bring a civil suit and file a complaint for civil damages before military courts,⁴⁶ and to appeal the decisions of the court.⁴⁷

⁴² Article 123 of the CMJ gives military tribunals jurisdiction over civilians charged with serving a terrorist organization that operates abroad (See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, A/HRC/19/61/Add.1, § 35, available at <http://daccess-ods.un.org/TMP/8137105.70335388.html>). The Special Rapporteur also points out that following the entry into force of the 2003 Counter-Terrorism Law, "*the focus of the military courts' terrorism-related cases changed to cases which has a link with 'international terrorism' or international money laundering.*"

⁴³ Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Issue of the administration of justice through military tribunals, E/CN.4/2006/58, 13 January 2006, Principle 5. Adopted by the UN Sub Commission in 2006, endorsed by the European Court of Human Rights in *Ergin v. Turkey* (No. 6) (*Application no. 47533/99*), para.24 and currently before the UN Human Rights Council. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/77/PDF/G0610677.pdf?OpenElement>

⁴⁴ General Comment No. 32, Human Rights Committee, Doc CCPR/C/GC/32, 23 August 2007, § 22, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>.

⁴⁵ Decaux Principles, *Ibid.* at Principle 9

⁴⁶ New Article 7 of the CMJ as amended by the Decree-Law No. 2011-69.

However, the jurisdiction *ratione materiae* and *ratione personae* of these tribunals, as set out at Articles 5 and 8 of the CMJ, go far beyond the permissible military offences committed by military personnel and extend to "ordinary" crimes (*crimes de droit commun*) involving civilians.⁴⁸ Moreover, under Article 22 of Law No. 82-70 of 6 August 1982,⁴⁹ military jurisdiction also extends to the Internal Security Forces.

On the basis of these provisions, military tribunals have jurisdiction over most cases involving human rights violations, in particular cases of extrajudicial executions and torture or ill treatment, committed during the uprising, from 17 December to 14 January 2011, or under the Ben Ali regime. These cases, initially brought before ordinary courts, have been transferred to military tribunals under Article 22, as referred to above.

To date, the proceedings in these tribunals have failed to meet international fair trial standards, as access to the investigation file granted to lawyers is often limited or delayed. In addition, many files involving senior security officials remain confidential and inaccessible. Furthermore, various sentences imposed by these tribunals have not been proportionate to the seriousness of the crime committed, which has contributed to reinforcing the impunity that prevailed under the old regime.⁵⁰

As noted above, international law and standards limit the jurisdiction of military tribunals to exclude cases of gross violations of human rights. In addition to the Decaux Principles, the UN Human Rights Commission (the predecessor body to the present UN Human Rights Council) asserted, in its resolution on Civil Defence Forces, that "*offences involving human rights violations by such forces shall be subjected to the jurisdiction of civilian courts*".⁵¹ Numerous Special Rapporteurs and independent experts of the United Nations, including the independent expert on the issue of

⁴⁷ Article 28bis of the Decree-Law No. 2011-69 provides for the creation of a Court of Military Appeal and the right to lodge an appeal against judgments of first instance in correctional or criminal matters. Article 30 also identifies those entitled to appeal to the Cassation Court against judgments and decisions rendered on the merits in the last resort, notably the victim of civil damage but only with respect to his or her civil interests.

⁴⁸ Former Article 5, paragraph 6 of the CMJ, which contained an explicit limitation to the jurisdiction of military courts with respect to civilians, was abolished by the Decree-Law No. 2011-69. Article 6 of the CMJ as amended by the Decree-Law, provides that "*In case of a prosecution for a criminal offence committed by military personnel while off duty and where one party is not military, the public prosecutor or the investigating judge relieve himself of the charges against the military part in favour of the military court of first instance.*"

⁴⁹ Article 22 of Law No. 82-70 of 6 August 1982 concerning the general statute of the Internal Security Forces, establishes the jurisdiction of military tribunals on "*cases involving agents of the Internal Security Forces for facts that took place in, or in 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 that, during or following public meetings, processions, parades, demonstrations and gatherings.*"

⁵⁰ In the well-known case of *Barakat Essahel*, which concerned acts of torture carried out in 1991 by the military against members of the armed forces suspected of involvement in a coup attempt and was brought before the Military tribunal of Tunis, the sentence against some of the accused at first instance (4 years imprisonment) was reduced to 2 years by the Military Court of Appeal of Tunis.

⁵¹ Resolution E/CN.4/RES/1994/67, 9 March 1994, para 2 (f);

impunity, have also recommended that serious violations of human rights shall not be brought before military tribunals but before civilian courts.⁵²

The broad jurisdiction of military tribunals in Tunisia is even more problematic, considering that these tribunals do not meet the necessary guarantees of independence and impartiality. This lack of independence assumes several forms. First, Article 2 of Decree-law No. 70 of 29 July 2011 provides that military judges are appointed by decree at the instigation of the Minister of Defence. Secondly, although the CMJ provides that military judges are independent of the military in carrying out their duties and only subject to the supremacy of the law,⁵³ the CMJ also provides that military judges are subject to general disciplinary rules.⁵⁴ These rules are largely based on the concept of subordination to superior commanders. Finally, although the composition of military tribunals is mixed, it should be noted that military judges are the majority in each disciplinary division of the military tribunals, which is composed of a president belonging to the judiciary and two military judges, and in each criminal division of the military tribunals, which is composed of a president belonging to the judiciary and four military judges.⁵⁵

The lack of guarantees of independence of military tribunals is also expressed through the composition and operating procedures of the Military Judicial Council (MJC). Therefore, although the composition of the MJC is divided equally between military judges and prosecutors and ordinary judges and prosecutors, the chairman of the MJC is the Minister of Defence.⁵⁶ This is even more significant given that decisions of the MJC are taken by majority and, in cases where there is an equal division of votes, the chairman may cast a vote. Furthermore, when the MJC sits as a disciplinary board, only military members take part in the vote.⁵⁷ Its discussions and deliberations are kept secret, since its members are bound by professional confidentiality during and after the exercise of their functions.⁵⁸

These provisions highlight the inherent incompatibility between military tribunals and the principles of an independent judiciary. In this regard, the European Court of Human Rights and the Inter-American Commission on Human Rights have both stressed the fact that military judges cannot be considered independent and impartial because they are part of the hierarchy of the army.⁵⁹

The lack of guarantees of independence of the military justice system also manifests itself in the position of the military prosecutor. According to the CMJ, the prosecutor's duties are performed by the public prosecutor of the permanent military tribunal of

⁵² Principle 29 of the UN Principles on Impunity, E/CN.4/2005/102/Add.1, 8 February 2005

⁵³ Article 5 of the Decree-Law No. 70 of 29 July 2011, concerning the organisation of the military justice and the statute of military judges.

⁵⁴ Article 19, *Ibid*, Decree-Law No. 2011-70 of 29 July 2011.

⁵⁵ Article 10, *Ibid*, Decree-Law No. 2011-70 of 29 July 2011.

⁵⁶ Article 14, *Ibid*, Decree-Law No. 2011-70 of 29 July 2011.

⁵⁷ Article 17, *Ibid*, Decree-Law No. 2011-70 of 29 July 2011.

⁵⁸ Article 18, *Ibid*, Decree-Law No. 2011-70 of 29 July 2011.

⁵⁹ European Court of Human Rights, *Findlay v. United Kingdom*, Judgment of 25 February 1997, and *Incal v. Turkey*, Judgment of 9 June 1998. Inter-American Commission of Human Rights, Annual Report 1997, OAS Document OEA/Ser.L/V/II.98/Doc.6, Chapter VII, Recommendation 1.

first instance or by one of his deputies.⁶⁰ This includes the exercise of “*public action*”, notably through the initiation of criminal proceedings, but it also includes, according to the principle of discretionary prosecution, the decision to close a case even when the facts constitute a criminal offence.

For an investigation to be effective, it must be conducted by an independent and impartial prosecutor. This independence may be compromised where the investigation of violations perpetrated by members of the armed forces or security forces is carried out by those responsible for the violations. The European Court of Human Rights in its case law affirmed that “*military prosecutors were, as well as the accused, active military personnel and they were members of the military structure based on the principle of hierarchical subordination*” and that “*this institutional link has resulted, in this case, in a lack of independence and impartiality of the military prosecutor in the carrying out of the investigation*”.⁶¹ It is clear that investigations by the military prosecutor involving the armed forces or security forces do not possess the independence and impartiality required by the procedural obligation required by the European Convention on Human Rights, in particular Article 3. To this end, the Human Rights Committee have recommended that: “*in case of violations of human rights committed by the military or armed forces, investigation should be conducted by civil authorities.*”⁶²

Tunisian authorities should:

- **Limit the jurisdiction of military tribunals only to military personnel who have committed military offences;**
- **End the jurisdiction of military courts and military prosecutors to investigate and rule on cases involving violations of human rights, including those involving the armed and security forces and, to this end, transfer all cases relating to such violations that are currently before the military courts to the ordinary civilian courts;**
- **Order new trials, conducted in accordance with international standards of fair trial, in ordinary civilian courts for cases involving serious violations of human rights previously tried before military tribunals; and**
- **Reform the CMJ and Law 82-70 of 6 August 1982 in accordance with international law and standards, including those relating to impunity for serious human rights violations.**

⁶⁰ New Article 10 and 14 of the CMJ as amended by the Decree-Law No. 2011-69.

⁶¹ *Case Voiculescu c. Roumanie*, Request No. 5325/03, Judgement of 3 February 2009. Also see, *mutatis mutandis*, *Barbu Anghelescu c. Roumanie*, n° 46430/99, § 67, 5 October 2004; *Bursuc c. Roumanie*, n° 42066/98, § 107, 12 October 2004 ; et *Mantog c. Roumanie*, n° 2893/02, § 69-70, 11 October 2007

⁶² International Commission of Jurists, *The Right to a remedy and to reparation for gross human rights violations*, Practitioners’ Guide Series N°2, Bogota, 2007, p 67.