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经济、社会和文化权利，包括发展权

法官和律师独立性问题特别报告员突尼斯访问报告* **

概要

法官和律师独立性问题特别报告员于 2014 年 11 月 27 日至 12 月 5 日对突尼斯进行了正式访问，目的在于审查该国的司法系统自 2011 年革命以来、在永久立法和体制取代过渡期间设立的临时法律和机构之前的状况

特别报告员在访问期间会见了司法、人权和过渡司法部、内政部和外交部一些高级政府官员、临时司法委员会主席以及各级司法机构的许多法官、上诉法院公诉人和一些检察官、人权和基本自由高级委员会以及真相与尊严委员会的代表。她还会见了民间社会、学术机构、联合国机构和其他政府间组织的律师和代表

报告开篇概括介绍了司法系统及其宪法和法律框架。特别报告员在报告的第二节当中列举了她的结论和关切问题，这些结论和问题涉及：(a) 制定一个全面的法律框架的必要性；(b) 独立性、公正性、诚信与问责制；(c) 法官的遴选、任命和任职条件；(d) 预算和工作条件；(e) 案件管理、内部规章和程序、司法延误和诉诸司法；(f) 威胁、攻击和缺乏保护的问题；(g) 检察部门；(h) 军事法院；(i) 律师；(j) 教育、培训和能力建设。她在报告最后向所有相关的利益攸关方提出了建议。

* 本报告的概要以所有正式语文分发。报告本身附于概要之后，仅以提交语文和阿拉伯文分发。

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Annex

[Arabic and English only]

Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia

Contents

I. Introduction

1. The Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, visited Tunisia from 27 November to 5 December 2014 at the invitation of the Government. She examined the situation of the justice system, and in particular how Tunisia endeavours to ensure the independence, protection and accountability of the judiciary, prosecutors and lawyers, and what obstacles may prevent them from discharging their functions effectively, adequately and appropriately.

2. The Special Rapporteur visited Tunis, Grombalia and Nabeul. She met with the Minister for Justice, Human Rights and Transitional Justice and with senior government officials in the Ministries of the Interior and Foreign Affairs and International Cooperation, as well as with members of the National Constitutive Assembly. She also met with the President of the Temporary Judicial Commission (Instance provisoire de la justice judiciare), who is also the First President of the Court of Cassation, the First Presidents of the Administrative Court and the Court of Audit, the First Presidents of the Courts of Appeal of Tunis and Nabeul, the President of the Court of First Instance of Grombalia, the Public Prosecutor of the Court of Cassation, the Deputy Public Prosecutor of the Court of Appeal of Tunis, the Public Prosecutor of the Court of Appeal of Nabeul and the Deputy Public Prosecutor of the Court of First Instance of Grombalia, the Director of Military Justice, the General Prosecutor before the Military Court of Appeal in Tunis, and other members of the judiciary. Lastly, she met with members of the legal profession as well as with representatives of the Higher Committee of Human Rights and Fundamental Freedoms, the Truth and Dignity Commission, civil society, academia, and United Nations agencies and other intergovernmental organizations.

3. The Special Rapporteur thanks the Government of Tunisia for facilitating a rich and interesting programme of meetings while respecting the independence of her mandate. She also thanks the United Nations Resident Coordinator and the Office of the United Nations High Commissioner of Human Rights (OHCHR) in Tunisia for their valuable cooperation and assistance.

II. Justice system

A Recent political context

4. Following the popular uprising in Tunisia demanding basic human rights and social justice, which began on 17 December 2010 and culminated in the ousting of President Ben Ali on 14 January 2011, Tunisia entered a period of transition during which time there were three interim Governments. Since the adoption of the new Constitution on 26 January 2014, Tunisia has held parliamentary elections, in October 2014, and presidential elections, in November and December 2014. The newly elected Parliament, which first convened on 2 December 2014, will be responsible for adopting the organic and other implementing laws pertaining to the reform of the judicial system as stipulated in the Constitution.

5. The judiciary in Tunisia used to be heavily dependent on the executive power, given that the former Supreme Judicial Council was presided by the President of the Republic and the Minister for Justice was the Vice-President. A majority of Council members were appointed by the executive, and, while its decisions were made by majority, the President or the Vice-President had a casting vote in the event of a tie. The procedures for the selection, appointment, transfer, removal, discipline and training of judges and prosecutors were largely in the hands of the executive.

6. In the aftermath of the revolution, the interim Constitution made provision to create a temporary judicial authority to replace the former Supreme Judicial Council.[1] The Temporary Judicial Commission was established as a provisional independent body with financial and administrative autonomy to supervise the careers of sitting judges and prosecutors.[2] This was deemed necessary to restore public trust in the judicial system after decades of executive interference in the independence of the judiciary and the proper administration of justice.

7. In May 2012, more than 80 judges and prosecutors were dismissed by a decree signed by the Minister for Justice. The Special Rapporteur is concerned that the dismissals did not respect due process and fair trial guarantees and did not comply with the relevant law on the statute for judges in force.[3] By some accounts, this unilateral decision was a reaction to public opinion, which demanded reform owing to the absence of vetting processes for the judiciary. The Special Rapporteur was informed that the effect of this decision had been to make judges deeply concerned about their own job security. She expresses her concern at the chilling effect that such mass dismissals may have had on the independence of the judiciary as a whole.

8. The Special Rapporteur was informed that some judges succeeded in challenging the unilateral decision of their dismissal before the Administrative Tribunal. When the Special Rapporteur met with the Chief Justice, 32 additional cases were allegedly still pending before the Tribunal.

9. The Special Rapporteur recognizes the important efforts made during the transition to reform and strengthen the independence of the justice system in compliance with international standards, including by creating the Temporary Judicial Commission, which is an improvement over its predecessor, the Supreme Judicial Council. She is encouraged by reports from different sources that the Commission,[4] which is composed of a majority of elected members, has been a step in the right direction towards strengthening the independence of judges through reportedly recent appointments it has made where competence prevailed over political expediency.

B. Constitutional provisions

10. Chapter V of the Constitution establishes the judicial power as one of the three branches of State. It includes important guarantees for the independence of judges, prosecutors and lawyers as the main actors of the judicial system.

11. The Supreme Judicial Council, established by articles 112 to 114 of the Constitution, is responsible for the effective administration of justice and the independence of the judiciary. The Supreme Judicial Council comprises four organs: the Council of the Judicial Judiciary, the Council of the Administrative Judiciary, the Council of the Financial Judiciary, and a plenary assembly of the three councils. Each of the three councils is

[1] Constituent Law No. 2011-6 of 16 December 2011, art. 22.

[2] Organic Law No. 2013-13 of 2 May 2013.

[3] Law No. 67-29 of 14 July 1967 as modified by Law No. 69-5 of 24 January 1969.

[4] Organic Law No. 2013-13 of 2 May 2013, arts. 5-11. The 20-member body comprises 15 elected members (10 judges elected by their peers, and five non-judges elected by the National Constituent Assembly by an absolute majority from a list of candidates drawn up by the election commission) and five appointed judges or prosecutors sitting in their official capacity (First President of the Court of Cassation presiding, the Public Prosecutor of the Court of Cassation, the General Director of Judicial Affairs, the Inspector-General heading the General Inspection Service in the Ministry of Justice and the President of the Real Estate Court.

competent to decide on the professional career of judges and prosecutors and on disciplinary measures. The mandate, structure, organization and procedures applicable to each of the four entities that compose the Supreme Judicial Council will, however, be determined by a separate law. Article 113 of the Constitution affirms that the Supreme Judicial Council is self-managed, and ensures its administrative and financial independence by preparing its draft budget and discussing it before the competent parliamentary committee.

12. The Constitution also establishes the Constitutional Court as an independent judicial body that oversees the constitutionality of laws, besides performing other tasks specified by the Constitution. A separate law will govern the organization of the Constitutional Court, its procedures and the guarantees enjoyed by its members. In addition, the Preamble to the Constitution stipulates that the State is built on the principle of the separation of powers and a balance between them. The Preamble also declares that the State must guarantee the supremacy of the law, respect for freedoms and human rights, the independence of the judiciary and equality of rights and duties between all male and female citizens. Article 20 of the Constitution also affirms that the State's international obligations take precedence over domestic law.

C. Court structure

13. The court system in Tunisia has separate judicial, administrative, financial and constitutional branches. The judicial court system includes criminal, civil, real estate and military courts comprising the Court of Cassation, courts of appeal, courts of first instance and district courts.

14. The Court of Cassation in Tunis serves as the final court of appeal on points of law in both civil and criminal matters. There are 10 courts of appeal, which are competent to hear first instance appeals from courts of first instance. There are 27 courts of first instance, in which a three-judge panel hears all commercial and civil cases irrespective of the monetary value of the claim. At the base of the court structure there are 85 district courts, in which a single judge hears cases.

15. There are three permanent military courts of first instance, a military court of appeal in Tunis, military indictment chambers and a military chamber at the Court of Cassation. Judgements of the military courts of first instance may be appealed to the military court of appeal and then reviewed on points of law by the military Chamber of the Court of Cassation.

16. Tunisia has a separate administrative court system composed of the Administrative Tribunal (Tribunal administratif) for litigation involving the administration, and the Court of Accounts (Cour des comptes), which examines the accounts and management of the finances of public authorities. Both are located in Tunis. In the event of conflict of jurisdiction between the judicial and administrative systems, the Council of Conflicts (Conseil des conflits de compétence),[5] composed of three judges from the Court of Cassation and three from the Administrative Tribunal, is called upon to decide. There is now a provisional body for the control of constitutionality of draft laws pending the effective establishment of the Constitutional Court stipulated in the Constitution.[6]

[5] Organic Law No. 96-38 of 3 June 1996.

[6] Organic Law No. 2014-14 of 18 April 2014, and Constitution, art. 149, para. 7.

D. Legal framework

17. At the international level, Tunisia is party to eight core international human rights treaties: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto, the International Covenant on Civil and Political Rights, the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Optional Protocols thereto on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, and the Convention on the Rights of Persons with Disabilities Pursuant to the International Covenant on Civil and Political Rights, Tunisia has undertaken to respect and to ensure to all individuals within its territory and subject to its jurisdiction all rights related to, inter alia, the proper administration of justice, including the principles of equality before the law, the right to an effective remedy, the right to liberty and security, the presumption of innocence, the right to a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law, the fundamental procedural guarantees of persons charged with a criminal offence, and the principle of legality.

18. As a State party to the International Covenant on Civil and Political Rights, Tunisia is under an obligation to adopt legislative, judicial, administrative, educative and other appropriate measures in order to ensure the establishment of an independent and impartial judiciary and the proper administration of justice by making such changes to domestic laws and practices as are necessary to ensure their conformity with international standards and norms.[7]

19. The State judicial system is based on civil law. Law No. 67-29 of 14 July 1967 governs the judicial organization of courts and tribunals (civil and criminal), the composition, mandate and powers of the Supreme Judicial Council (now replaced by the Temporary Judicial Commission and the statute for judges and prosecutors. The afore-mentioned law provides that sitting judges and prosecutors are part of the same judicial corps of magistrates (magistrats); they take the same entry examination, and graduate from the same school, the Higher Institute for Magistrates (l'Ecole supérieure de la magistrature); the same or very similar provisions are applicable to both judges and prosecutors in relation to selection and appointment, performance evaluation, promotion and disciplinary proceedings. Law No. 2013-13 of 2 May 2013 replaced the Supreme Judicial Council with the Temporary Judicial Commission; the provisions of Law No. 67-29 not in conflict with Law No. 2013-13 remain in force.

III. Challenges to the independence and impartiality of the judiciary and the proper administration of justice

A. Need to adopt a comprehensive legal framework

20. The achievements of the Constitution in the justice sector need to be translated into reality. The Parliament has the task of adopting the necessary laws to operationalize the Supreme Judicial Council by the end of April, and the Constitutional Court by the end of October 2015. These laws need to be aligned with the Constitution and respect international human rights standards and principles.

[7] Human Rights Committee, general comment No. 31 (CCPR/C/21/Rev.1/Add.13).

21. The Special Rapporteur recognizes the important efforts made during the transition to reform and strengthen the independence of the justice system in compliance with international standards. Transitions, however, always come with challenges. This has been the case in Tunisia, where transitional laws and provisional bodies have attempted to bridge the gaps pending the adoption of new legislation and the establishment and implementation of permanent institutions.

22. The Special Rapporteur believes that an overhaul of the legislation relating to the legal system is necessary to implement the Constitution and to ensure an independent judiciary and well-functioning justice system.

B. Independence, impartiality, integrity and accountability

23. The Constitution, in its article 102, consecrates the judiciary as an independent power that guarantees justice, the supremacy of the Constitution, the sovereignty of the law and the protection of rights and freedoms. Articles 102 and 103 also guarantee the principle of the individual independence of judges, and the principles of impartiality, integrity, competence and diligence. Article 109 prohibits all interference with the judiciary.

24. The Special Rapporteur heard numerous complaints from both judges and lawyers about the lack of individual independence of judges, and was told that the most important priority was to combat judicial corruption. One positive step that the Special Rapporteur wishes to highlight is the establishment by article 130 of the Constitution of the Good Governance and Anti-Corruption Commission as an independent body. The Commission has investigative powers within the public and private sectors, and has a crucial role to play in ensuring accountability, including of the judiciary, and in improving the credibility of and confidence in the justice system.

25. The Special Rapporteur heard complaints about the selectivity and partiality shown in the way some judges treat lawyers and their clients. She was informed that, during hearings, judges sometimes ask lawyers or their clients personal or impertinent questions that are not relevant to the facts of the case to destabilize them. The Special Rapporteur strongly believes that such allegations are very serious and merit detailed investigation. Such evidence should be brought before the newly created Supreme Judicial Council.

26. The Special Rapporteur believes that it is important for Tunisia to ensure that necessary safeguards are put in place to effectively guarantee the independence of judges. For example, judges should have recourse to an independent authority, such as the Supreme Judicial Council, when their independence is under threat, and the new statute for judges should have specific sanctions for those seeking unduly to influence judges.

1. Supreme Judicial Council

27. The composition of the Supreme Judicial Council matters greatly to judicial independence, as it is required to act in an objective, fair and independent manner when selecting judges.

28. The Constitution provides that two thirds of each of the four bodies are magistrates (sitting judges or prosecutors), and one third are non-magistrates who are independent experts. For the members who are magistrates, the majority are elected, while the rest will be appointed judges and prosecutors sitting in their official capacity. According to article 112, the overall majority of the members of each of the four bodies is to be elected for a single six-year term. The new law will specify the number of members for each of the four bodies of the Supreme Judicial Council, who is eligible for election or appointment, the

criteria, and who will elect or appoint the members. At the time of writing, a preliminary draft of the law had been published.

2. Accountability

29. Article 130 of the Constitution states that judges are accountable for any shortcomings in the performance of their duties. Judges enjoy immunity against criminal prosecution and may not be prosecuted or arrested unless their immunity is lifted. They may be arrested if caught in the act of committing a crime; one of the three judicial councils on which they depend are to be informed to decide on the request for lifting immunity. Article 114 provides that decisions on discipline are to be taken by the relevant judicial council.

30. The preamble to the Bangalore Principles on Judicial Conduct explicitly states that the Principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial and are intended to supplement and not to derogate from existing rules of law and conduct that bind judges.

31. According to Principles 17 and 20 of the Bangalore Principles, disciplinary proceedings should be clearly established in law and respect fair trial and due process guarantees, including the right to judicial review. The law must give detailed guidance on infractions by judges triggering disciplinary measures, including the gravity of the infraction that determines the kind of disciplinary measure to be applied in the case at hand (A/HRC/11/41, para. 57).

32. A code of conduct or ethics should be put in place that clearly sets out reprehensible behaviour and respective sanctions for the judiciary. The Special Rapporteur welcomes the fact that the judges and staff members of the Court of Accounts have a charter of professional ethics dated July 2010. Such codes of conduct should be elaborated by judges themselves and be sufficiently detailed and comprehensive, in accordance with the Bangalore Principles and the principle of legality. Once the codes of conduct have been adopted for other sections of the judiciary, adequate training should be organized to raise awareness and to ensure their implementation.

33. The Special Rapporteur was informed that the General Inspection Authority of the Ministry of Justice, which together with the former Supreme Judicial Council used to conduct disciplinary proceedings against judges before the revolution, continued to play a role in disciplinary matters despite the replacement of the Supreme Judicial Council with the Temporary Judicial Commission. Under the law creating the Temporary Judicial Commission, the Minister for Justice may seize he Commission by transmitting a disciplinary file against a judge, prepared on the basis of a report by the General Inspection Authority.[8] The Special Rapporteur believes that this competence should be transferred to the Supreme Judicial Council. If the General Inspection Service were to continue to have a role as an inspection body, it should be subordinated to the Supreme Judicial Council, not to the Minister for Justice.

34. In the above connection, the Special Rapporteur recalls that, in general, the body that adjudicates cases of judicial discipline should be separate from the persons or body who initiate complaints or investigations that may lead to disciplinary measures, and must not be influenced by or have as members persons who initiated such proceedings. In this

[8] Organic Law 2013-13 of 2 May 2013, art. 16.

regard, the Special Rapporteur welcomes the fact that article 114 of the Constitution provides that decisions on discipline are to be taken by the relevant judicial council.

C. Selection, appointment and conditions of tenure of judges

1. Statute for judges

35. The new statute for judges should set out fair, transparent and objective criteria and procedures for the selection, appointment, tenure, promotion, transfer, removal and discipline of judges. This is an important safeguard for the independence of judges.

36. Institutional independence of the judiciary should be accompanied by financial and administrative independence.

2. Qualifications and selection

37. Principle 10 of the Basic Principles on the Independence of the Judiciary states that persons selected for judicial office should be individuals of integrity and ability with appropriate training or qualifications in law. Furthermore, any method of judicial selection should safeguard against judicial appointments for improper motives and against any type or grounds of discrimination. A former mandate holder underscored that competitive examinations conducted at least partly in a written and anonymous manner could serve as an important tool in the selection process of judges (A/HRC/11/41, para. 30). The Special Rapporteur adds that written examination should be followed up by an oral and public one to assess the competence, ability and integrity of future judges. Furthermore, a full investigation into the conduct and prior record of candidates should be carried out prior to their appointment to ensure that their behaviour or activities satisfy the appearance of propriety, which, is a principle essential to the performance of all of the activities of a judge.[9]

38. The Constitution provides that judges are to be nominated by presidential decree on the basis of recommendations of the Supreme Judicial Council. The nomination of senior judges is to be made by presidential decree, after consultation with the Prime Minister, on the basis of a list of candidates provided by the Supreme Judicial Council. According to article 106 of the Constitution, senior judicial positions will be decided by law.[10]

39. As already stated by the Special Rapporteur, if the law stipulates that an organ of the executive branch is the one formally appointing judges following their selection by an independent body, the recommendations of such a body should only be rejected in exceptional cases and on the basis of well-established criteria that have been made public in advance. Should the executive body not follow the recommendations, there should be a specific procedure by which it is required to substantiate in writing, and made accessible to the public, the reasons for which it has not followed the recommendation. This would enhance transparency and the accountability of the selection and appointment process (A/HRC/11/41, para. 33).

[9] Bangalore Principles of Judicial Conduct, Value 4.

[10] Law No. 67-29 of 14 July 1967, art. 7 bis lists the First President of the Court of Cassation, the Public Prosecutor of the Court of Cassation, the Prosecutor-General Director of Judicial Services, the Inspector-General of the Ministry of Justice, the President of the Real Estate Tribunal, the First President of the Court of Appeal of Tunis and the Public Prosecutor of the Court of Appeal of Tunis.

3. Conditions of tenure and promotion

40. According to article 114 of the Constitution, each of the three judicial councils (judiciary, administrative and financial) has the responsibility to decide on the professional career of judges. The Constitution does not have any specific provisions on the security of tenure of judges, stipulating only in article 107 that a judge may not be transferred without his or her consent and that a judge cannot be suspended, dismissed or be subject to disciplinary sanctions except in accordance with the instances stipulated in the law and subject to such guarantees as those established by law and by virtue of a motivated decision of the Supreme Judicial Council.

41. The Special Rapporteur emphasizes that the new statute for judges should comply with Principle 18 of the Basic Principles on the Independence of the Judiciary on the issue of security of tenure by providing that judges may only be removed or suspended for reasons of incapacity or behaviour that renders them unfit to discharge their duties. She expresses her concern at reports that judges have been transferred without their prior consent.

42. The Special Rapporteur also heard concerns that judges had been reappointed beyond the indicative retirement age (reportedly set at 60 years of age) on an ad hoc basis and without clear criteria. The new statute for judges should, in compliance with Principle 12. Basic Principles on the Independence of the Judiciary, guarantee security of tenure of judges until a mandatory retirement age or the expiry of their term of office.

43. The promotion of judges is currently based on the principle of seniority.[11] In addition to experience, promotion should, in compliance with Principle 13 of the Basic Principles on the Independence of the Judiciary, be based on objective criteria, in particular ability and integrity.

44. The performance evaluation of judges, including newly appointed judges on their one-year period of probation, is currently carried out by the President of the Court of Appeal after consultations with the Public Prosecutor, and on the basis of observations by the President of the court at which the judge is serving.[12] The Special Rapporteur strongly believes that there is a need for an assessment procedure that does not only depend on court presidents, given that such a procedure may lead to a system where judges unduly consult the President in specific cases instead of making their own independent decisions. Furthermore, the involvement of the Public Prosecutor is questionable, because this might also interfere with the independent decision-making of judges or lead to prosecutorial bias, in contradiction of the principle of equality of arms. The Special Rapporteur notes with concern that the current law does not prescribe any principles according to which the performance of judges should be assessed or any safeguards to ensure that the assessment is conducted in a fair, objective and transparent manner.

D. Budget and conditions of work

45. During the mission, the Special Rapporteur heard from a range of interlocutors that the poor conditions of work, including low salaries, inadequate or inexistent office infrastructure, lack of basic facilities, and non-systematized methods of work, were a major challenge to the independence of the judiciary. Providing judges with an adequate salary, in accordance with Principle 11 of the Basic Principles on the Independence of the judiciary,

[11] Law No. 67-29 of 14 July 1967, art. 33.

[12] Ibid., art. 34.

would be an important measure to counter pressure against them and to promote independent decision-making.

46. Another major challenge that the Special Rapporteur identified is the issue of corruption of the judiciary. Lack of resources may render judges more vulnerable to corruption, with the result that their independence is weakened. Furthermore, the allocation and administration of those resources by the executive may render the judiciary more vulnerable in accepting to be influenced over the outcome of sensitive cases, thereby weakening its independence.

47. According to Principle 7 of the Basic Principles on the Independence of the Judiciary, it is the duty of each Member State to provide adequate resources to enable the judiciary to perform its functions properly.

48. A fixed percentage of the national budget (between 2 and 6 per cent) should be allocated to the judiciary to enable the judiciary to properly perform its functions so that their resources are not used to threaten or to bring pressure upon a particular judge or judges (A/HRC/11/41, para. 37).[13]

49. The Special Rapporteur found that there was no clarity as to whether there was a fixed percentage of the national budget allocated to the judiciary and, if there was one, it was reportedly as low as 0.7 per cent. The three judicial councils, in coordination with the Supreme Judicial Council, should manage and prepare their own budget and administer the funds directly. They should each also have appropriate human and material resources to ensure improved conditions and methods of work that are conducive to the exercise of the judges' fundamental functions.

50. Furthermore, the Special Rapporteur considers that the Supreme Judicial Council should give its consent if the budget allocated is to be reduced from one fiscal year to another (A/HRC/11/41, para. 41). The Supreme Judicial Council should administer the funds directly, and be subject to independent and external oversight (ibid. para. 43).

E. Case management, internal regulations and procedures, judicial delays and access to justice

51. An important aspect of the fairness of a hearing is its expeditiousness. In its general comment No. 32, the Human Rights Committee highlighted that, in both civil and criminal cases, undue delays that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing and does not serve the interests of justice (CCPR/C/GC/32, paras. 27 and 35).

1. Case management

52. The Special Rapporteur learned about the apparent lack of transparency in the assignment of cases to judges, the constitution of benches, decisions on hearing dates, lack of information on when judgements are made, and the need to physically go to court to personally file documents and follow up on cases. She was informed that there was no information technology infrastructure for the automatic allocation or management of cases, no databases recording the number, type and status of cases before the courts or any meaningful statistics produced thereon or published.

53. The Special Rapporteur heard complaints from other professionals involved in the administration of justice, such as notaries, fiscal advisers and judicial experts about outdated laws and practices governing their respective roles. The laws governing the status

[13] Basic Principles on the Independence of the Judiciary, Principle 11.

of each of these professions, the conditions for entry into them, the training required, the maintenance of lists with the updated contact details of such professionals, who appoints them during a case, their remuneration, whether legal or other advice can be provided directly to the lay client, and their rights of audience need to be revised and regulated in consultation with the legal profession.

2. Judicial delays

54. The Special Rapporteur was informed that there was a complete lack of efficiency in the administration of justice. For example, judgements are first hand-written and then typed, work processes are slow, there is no methodology for preparing cases for hearings, too many people are working in the courts without clear responsibilities and allocation of tasks, and nobody administers court work. The Special Rapporteur learned that, in one court, there had been no ink for a printer for an entire year because courts were not involved in the management of their budget and everything had to go through the Ministry of Justice.

55. The Special Rapporteur heard accounts of court files disappearing then reappearing several months later owing to the lack of court clerks, and that lawyers had to pay to physically locate their files in court. She was also informed that those employed as court clerks were not adequately trained to provide an efficient service to all court users. Consequently, judges were overwhelmed by their workload, given that they were required to perform purely clerical tasks as well.

56. The Special Rapporteur learned from various sources that a very high number of cases were appealed; up to 70 per cent of cases from the courts of first instance are appealed to the Court of Appeal, and up to 70 per cent of cases from the Court of Appeal go to the Court of Cassation. The Special Rapporteur is concerned about the lack of relevant statistical data on case management, the impact of the lack of methodology and efficiency and the consequent delays on the quality of justice and the accessibility of the justice system. Such delays in the administration of justice may result in miscarriages or the denial of justice.

3. Pretrial detention

57. Article 27 of the Constitution provides that a defendant should be presumed innocent until proven guilty, and be entitled to a fair hearing and to all the necessary guarantees relating to the right to a defence throughout all phases of prosecution and trial. According to article 29, persons placed under arrest are to be immediately informed of their rights and the charges against them, and may appoint a lawyer to represent them.

58. According to article 13 bis of the Code of Criminal Procedure, a person is allowed to consult with a lawyer only after having appeared before an investigative judge; during police custody (garde à vue), suspects are totally isolated, without access to counsel or family for up to six days. The Special Rapporteur was informed that there were judges who did not understand or believe in the right to a defence; apparently, in some criminal cases, the defence lawyer is considered an "enemy" by the judge and the prosecutor.

59. The Special Rapporteur is concerned that the above-mentioned factors run counter to the right to a fair hearing, the right to defence and the right to have access to legal counsel, and open a serious gap between the law and the guarantees enshrined in the Constitution. The excessive length of police custody combined with the fact that a suspect does not have access to a lawyer may create the circumstances for ill-treatment (A/HRC/19/61/Add.1, paras. 17-20). Police custody comes under the oversight of the Prosecutor General, who has the sole authority to extend, in exceptional cases, the initial period of police custody of three days by another three days. It is also mandatory for the

judicial police to have a detainee examined by a doctor upon the request of the detainee or the detainee's relatives.[14] The Special Rapporteur heard numerous complaints according to which as many as 90 per cent of police officers refuse to grant a medical check-up when requested and, even when it is carried out, it is not recorded in the detention written record (procès verbal). The Special Rapporteur also heard complaints that evidence obtained under torture was not expressly excluded or systematically challenged in court, which is contrary to article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Special Rapporteur welcomes the stated intention of the authorities to amend the Code of Criminal Procedure.

4. Access to justice

60. The Special Rapporteur learned that a legal aid system is in place for civil, but not in all criminal, matters;[15] the system, however, is underfunded and has restrictive conditions for eligibility, while the low retainer fee for court-appointed defence counsel undermines the very effectiveness of legal aid. The Special Rapporteur recalls that the formal appointment of counsel by the State is insufficient to satisfy the obligations of the State under article 14 paragraph 3 (d) of the International Covenant on Civil and Political Rights. The State is indeed required to take "positive action" to ensure that applicants effectively enjoys their right to free legal assistance (A/HRC/23/43, para. 40).

F. Threats, attacks and lack of protection

61. The Special Rapporteur was informed that lawyers active in the defence of human rights were targeted and threatened, in particular those defending suspected terrorists. Furthermore, the media reportedly associate the lawyers defending suspected terrorists with their clients or their clients' causes. The Special Rapporteur also heard reports from numerous sources on the increasing coverage by the media of trials where journalists make legal qualifications about alleged crimes on television in violation of the right of suspects to be presumed innocent until proven guilty, thus compromising their right to a defence.

62. The Special Rapporteur was informed that judges were often subjected to aggressive media scrutiny, such as when they decide to release suspects and subsequently come under media pressure to justify their decision.

63. The Human Rights Committee, in its general comment No. 32, pointed out that it was a duty for all public authorities to refrain from prejudging the outcome of a trial, for example, by abstaining from making public statements affirming the guilt of the accused, and that the media should avoid news coverage undermining the presumption of innocence (CCPR/C/GC/32, para. 30).

64. The Special Rapporteur was informed that the position of Prosecutor of the Court of First Instance in Tunis was one of the most dangerous in Tunisia, given that the Prosecutor has the exclusive competence to initiate terrorist-related offences and to decide on whether to prosecute.[16]

65. The Special Rapporteur emphasizes that the State has a positive obligation to take effective measures to ensure the personal safety of judges, lawyers, prosecutors and their families (see A/64/181, para. 68, A/HRC/11/41, para. 79, A/HRC/20/19, para. 78).

[14] Code of Criminal Procedure, art. 13 bis.

[15] Law No. 2002-52 of 3 June 2002.

[16] Law No. 2003-75 of 10 December 2003, art. 34.

G. Prosecutorial services

66. Article 115 of the Constitution provides that the public prosecution is part of the judicial justice system, and is covered by the guarantees provided for in the Constitution. Moreover, public prosecutors exercise their functions within the framework of the penal policy of the State as regulated by the relevant laws.

67. Guideline 13 of the Guidelines on the Role of Prosecutors provides that prosecutors should, inter alia, carry out their functions impartially, protect the public interest, and act with objectivity.

68. The Special Rapporteur has already highlighted in previous reports that it is essential that prosecutors be able to play their role independently, impartially, objectively and in a transparent manner in the discharge of their functions (for example, see A/65/274, para. 18). They also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary (A/HRC/20/19, para. 93).

69. As stated above, sitting judges and prosecutors are part of the same judicial corps and subject to the same rules with regard to selection, appointment, transfer, removal, discipline and training, which are still partly in the hands of the executive power.

70. The Special Rapporteur was informed by sitting judges and prosecutors that they could seamlessly move from one function to the other during their careers, which they perceived as an enriching experience in understanding both roles. They did not regard this as an issue undermining their independence. The Special Rapporteur did, however, hear reports that the proximity between judges and prosecutors raised serious doubts regarding the independence, impartiality and objectivity of judges, and created much confusion about the respective roles of sitting judges and public prosecutors. The Special Rapporteur emphasizes that the perception by the general public of sitting judges and prosecutors performing different roles and functions is important, given that public confidence in the proper functioning of the rule of law is best ensured when every State institution respects the sphere of competence of other institutions (A/HRC/20/19, para. 40) and its actors have a separate career.

71. According to the Code of Criminal Procedure, the State Prosecutor is the hierarchical superior of the judicial police (art. 10), and has prosecutorial discretion to decide whether to dismiss complaints received (art. 30). The public prosecution service falls under the authority of the Minister for Justice.[17] The Minister has a range of powers vis-à-vis the State Prosecutor, including to report known violations of criminal law, to initiate or to have someone initiate prosecution, or to seize the competent jurisdiction with the written submissions that the Minister considers desirable.[18] This is in contradiction to the principle of independence of the public prosecution service of the executive branch of Government.

72. According to the Guidelines 14 and 15 on the Role of Prosecutors, prosecutors should not initiate or continue prosecution, or should otherwise make every effort to stay proceedings when an impartial investigation shows charges to be unfounded and they should give due attention to the prosecution of crimes committed by public officials. The Special Rapporteur was informed that, reportedly, the outgoing Minister for Justice never gave instructions to prosecutors. The Special Rapporteur was, however, also told that, even if in practice public prosecutors do not accept written instructions from the Minister when

[17] Law No. 67-29, art. 15.

[18] Code of Criminal Procedure, art. 23.

deciding on whether to prosecute a case and to assign it to an investigative judge, there were no clear and written criteria, so they followed the prevailing public opinion or the political trend set by the Government. For example, the Special Rapporteur was informed that there had been a number of prosecutions against journalists, bloggers and artists who had criticized the Government, and that the general public felt that the judicial system was defending the interests of the Government in targeting these persons. The Special Rapporteur emphasizes that this is not desirable; prosecutors should avoid confusion between public and State interests, namely, the exercise of functions in the public interest, such as criminal prosecution, should not be seen as having the role of protecting the interests of the Government, a political party or any other State institution (A/HRC/20/19, para. 50).

73. The selection and promotion of prosecutors should be based on objective criteria and preclude appointments for improper motives. Furthermore, the law on the Supreme Judicial Council and the statute for judges should specify objective criteria for appointment and promotion, including the appropriate skills, knowledge and training. The powers of the executive over the promotion and transfer of prosecutors should cease; in this regard, the Special Rapporteur is pleased to note that article 114 of the Constitution provides that decisions on discipline are taken by the relevant judicial council.

H. Military courts

74. The Constitution provides that military courts are to be specialized in the domain of military offences, stipulating in its article 110 that the relevant law[19] is to regulate their jurisdiction, composition, applicable procedures and the statute for relevant judges.

75. In its general comment No. 32, the Human Rights Committee affirmed that it is important to take all necessary measures to ensure that military trials take place under conditions that genuinely afford the full guarantees stipulated in article 14 of the International Covenant on Civil and Political Rights (CCPR/C/GC/32, para. 22).

76. The Special Rapporteur reiterates her view that military courts should only have jurisdiction over military personnel who commit military offences or breaches of military discipline, and then only when those offences or breaches do not amount to serious human rights violations. Exceptions are to be made only in exceptional circumstances and must be limited to civilians abroad and assimilated to military personnel (A/68/285, para. 89).

77. The Special Rapporteur expresses her great concern at the accounts heard that civilians were still being tried by military courts. She welcomes the reforms aimed at providing attributions of independence to the military justice system, including decree-law No. 69 of 2011 (A/HRC/24/42/Add.1, para. 47), and the possibility for victims to be *partie civile* in proceedings before military courts and to make claims for reparation for the harm suffered (ibid., para. 49).

78. The Special Rapporteur is concerned about the institutional dependence of military judges on the Minister for Defence, who presides over the Military Judicial Council, which is responsible for appointments, promotions and disciplinary measures (even though in actual practice the Minister for Defence has reportedly never presided over the Military Judicial Council). The Special Rapporteur notes that military judges are independent of the military hierarchy when exercising their functions, are subject to the supremacy of the

[19] Decree No. 9 of 10 January 1957 promulgated the Code of Military Justice, as amended by Law No. 2011-69 of 29 July 2011 and Law No. 2011-70 of 29 July 2011.

law,[20] and are protected against threats or attacks in the exercise of their duties.[21] The Special Rapporteur is equally concerned about the hierarchical dependence of military judges on their superiors, given that they are subject to general disciplinary rules.[22]

I. Lawyers

79. Article 105 of the Constitution recognizes the important role of lawyers as a free independent profession that contributes to the establishment of justice and the defence of rights and liberties. Lawyers are entitled to the legal guarantees that ensure their protection and the fulfilment of their tasks.

80. Lawyers play an essential role in the right to justice, in access to justice, and in the right to a defence. In order to fulfil their role, they need a legal and institutional framework that allows them to exercise their profession freely and a judicial culture that allows them to meet their clients in private and to communicate with the accused in conditions that respect fully the confidentiality of their communications (A/HRC/8/4, para. 40).

81. The preamble to the Basic Principles on the Role of Lawyers provides that adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession.

82. The Special Rapporteur heard complaints that court-appointed defence counsel is mandatory only in certain cases,[23] and are paid a minimal retainer fee, considered derisory by lawyers, currently fixed by the State at 180 dinars (approximately $90).[24] Moreover, such work is allocated to junior lawyers with little or no experience, or to interns, who work unsupervised. The Special Rapporteur reiterates that the lack of effective legal assistance at all stages of the criminal justice process is contrary to article 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights (see A/HRC/23/43, para. 94 (c)). This is a worrying practice that compromises the right of defence.

83. The Special Rapporteur heard complaints about the lack of necessary infrastructure in prisons; for example, in a specific women's prison, there is reportedly only one office made available for lawyers to meet clients in private, with the result that some have to wait for hours to consult with their clients, and in some instances return the following day. The Special Rapporteur was informed that, in one case, a lawyer had had to wait for nearly four hours to meet a client in what appeared to be an empty prison. It was reported that, in another prison that housed thousands of prisoners, only four offices were available for confidential lawyer-client meetings. Reportedly, in some prisons, the lawyers could not communicate with their clients in conditions that respect fully the confidentiality of communications; moreover, in one prison, equipment had been installed to spy on lawyers during such visits, and the information obtained was handed over to the prosecutor. The Special Rapporteur is seriously concerned about such allegations, which would be in breach of the right to a defence and the principle of professional privilege.

84. The Special Rapporteur is even more concerned about reports that lawyers are sometimes considered "enemies" of sitting judges and prosecutors. She highlights the fact

[20] Law No. 2011-70, art. 5.
[21] Ibid., art. 6.
[22] Ibid., art. 19.
[23] Law No. 2002-52 of 3 June 2002, art. 1 provides that, in civil matters, legal aid may be granted to the plaintiff or the defendant at any stage of the proceedings, whereas in criminal matters it may be granted if the offence committed is punishable by imprisonment of at least three years and if the party requesting legal aid is not a repeat offender.
[24] Decree law No. 2011-1178 of 23 August 2011, art. 1.

that lawyers play an essential role in guaranteeing the right to defence and, in accordance with the Basic Principles on the Role of Lawyers, should not be confused with their clients or their clients' causes.

85. The Special Rapporteur is pleased to note that there is an independent bar association in Tunisia that oversees the exercise of the legal profession. However, lawyers have complained about the lack of sufficient means to oversee effectively the exercise of the legal profession.

J. Education, training and capacity-building

86. The Special Rapporteur found that the main challenge in the reform of the judiciary in Tunisia is to change the mentality of judges, prosecutors, lawyers and administrative staff in courts. She heard from various stakeholders about practical measures and programmes to train all those involved in the administration of justice, and further encourages such initiatives.

87. A number of interlocutors expressed their concern about the fact that legal professional education for judges and prosecutors at the Higher Institute for Magistrates was basic, and should cover in greater depth ethical issues of independence and impartiality, and practical issues of working methods and case management. Initial and on-the-job training on ethical conduct and efficiency in the organization of work in the administration of justice should be made compulsory for all judges, including for their promotion.

88. The Special Rapporteur was pleased to learn that there is mandatory on-the-job professional training for sitting judges and prosecutors with fewer than six years of experience, but regrets that training is not compulsory thereafter. Reportedly, there is no compulsory training to become eligible for promotion. The Special Rapporteur is concerned about complaints that insufficient means are allocated to training, and that information about training opportunities, those selected to attend and the criteria used is lacking or not transparent. More needs to be done to set aside funds, and to create and propose training courses in a long-term sustainable manner, to the benefit of all judicial actors. This would further strengthen the integrity of the justice system and its independence.

IV. Conclusions

89. **Tunisia finds itself at the critical stage of having to transition from a largely fragmented justice system, which was revised to create interim structures and laws owing to the political necessities and realities, to a system designed in a holistic way and set out in the Constitution as one of the three powers of the State.**

90. **Although the general public has a poor perception of the justice system and trust in it is low, justice not only needs to be done but must also be seen to be done. The abuses of the previous regime, where corruption and regular executive interference in the work of the judiciary to influence the outcome of specific cases before the courts were common, must cease. The issue of the independence of the judiciary is also related to institutional culture and mentality, which must eventually give way to a culture based on human rights and an understanding of the principle of the independence of the judiciary and the separation of powers.**

91. **The Constitution generated high expectations and has left much work to legislators, to revise existing laws and to draft new ones to operationalize the vision of**

an independent judiciary and of a functioning, independent and impartial justice system.

92. **Some progress has already been made, but much remains to be done. Against this backdrop, the Special Rapporteur would like to highlight the importance of the role to be played by the newly-elected authorities in building an independent justice system in Tunisia. She encourages them to continue the broad and open-ended consultations to adopt the legislation necessary for the establishment and functioning of the Supreme Judicial Council and the Constitutional Court in accordance with the Constitution of 2014 as a matter of urgency. Such legislation should comply with the international human rights obligations of Tunisia to strengthen the rule of law, to build trust in democratic institutions, and to develop a judicial system that will guarantee people's human rights.**

V. Recommendations

A. Legal framework

93. **The Parliament should draft, on the basis of broad and inclusive consultations, including with civil society organizations, and adopt the necessary legislation, in particular that required to operationalize the Supreme Judicial Council and the Constitutional Court, and to elect their members as a matter of urgency.**

B. Independence, impartiality, integrity and accountability

94. **The close ties that exist between the judiciary and the executive should be severed so that that the judiciary may become independent in practice.**

95. **The principle of independence should be affirmed expressly in the law governing the mandate, structure, organization and procedures applicable to each of the four entities composing the Supreme Judicial Council.**

C. Selection, appointment and conditions of tenure of judges

96. **The law governing the composition of the Supreme Judicial Council should specify the exact number of members of the Council, and that at least a majority should be judges elected by their peers. It should also specify that due consideration should be given to gender balance among Council members, and establish clear and objective procedures and criteria for both elected and appointed members, and the term of their mandates.**

97. **The composition, mandate, structure, organization and procedures applicable for each of the four entities composing the Supreme Judicial Council should be established in the law, which should also guarantee its administrative and financial independence.**

98. **The law governing the statute of judges should specify clearly that the selection, appointment and promotion of judges should be based on fair, transparent and objective criteria and procedures. Such procedures and criteria should be based on merit, competence, ability, appropriate training and qualifications in law, integrity and propriety, in accordance with the Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct.**

99. **The law governing the statute of judges should provide that judges may only be removed or suspended for reasons of incapacity or behaviour that renders then unfit to discharge their duties, and guarantee security of tenure for judges until a mandatory retirement age or the expiry of their term of office.**

100. **The Supreme Judicial Council should strengthen the vetting of future judges, including a full investigation into the conduct of candidates, prior to their appointment, to ensure their integrity and to fight corruption.**

101. **The assessment of judges' work, and the decisions on the promotion and transfer of judges should be based on the same objective criteria that govern their selection and appointment, and should include procedural guarantees of fairness, such as the right to be consulted and to express one's views on the assessment, and to challenge the assessment, if deemed necessary.**

102. **The law dealing with the statute of judges should stipulate clearly that the initiation and conduct of disciplinary investigation (including general guidelines in terms of sources of information and how to gather it), disciplinary proceedings and the implementation of disciplinary sanctions are to be conducted by the Supreme Judicial Council. It should stipulate expressly that all stages of disciplinary proceedings should include guarantees of a fair trial and be subject to an independent review by a competent, independent and impartial tribunal.**

103. **A code of conduct for judges, sufficiently detailed, comprehensive and in accordance with the Bangalore Principles of Judicial Conduct, should be elaborated by judges themselves.**

D. Budget and conditions of work

104. **The Supreme Judicial Council and the courts should enjoy real administrative and financial independence through its own separate budget allocation and management. The three judicial councils, in coordination with the Supreme Judicial Council, should be vested with the role of receiving proposals from the courts, preparing a consolidated draft for the judicial budget and presenting it to the appropriate parliamentary committee, with the right to participate in subsequent deliberations.**

E. Case management, internal regulations and procedures, judicial delays and access to justice

105. **The solutions offered by information and communications technology should be explored through technical assistance and capacity-building to increase the efficiency of case management and working processes, and to reduce undue delays in all courts. All actors in the judicial system should be trained, in particular on information and communications technology.**

106. **The Code of Criminal Procedure should be reformed to reduce the lawful duration of police custody to a maximum of 48 hours and to ensure that access to a lawyer during police custody is expressly provided for in the law; and to make the legal grounds and records of arrest available to the families and to defence counsel. All allegations of torture should be investigated ex officio by the investigative judge.**

F. Threats, attacks and lack of protection

107. **Any act of harassment, threat, attack or physical assault against judges, prosecutors or lawyers should be investigated promptly and carefully and the perpetrators sanctioned. Appropriate protection measures, should when necessary, be provided to judges, prosecutors, lawyers and their families.**

G. Prosecutorial services

108. **The public prosecution service should be independent of the Minister for Justice and be headed by the Prosecutor-General of the Republic, who also should be independent of the Minister for Justice. The service should be financially autonomous.**

109. **The independence of prosecutors vis-à-vis the judiciary should be established in relevant organic laws and other relevant legislation to ensure the distinct role that each of them should have, in accordance with the Guidelines on the Role of Prosecutors.**

110. **The law governing the selection, appointment and promotion of prosecutors should include fair, impartial and objective criteria and procedures. Such procedures and criteria should take into account professional qualifications, ability, integrity and experience, in accordance with the Guidelines on the Role of Prosecutors.**

111. **The above-mentioned law should ensure that case-specific instructions to prosecutors are eschewed; in extraordinary cases when such instructions are deemed necessary, such instructions should be given in writing, formally recorded and carefully circumscribed to avoid undue interference or pressure. The law should also afford prosecutors the right to challenge the instructions received, particularly when they are deemed unlawful or contrary to professional standards or ethics.**

112. **A code of conduct for prosecutors should be elaborated by prosecutors themselves, bearing in mind their distinct role and duties in the administration of justice and in accordance with the Guidelines on the Role of Prosecutors.**

H. Military courts

113. **Legislation on military courts should be revised to ensure that the military court system only has jurisdiction to try military personnel who have committed military offences or breaches of military discipline, when such offences do not amount to serious human rights violations, and to transfer from military to civilian courts the investigation and jurisdiction of cases involving gross human rights violations committed with the alleged involvement of military and security forces.**

I. Lawyers

114. **The remuneration of defence lawyers appointed to provide legal assistance in criminal cases should be increased in accordance with the indicative legal fees set by the bar association.**

115. **The authorities should, with immediate effect, cease to associate lawyers with the interests of their clients and refrain from expressing related comments in the public sphere, including the media.**

116. **Awareness-raising measures on the role of lawyers should be taken by all relevant actors.**

117. **All communications and consultations between lawyers and their clients within their professional relationship should be confidential in law and in practice.**

J. Education, training and capacity-building

118. **Initial and on-the-job training and continuing legal education should be provided on issues of institutional independence and the codes of conduct and ethics for judges and prosecutors.**

119. **Training opportunities should be sufficiently publicized in advance and adequately accessible to all judges, prosecutors and lawyers.**

120. **United Nations specialized agencies, funds and programmes and the donor community should provide financial assistance and technical support to national training institutions for developing quality education curricula and professional training designed for judges, prosecutors and lawyers.**