



## **International Commission of Jurists**

### **Submission to the Human Rights Committee regarding the consideration of the 5<sup>th</sup> State Report submitted by the Republic of Tunisia**

**13 March 2008**

In occasion of the 92<sup>nd</sup> Session of the Human Rights Committee, the International Commission of Jurists (hereinafter, "ICJ") has the honour to contribute to the work of the Human Rights Committee with a submission on the military criminal justice system of the Republic of Tunisia. The ICJ respectfully submits to the Human Rights Committee the view that some constitutive and procedural provisions of the Tunisian military criminal justice system are in violation of its obligations under the International Covenant on Civil and Political Rights, and, in particular, of its commitments enshrined in articles 2 and 14 of the abovementioned treaty. The ICJ would like to present in this submission the arguments that led to this conclusion and to invite the Human Rights Committee to consider them in the drafting of the Concluding Observations on the State Report submitted by the Republic of Tunisia.

#### Introduction

The ICJ is concerned by certain patterns of the military criminal justice system of the Republic of Tunisia in relation to the respect of its obligations under articles 2 and 14 of the International Covenant on Civil and Political Rights (hereinafter, "ICCPR").

The Tunisian military criminal jurisdiction is essentially framed by the Code of Military Justice of 1957,<sup>1</sup> which was amended several times,<sup>2</sup> as integrated by other laws, such as the law on "functional employment of magistrates in military justice".<sup>3</sup>

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<sup>1</sup> Decree of 10 January 1957.

The military criminal jurisdiction is composed by the Permanent Military Tribunal; a Military Chamber of Indictment (*Chambre militaire de mise en accusation*) before the Permanent Military Tribunal; the Military Court of Cassation, which is a section of the ordinary Court of Cassation, integrated by an high military officer appointed by the Ministry of Defence; Military Examining Magistrates and the Military Public Prosecutor.<sup>4</sup>

### The Right to be Tried by a Competent Tribunal Established by Law

Permanent or temporary military tribunals can be constituted by decree of the Head of State under proposal of the Ministry of Defence in case of need. The decree itself establishes the limits of its competence and jurisdiction.<sup>5</sup> With the same procedure, the Head of State can institute other military tribunals in times of war or any time the interest of the interior or exterior security of the country requires it.<sup>6</sup>

The ICJ recalls that the creation of special tribunals could be in contradiction with the right to be tried by a competent tribunal established by law, as expressed by article 14(1) ICCPR, and with the principle of natural judge, as enshrined in principle 5 of the *Basic Principles on the Independence the Judiciary*.<sup>7</sup>

### The Right to be Tried by an Independent and Impartial Tribunal

According to the law, the criminal military jurisdiction is a dependency of the Ministry of Defence and is under the control of the Military Justice Administration.<sup>8</sup> While in time of war all the judges are of military provenience,<sup>9</sup> in times of peace the jurisdiction is integrated by ordinary judges.<sup>10</sup> Nevertheless, all the judges are appointed by the Executive Power: the military judges are nominated by the Ministry of Defence<sup>11</sup> and the ordinary judges by the Ministry of Defence and the Ministry of Justice for

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<sup>2</sup> Law Decree no. 79-12 of 10 October 1979, Law no. 79-55 of 5 December 1979, Law Decree no. 86-5 of 12 September 1896, Decree no. 86-987 of 30 September 1986, Law no. 86-1001 of 9 December 1986, Law no. 87-81 of 3 December 1987, Law no. 93-104 of 25 October 1993, Law no. 2000-56 of 13 June 2000.

<sup>3</sup> Decree no. 87-341 of 6 March 1987. The translation of the title is ours.

<sup>4</sup> Article 1, Code of Military Justice 1957.

<sup>5</sup> Article 1(1), Code of Military Justice 1957. See also, Decree no. 82-1405 of 30 October 1982.

<sup>6</sup> Article 2, Code of Military Justice 1957.

<sup>7</sup> *Basic Principles on the Independence the Judiciary*, adopted by the 7th United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>8</sup> Decree no. 79-735 of 22 August 1979.

<sup>9</sup> Article 12, Code of Military Justice 1957.

<sup>10</sup> Article 10(4) and (17), Code of Military Justice 1957: namely in the positions of president of the Permanent Military Tribunal and of its Chambers, or, in case of necessity, to fill vacant positions that cannot be filled by military judges.

<sup>11</sup> Article 10(9), Code of Military Justice 1957.

renewable periods of one year.<sup>12</sup> The General Military Prosecutor is appointed by the Ministry of Defence and works under its supervision.<sup>13</sup>

The ICJ notes that the appointment of the judicial authorities by the Executive Power and the control of the Government over the duration of their mandate are in clear violation of the right to fair trial by an “independent and impartial tribunal” as established in article 14(1) ICCPR. In particular, the ICJ deems worth of mention that the Human Rights Committee has noted that “lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy.”<sup>14</sup> The importance of a clear separation of powers and competences has been considered several times by the Human Rights Committee to be “essential for the compliance with a number of articles of the Covenant, notably article 14”<sup>15</sup> and “[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception”.<sup>16</sup>

### The Jurisdiction of Military Courts

The jurisdiction of Tunisian military courts is wide. As for the jurisdiction *ratione materiae*,<sup>17</sup> the Court can adjudicate on military offences; on offences of whatever kind occurring in the barracks, camps, buildings and places occupied by militaries for the needs of the army or of the armed force; on offences committed against the army; on offences committed by or against allied armies on the Tunisian territory, unless a contrary convention between the Tunisian government and the army’s government exists; on offences of the ordinary law committed by militaries against each other while on duty or in occasion of service; and on offences committed by militaries against each other while off-duty. Moreover, the jurisdiction of military tribunals can be endorsed of additional *ratione materiae* jurisdiction at any moment by special laws or regulations and

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<sup>12</sup> Article 11(1), Code of Military Justice 1957.

<sup>13</sup> Article 14(4), Code of Military Justice 1957.

<sup>14</sup> “Concluding Observations of the Human Rights Committee: Slovakia”, UN document CCPR/C/79/Add.79, 4 August 1997, paragraph 3.

<sup>15</sup> “Concluding Observations of the Human Rights Committee: Peru”, UN document CCPR/CO/70/PER, 15 November 2000, paragraph 10. See also, “Concluding Observations of the Human Rights Committee: Romania”, 28 July 1999, United Nations document CCPR/C/79/Add.111, paragraph 10. See also “Concluding Observations of the Human Rights Committee: Peru”, 15 November 2000, United Nations document CCPR/CO/70/PER, paragraph 10; “Concluding Observations of the Human Rights Committee: El Salvador”, CCPR/C/79/Add.34, 18 April 1994, paragraph 15; “Concluding Observations of the Human Rights Committee: Tunisia”, United Nations document CCPR/C/79/Add.43, 10 November 1994, paragraph 14; and “Concluding Observations of the Human Rights Committee: Nepal”, 10 November 1994, United Nations document CCPR/C/79/Add.42, paragraph 18; Decision of 22 March 1996, Communication N° 521/1992, Case of *Vladimir Kulomin vs. Hungary*, paragraph 11.3, United Nations document CCPR/C/56/D/521/1992, 1 August 1996; Decision of 20 October 1993, Communication No. 468/1991, Case of *Angel N. Oló Bahamonde vs. Equatorial Guinea*, paragraph 9.4, United Nations document CCPR/C/49/D/468/1991, 10 November 1993.

<sup>16</sup> See, General Comment N° 32, “Article 14: Right to equality before courts and tribunals and to a fair trial”, 2007, United Nations document CCPR/C/GC/32 of 23 August 2007, para, 19 and 20. See also, Decision of 28 October 1992, Communication N° 263/1987, Case of *Miguel González del Río vs. Peru*, paragraph 5.2, United Nations document CCPR/C/46/263/1987, 20 November 1992.

<sup>17</sup> Article 5, Code of Military Justice 1957.

can be invested by special laws on adjudication of offences against the internal and external safety of the State.

The jurisdiction *ratione personae* of the military courts comprehends:<sup>18</sup> officers of the army, of the armed forces or other military forces; the cadets of military academics and schools; sub-officers and enlisted members of the army, of the armed forces or of other military forces; retired officers, reserved officers, sub-officers of other reserved members of the army when called on service in the army, in the armed forces or in other military forces; people, included civilians, employed in general works for the army, the armed forces or other military forces, in times or state of war or when present in zone under state of emergency; prisoners of war; and civilians that committed or participated in the offence. According to this classification, the competence *ratione personae* of the military courts includes the members of the Interior Security Forces,<sup>19</sup> that, according to the law, constitute “a civil armed force” under the control of the Ministry of the Interior and are integrated by the agents of the National Security, of the National Police and by prison’s guards.<sup>20</sup> In this case, the Military Tribunals have jurisdiction to try offences committed during or in occasion of service by agents of the Interior Security Forces, when these offences are “in relation to their competences in the framework of internal or external security or to the maintenance of order in public life and in public places and in public or private enterprises.”<sup>21</sup>

The ICJ is deeply concerned by the vast possibilities given to military tribunals to try civilians. According to abovementioned norms, civilians can fall within these courts’ jurisdiction for ordinary criminal offences in which a military is involved, whether as author or victim;<sup>22</sup> for offences committed by civilians, whether as author or participant, in the military buildings, places or zones or against the army;<sup>23</sup> for offences against the internal or external security; for terrorism offences;<sup>24</sup> for the service or cooperation of a Tunisian citizen, in time of peace, with a foreign army or with a “terrorist” organisation that operates abroad;<sup>25</sup> and when members of Interior Security Forces in the cases explained above. It is not to be forgotten that military tribunals can have jurisdiction over offences assigned to their competence by “special laws or regulations”.<sup>26</sup>

The ICJ remembers that, according to the Human Right Committee, trials of civilians on military courts “should be exceptional”.<sup>27</sup> In many occasions the Human Rights Committee has found the prosecution and judgment of civilians by military tribunals to

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<sup>18</sup> Article 8, Code of Military Justice 1957.

<sup>19</sup> Law no. 82-70 of 6 August 1982, on the statute of the Forces of Interior Security, article 22.

<sup>20</sup> *Ibid.*, article 4.

<sup>21</sup> *Ibid.*, article 22 (our translation).

<sup>22</sup> Article 5, Code of Military Justice 1957.

<sup>23</sup> Articles 5 and 8(G), Code of Military Justice 1957.

<sup>24</sup> Article 52*bis* of the Criminal Code, included in 1993.

<sup>25</sup> Article 123, Code of Military Justice 1957.

<sup>26</sup> Article 5(4), Code of Military Justice 1957.

<sup>27</sup> General Comment no.32, “Article 14: Right to equality before courts and tribunals and to a fair trial”, 2007, UN Doc. CCPR/C/GC/32 of 23 August 2007, para.22.

be incompatible with article 14 of the ICCPR.<sup>28</sup> The ICJ claims that the jurisdiction of the Tunisian military courts is too vast and does not respect the criteria of exceptionality, necessity and the justification "by serious reasons"<sup>29</sup> required for the military jurisdiction on civilians to be in respect of article 14(1) ICCPR.

The ICJ also recalls that the Human Rights Committee has reiteratively considered that the practice of using military courts to try military and police personnel who have committed human rights violations is incompatible with the obligations assumed under the ICCPR, especially those stemming from articles 2(3) and 14.<sup>30</sup>

On the jurisdiction *ratione materiae* of the Tunisian military courts, the ICJ highlights that the Human Rights Committee has stated reiteratively that the jurisdiction of military courts should be limited to offences which are strictly military in nature and which have been committed by military personnel.<sup>31</sup>

### Judicial Guarantees in Military Courts

The procedural rules of the military tribunals rely in general terms on the ordinary rules of criminal procedure. Nevertheless, the Code of Military Justice includes several variations to the ordinary procedure. One of them consists in the wide powers given to the Ministry of Defence in procedural matters. The institution of criminal proceedings in the military courts requires the previous authorisation of the Ministry of the Defence<sup>32</sup> and he/she can order the suspension of the execution of the sentence of the military

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<sup>28</sup> Concluding observations on Peru, UN document CCPR/CO/70/PER, para.11. See also Concluding Observations on: Egypt (CCPR/CO/76/EGY, 1 November 2002, paragraph 16), Russian Federation (CCPR/C/79/Add.54, 26 July 1995, paragraph 25), Kuwait (CCPR/CO/69/KWT, 27 July 2000, paragraphs 17 & 18), Slovakia (CCPR/C/79/Add.79, 4 August 1997, paragraph 20), Uzbekistan (CCPR/CO/71/UZB, 26 May 2001, paragraph 15), Uzbekistan, (CCPR/CO/71/UZB, 26 May 2001, paragraph 15), Cameroon (CCPR/C/79/Add.116, 4 November 1999, paragraph 21), Algeria (CCPR/C/79/Add.1, 25 September 1992, paragraph 5), Nigeria (CCPR/C/79/Add.64, 3 April 1996), Poland (CCPR/C/79/Add.110, 29 July 1999, paragraph 21), Lebanon (CCPR/C/79/Add.78, 1 April 1997, paragraph 14), Chile, ( CCPR/C/79/Add.104, 30 March 1999, paragraph 9), Syria (CCPR/CO/71/SYR, paragraph 17), Morocco (CCPR/C/79/Add.113, 1 November 1999, paragraph 18).

<sup>29</sup> General Comment no.32, "Article 14: Right to equality before courts and tribunals and to a fair trial", 2007, UN Doc. CCPR/C/GC/32 of 23 August 2007, para.22.

<sup>30</sup> Concluding observations on: Bolivia (CCPR/C/79/Add.74, paragraph 11), Brazil (CCPR/C/79/Add.66, 24 July 1996, paragraph 10), Chile (CCPR/C/79/Add.104, 30 March 1999, paragraph 9), Colombia (CCPR/C/79/Add.2, 25 September 1992, paragraph 393; CCPR/C/79/Add.76, 5 May 1997, paragraph 18), Croatia (CCPR/C/79/Add.15 - A/48/40, 28 December 1992, paragraph 369), Dominican Republic (CCPR/CO/71/DOM, 26 April 2001, paragraph 10), El Salvador (CCPR/C/79/Add.34, 18 April 1994, paragraph 5), Ecuador (CCPR/C/79/Add.92, 18 August 1998, paragraph 7), Guatemala (CCPR/CO/72/GTM, 27 August 2001, paragraphs 10 & 20), Lebanon (CCPR/C/79/Add.78, 1 April 1997, paragraph 14) Peru (CCPR/C/79/Add.8, 25 September 1992, paragraph 8), Venezuela (CCPR/C/79/Add.13, 28 December 1992, paragraph 7).

<sup>31</sup> Concluding observations on: Egypt (CCPR/C/79/Add.23, 9 August 1993, paragraph 9), Chile (CCPR/C/79/Add.104, 30 March 1999, paragraph 9), Poland (CCPR/C/79/Add.110, 29 July 1999, paragraph 21) Cameroon (CCPR/C/79/Add.116, 4 November 1999, paragraph 21), Morocco (A/47/40, 23 October 1991, paragraph 57), Syria (CCPR/CO/71/SYR, paragraph 17), Kuwait (CCPR/CO/69/KWT, paragraph 10), the Russian Federation (CCPR/C/79/Add.54, 29 July 1995, paragraph 25), Slovakia (CCPR/C/79/Add.79, paragraph 20) and Uzbekistán (CCPR/CO/71/UZB, 26 April 2001, paragraph 15).

<sup>32</sup> Article 15 and 21, Code of Military Justice 1957.

tribunal.<sup>33</sup> The only appeal provided for is against the decisions of the Examining Magistrate (*Juge d'instruction criminelle*).<sup>34</sup> However, the law allows to challenge the judgments of the military tribunals and of the Chamber of Indictment before the Court of Cassation.<sup>35</sup> The defendant can be tried *in absentia*, even in cases of death penalty that constitute a great number of the offences of the Military Justice Code.<sup>36</sup> The conflicts between ordinary and military jurisdiction are to be solved as last instance in the Court of Cassation.<sup>37</sup>

The Code of Military Justice expressly denies the possibility to constitute as "*partie civile*" in the military trial.<sup>38</sup> It does allow the civil action only in ordinary *fora* and the action is automatically suspended until a criminal decision in the military tribunal is reached.

The ICJ reminds that the strong power of the Ministry of Defence in the trial can undermine the independence and impartiality of the military tribunals, and constitute an illegitimate interference with the judiciary. It also notes that the discretionary power in the hands of the abovementioned Ministry to suspend the execution of the sentence can result in the negation of the positive obligation sourcing in article 2(1) ICCPR to bring to justice perpetrators of human rights violations. The Human Rights Committee has clearly considered that, when investigations reveal violations of certain rights contained in the ICCPR, "States parties must ensure that those responsible are brought to justice"<sup>39</sup> and a failure on this side constitutes a violation of article 2 of the Covenant.<sup>40</sup>

The existence of trial *in absentia*, particularly when it could lead to sentences of death penalty, may undermine the right of the defendant to be "tried in his presence" and impair his right to "defend himself in person or through legal assistance of his own choosing", as required by article 14(3)(d) ICCPR.

Finally, the denial of the right to constitute as "*partie civile*" in the military criminal trial risks to infringe the right to a remedy enshrined in article 2(3) of ICCPR.

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<sup>33</sup> Article 44, Code of Military Justice 1957.

<sup>34</sup> Article 28, Code of Military Justice 1957: "The Chamber of Indictment (*Chambre de Mise en Accusation*) constituted in the appeal court of Tunis has competence to adjudicate on the oppositions against the decision done in accordance with article 27" (our translation). Article 27 contemplates the decisions of the Examining Magistrate: namely, the decision of non-prosecution (*arrêt de classement*) and the decision of proceeding to trial (*arrêt de renvoi*).

<sup>35</sup> Article 29, Code of Military Justice: "the decisions given by the Chamber of Indictment and the judgments given by the military tribunals can be appealed to the Court of Cassation" (our translation).

<sup>36</sup> For example: treason, *espionage*, violation of the fundamental duties of the commander, surrender or desertion in case of war and cowardice before the enemy.

<sup>37</sup> Article 9, Code of Military Justice 1957, and article 291 and 292 of the Code of Criminal Procedure.

<sup>38</sup> Article 7, Code of Military Justice 1957.

<sup>39</sup> General Comment no.31, "Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant", 21 May 2004, UN Doc. CCPR/C/74/CRP.4/Rev.6, para.18.

<sup>40</sup> *Ibidem*.