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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**JOINT OPINION**

**ON THE LAW**  
**No. 2008-37 OF 16 JUNE 2008**  
**RELATING TO THE HIGHER COMMITTEE**  
**FOR HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**  
**OF THE REPUBLIC OF TUNISIA**

**by**  
**THE VENICE COMMISSION**  
**and**  
**THE OSCE/ODIHR**

**Adopted by the Venice Commission**  
**at its 95<sup>th</sup> Plenary Session**  
**(Venice, 14-15 June 2013)**

**on the basis of comments by**

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## I. INTRODUCTION

1. As part of an OSCE/ODIHR project on consolidating and promoting democratic structures in Tunisia and among OSCE Mediterranean Partners for Co-operation, the OSCE/ODIHR offered to Tunisian authorities to review their existing legislation for compliance with international standards. This project is part of a longer-term OSCE/ODIHR effort to support OSCE Mediterranean Partners for Co-operation.
2. On 19 February 2013, the First Deputy Director of the OSCE/ODIHR reiterated, *inter alia*, this offer in a letter sent to the Advisor of the Minister of Human Rights and Transitional Justice in Tunisia. In this letter, he further stated his Office's willingness to review Law no. 2008-37 of 16 June 2008 relating to the Higher Committee for Human Rights and Fundamental Freedoms, ideally in cooperation with the Venice Commission.
3. By letter of 2 April 2013, the Advisor of the Minister of Human Rights and Transitional Justice asked the OSCE/ODIHR to prepare a joint opinion on the 2008 Law relating to the Higher Committee for Human Rights and Fundamental Freedoms in cooperation with the Venice Commission.
4. This Opinion is provided in response to the above-mentioned request, with a view to supporting the process of developing legislation for the Higher Committee for Human Rights and Fundamental Freedoms (hereinafter "The Higher Committee") that is in compliance with relevant international standards.
5. The present Joint Opinion was adopted by the Venice Commission at its 95<sup>th</sup> Plenary Session (Venice, 14-15 June 2013).

## II. SCOPE OF REVIEW

6. The scope of the Opinion covers only the above-mentioned Law relating to the Higher Committee for Human Rights and Fundamental Freedoms (hereinafter "the Law"), submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation pertaining to the promotion and protection of human rights in Tunisia.
7. The Opinion raises key issues and indicates areas of concern. The ensuing recommendations are based on relevant international standards, including OSCE standards, and good practices. In the interests of concision, the Opinion focuses on problematic areas rather than on the positive aspects of the Law.
8. This Opinion is based on an official translation of the Law. The translation may nevertheless not always accurately reflect the original version on all points and, consequently, certain comments may be due to problems of translation.
9. In view of the above, the OSCE/ODIHR and the Venice Commission would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Law or related legislation that the OSCE/ODIHR or the Venice Commission may make in the future.
10. The Venice Commission and OSCE-ODIHR are conscious of the fact that the Law was adopted in 2008. As part of the reform process in Tunisia following the revolution, there is now an opportunity to establish an effective institution for the protection of human rights. The present opinion aims to assist the Tunisian authorities in this task, it being understood that the basic rules for the new institution will be part of the future Constitution.

### III. EXECUTIVE SUMMARY

11. To ensure full compliance with international standards, notably the UN's Paris Principles, it is recommended as follows:

#### 1. Key Recommendations

- A. To guarantee the existence of the High Committee in the Constitution, which provisions should set out its main powers and basic principles, notably its independence, including of financial nature, as well as the rules governing the appointment of its members and the termination of their mandates; [pars 16 and 17, 27-28, 47-48 and 72];
- B. To specify in the Law that the Higher Committee is a general, autonomous and independent human rights body with wide competences; [pars 22 and 27];
- C. To specify in the Law that the Higher Committee may provide opinions, recommendations, reports or proposals on any matters related to the promotion of human rights not only upon request by the competent public institutions, or based on an individual complaint, but also upon its own initiative; [par 22, 25 and 37];
- D. To specify the basic parameters of procedures for submitting and handling human rights complaints in the Law, including the mandate of the Higher Committee to resolve such complaints itself (unless another independent human rights body is mandated to do so), by a variety of means including amicable settlements, findings and recommendations; [pars 23-24, and 69];
- E. To include in the Higher Committee's tasks under the Law, as part of its general mandate, the ability to make recommendations regarding amendments to and adoption of laws and administrative measures, and the ratification of relevant international instruments, as well as monitoring of implementation of such instruments; [par 27];
- F. To ensure in the Law that the composition of the Higher Committee and support staff reflects diverse segments of Tunisian society, professions and backgrounds, as required by its powers, as well as an equal representation of women and men, and a balance of regions; [par 44];
- G. To incorporate in the Law a broad, transparent and open selection and appointment process aiming to select/appoint members of the Higher Committee of diverse backgrounds and professions, due to their individual skills and experience, and based on pre-determined, objective and publicly available criteria; [pars 44 and 48];
- H. To include in the Law a provision granting immunity from legal liability for Higher Committee members and support staff, for actions undertaken in their official capacity; this provision should also outline circumstances, and ensuing procedures, in which such immunity may be waived; [par 51];
- I. To set out clearly in the Law the circumstances and procedure for cases in which members of the Higher Committee end their term of office prematurely, which shall involve also independent bodies, and provide the respective members with the right to be heard; [pars 55-56 and 72];
- J. To see to it that the Law restricts public executive authorities from having control over the allocation of public funds to the Higher Committee in a manner that could interfere with its financial independence; [par 63];

## 2. Additional Recommendations

- K. To ensure that the Law foresees the monitoring of the implementation of its recommendations and proposals as part of the Higher Committee's mandate; [par 22];
- L. To specify in the Law that gender equality and women's rights shall be mainstreamed into all human rights protection strategies; [par 25];
- M. To outline specifically in the Law the need to maintain confidentiality of the identity and private life of complainants with regard to Government, the National Assembly or Parliament, and the public at all times; [par 26];
- N. To set out in the Law the relationship between the Higher Committee and the President, National Assembly or Parliament, government, and other public institutions, while ensuring that such relationship will not compromise the Higher Committee's independence; [par 28];
- O. To include in the Law the obligation and deadlines for public institutions and state officials to cooperate with the Higher Committee in the conduct of its activities and investigations; [par 29];
- P. To clarify in the Law that the role of the Higher Committee is to advise on and review official reports to be submitted to UN human rights bodies, rather than to draft them itself; [par 30];
- Q. To set out in the Law that not the Chairman, but rather the Higher Committee as a whole shall be mandated to conduct inquiries and other tasks that are part of its mandate, including visiting places where people are deprived of their liberty, regularly, without prior notice and at a time of its choosing; [pars 33, 37 and 59];
- R. To specify in the Law that visits to places where persons are deprived of their liberty shall aim to enforce both national laws, and relevant international standards; [par 33];
- S. To state explicitly in the Law that meetings with persons deprived of their liberty, as well as all correspondence between them and the Higher Committee, shall be conducted privately and confidentially, without supervision; [par 34];
- T. To foresee in the Law the possibility for the Higher Committee to issue independent findings and recommendations on how to solve problems and shortcomings identified during visits to facilities where persons are deprived of their liberty; [par 35];
- U. If a separate national preventive mechanism is set up, to include in the Law a framework for effective cooperation between the Higher Committee and this body; [par 36]
- V. To extend the term of office of members of the Higher Committee to six years, without the possibility of renewal, to enhance independence of this office; [par 43];
- W. To amend Article 8 of the Law so that the Chairman is elected by members of the Higher Committee from among the members of the Committee; [par 50];
- X. To include in the Law a provision guaranteeing immunity for baggage, correspondence, and means of communication of the Higher Committee, as well as the general inviolability of property, documents and premises; [par 52];
- Y. To specify in the Law that members of the Higher Committee shall not seek or receive instructions relating to the performance of duty from government, or any other public body or official; [par 53];

- Z. To outline in the Law that a certain number of Higher Committee members shall be full-time members who, upon the end of their tenure, should be allowed to return to previous or similar public service posts; [par 54];
- AA. To include in the Law provisions on impermissible conflicts of interest in the exercise of Higher Committee members' mandates, and the consequences of such conflict of interest; [par 56];
- BB. To consider inserting in the Law a provision foreseeing the appointment of a Deputy Chairman to replace the Chairman of the Higher Committee in times of absence; [par 60];
- CC. To ensure that important decisions of the Higher Committee are always taken only when the necessary quorum is present; [par 61];
- DD. To permit by law the receipt of additional subsidies for the work of the Higher Committee, including by international donors, following a fully transparent procedure; [par 63];
- EE. To clarify the difference between the two annual reports mentioned in Article 12 of the Law, or preferably merge them into one main annual report, which shall be submitted to the President, all relevant parts of government, the National Assembly or Parliament, and the public, and which shall ideally be debated in the National Assembly or Parliament; [par 64];
- FF. To ensure that all reports and opinions issued by the Higher Committee are published; [par 65];
- GG. To consider deleting the part of Article 10 of the Law requiring the approval of the Higher Committee's rules of organization and procedure by the President; [par 66];
- HH. To re-discuss whether the sub-committee hearings shall be open to those Committee members who are representatives of ministries, to avoid a potential conflict of interests; [par 68] and
- II. To set out in the Law a level of remuneration for members (particularly full-time members) of the Higher Committee, which should be at a competitive level, and reflect the special human rights oversight nature of the Higher Committee; and the high level expertise of its members; [par 70].

## **IV. ANALYSIS AND RECOMMENDATIONS**

### **1. Relevant International Standards**

12. Based on Article 1 of the Law, the Higher Committee for Human Rights and Fundamental Freedoms is responsible for protecting and promoting human rights, consolidating their values, spreading the human rights culture, and helping guarantee the exercise of human rights. The Higher Committee thus constitutes a National Human Rights Institution within the meaning of the United Nations Principles relating to the status of national institutions, commonly known as the Paris Principles<sup>1</sup>.

13. Due to the different nature, mandate and competences of National Human Rights Institutions all over the world, the Paris Principles do not contain specific international standards governing such institutions, but rather the basic necessary elements to ensure functioning National Human Rights Institutions, be it in the form of a human rights commission, or in the form of a people's advocate or Ombudsperson. According to the Paris

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<sup>1</sup> Defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993.

Principles, a National Human Rights Institution should be vested with the competence to promote and protect human rights, and have a broad human rights mandate. Further, the composition of such institution should reflect the principles of pluralism, and it should be independent, in particular financially independent, from Government.

14. The need for effective, independent, and pluralistic national institutions for the promotion and protection of human rights has also been reiterated most recently in the UN Human Rights Council's Resolution 20/14 on National Institutions for the Promotion and Protection of Human Rights<sup>2</sup>, and numerous resolutions passed by the UN General Assembly.<sup>3</sup>

15. In the Council of Europe area, the Committee of Ministers also recommended to Member States to establish effective national human rights institutions, "in particular human rights commissions which are pluralist in their membership, ombudsmen, or comparable institutions".<sup>4</sup> Within the OSCE region, OSCE participating States have likewise committed to facilitate the establishment and strengthening of independent national institutions in the area of human rights and rule of law.<sup>5</sup>

## 2. Main Tasks of the Higher Committee

16. The Higher Committee in Tunisia, as stated in Article 2 of the Law, provides opinions on issues received from the President of Tunisia; these may be any issues relating to the consolidation and protection of human rights and fundamental freedoms. The Higher Committee also draws attention to cases of human rights violations, and submits to the President proposals likely to consolidate human rights and fundamental freedoms at a national and international level, including such that lead to (national and international) human rights compliance of laws and practices. It is moreover tasked to carry out assignments entrusted to it in this field by the President, receive and examine requests and complaints pertaining to human rights issues, hear, as necessary, persons lodging such complaints, and send the complaints on to a competent authority for submission to courts. The Higher Committee likewise advises persons requesting assistance and complainants on how to have their rights recognized. Reports on the above activities are then submitted to the President.

17. Further tasks are listed in Article 3 of the Law, namely research functions, preparation of draft reports on behalf of Tunisia to the United Nations bodies and committees, and follow-up to such reports, human rights awareness-raising, as well as the preparation and implementation of national action plans and programmes on human rights.

18. It is welcomed that, in the current process of establishing a new Constitution for Tunisia, the improvement of the legal framework pertaining to the operation of a national human rights institution has been considered. The most recent draft of the Constitution of Tunisia (dated 1 June 2013) contains a specific provision on the so-called "constitutional bodies", which are independent structures aiming to "strengthen democracy". They shall

<sup>2</sup> Adopted at the Human Rights Council's 20<sup>th</sup> session on 16 July 2012. See also the Human Rights Commission's Resolution 2005/74, adopted at its 59th meeting on 20 April 2005.

<sup>3</sup> See the following UN General Assembly resolution: nos. 63/169 and 65/207 on the role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights (adopted at the 70th plenary meeting on 18 December 2008 and the 71<sup>st</sup> plenary meeting on 21 December 2010 respectively), and nos. 63/172 and 64/161 on national institutions for the promotion and protection of human rights (adopted at the 70th plenary meeting on 18 December 2008, and the 65th plenary meeting on 18 December 2009 respectively).

<sup>4</sup> Recommendation No. R (97) 14 of the Committee of Ministers to Member States on the Establishment of Independent Institutions for the Promotion and Protection of Human Rights

<sup>5</sup> See the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, par 27. See also the OSCE Ministerial Council Decision No. 10/07 on Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding (30 November 2007), par 10, in which participating States are encouraged to establish national institutions or specialized bodies to combat intolerance and discrimination. See also the OSCE Ministerial Council Decision 14/04, OSCE Action Plan for the Promotion of Gender Equality (7 December 2004), Art. 44 (g), focusing on the establishment of democratic institutions to advance gender equality, such as Ombudsman's offices at local and national levels.

have judicial personality, and administrative and financial autonomy. Members of such bodies shall be elected by the National Assembly or Parliament, to which these bodies shall submit annual reports, and be accountable. All state organs shall facilitate the work of such independent constitutional bodies.

19. A “human rights body” shall be established as one of the above-mentioned constitutional bodies. According to the information provided by the Constitutional Bodies’ Commission of the National Constituent Assembly, the constitutional recognition of the “human rights body” is meant to guarantee its stability, its administrative and financial independence, and its full powers. The “human rights body” shall be composed of independent and neutral personalities, who shall exercise their mandate for one (non-renewable) tenure of six years. This human rights body shall be charged with ensuring and monitoring respect for human rights and fundamental freedoms and their development. It is also tasked to investigate cases involving violations of human rights and fundamental freedoms, by dealing with them itself, or by submitting them to the competent authorities, and to provide its opinion on all human rights related draft legislation.

20. The UN Paris Principles stipulate that national human rights institutions shall be given as broad mandates as possible, which shall be clearly set forth in a constitutional or legislative text. This includes the preparation of opinions, recommendations, proposals and reports on human rights-related matters, either at the request of government, parliament or other competent bodies, or, through the exercise of the an institution’s power, without higher referral. The national human rights institution may also decide to publish such documents, which shall relate to legislative and administrative provisions, as well as those relating to judicial organizations, human rights violations in general, the national situation of human rights, or may include proposals to the Government to end specific human rights violations.

21. Other tasks set out by the Paris Principles include the promotion and harmonization of national legislation and practices with international human rights instruments ratified by the respective State, contributions to human rights reports submitted to United Nations bodies and cooperation with the latter, as well as assisting in the formulation of programmes for human rights education.

22. While Article 2 of the Law reflects some of the tasks of national human rights institutions stipulated in the Paris Principles, it is noted that these are limited to various manners of advising the President of Tunisia on human-rights related issues (upon presidential request), raising awareness on human rights issues, and implementing government policies. The Higher Committee should constitute an independent and autonomous human rights body; this should also be outlined explicitly in the Law.<sup>6</sup> As such, it should not become active merely upon request of the President of Tunisia, but should rather be able to provide opinions, recommendations, proposals or reports on any matters concerning the promotion and protection of human rights (unless these tasks are taken over by another human rights protection body, such as an ombuds institution<sup>7</sup>). This may happen at the request of any public body, including the President, the National Assembly or Parliament and the Government, but also on the Higher Committee’s own initiative. The Law should also enable the Higher Committee to monitor how its recommendations and proposals are followed by relevant authorities.

23. At the same time, while Article 2 of the Law provides this national human rights institution with the mandate to receive and examine (presumably individual) human rights complaints, it does not appear to have the powers to autonomously investigate and respond directly to such complaints. Instead, they are then sent on to a “competent authority” for submission to courts. Referring complaints to competent authorities should not preclude the Higher Committee from resolving alleged human rights violations itself (unless, as stated above, there is another human rights body with the specific mandate to review human rights

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<sup>6</sup> See Article 3 of the National Human Rights Commission of Mongolia Act.

<sup>7</sup> According to the information available, the establishment of an ombuds institution is not envisaged at this stage in Tunisia.

complaints). Numerous other human rights commissions, both in the OSCE area,<sup>8</sup> and in other Mediterranean Partners for Co-operation<sup>9</sup>, examine, and also directly respond, in some manner or other, to human rights complaints, e.g. by addressing competent public authorities<sup>10</sup>, or initiating mediation procedures. If the Law means to establish the Higher Committee as the main human rights complaints-handling mechanism in Tunisia, it is recommended to explicitly state therein that the Higher Committee shall be competent to both examine, and respond to complaints and other indications of human rights violations independently by various means listed in the Paris Principles, including reaching amicable settlements through conciliation and mediation, issuing findings on certain human rights situations and complaints, and making recommendations to competent authorities including, e.g., proposals to amend legislation, regulations or administrative practice. Depending on the circumstances of the case, the possibility of forwarding complaints to other competent organs should likewise be maintained.

24. It is further noted that the Higher Committee's powers to receive and investigate complaints are outlined only very briefly in Article 2 par 3. This provision does not specify the procedure for submitting such complaints and handling them. In order to ensure that individuals, as well as private entities are fully aware of their right to submit complaints to the Higher Committee, and of the ensuing procedures, the deadlines for submitting complaints to the Higher Committee, as well as the time period within which a complaint should be processed, and the list of possible and pertinent actions that the Higher Committee may take in such cases, should be outlined in detail in the Law. The complaints handling procedure and actions taken in response to complaints should be transparent, and decisions, actions and reports/opinions should be publicized as much as possible. The Law should also specify against which bodies such complaints may be directed, particularly whether these shall only be public bodies, or whether, in certain cases, they may also be directed at businesses (e.g. in discrimination cases, or where businesses exercise public functions).

25. Ideally, the Higher Committee should be able to investigate complaints received by individuals, but should also have the right to undertake *ex officio* investigations into any human rights issues that come to its attention, where required. The investigation of complaints and/or general human rights situations autonomously should be an essential part of its activity. In this context, it is also recommended to mainstream gender equality and women's rights into all protection strategies, so that the complaints-handling procedure and actions of the Higher Committee also address the particular protection needs of women and girls in the national context.

26. At the same time, confidentiality with regard to the identity and private lives of complainants should be maintained at all times, especially vis-à-vis government, parliament and the public (unless individual complainants waive this right).<sup>11</sup> This should be outlined specifically in the Law, with special attention given to the protection and safety of complainants, injured parties and witnesses.

27. In order to ensure the effectiveness of the Higher Committee as a body to promote and protect human rights in Tunisia, this body's powers to shape human rights policy in the country should be enhanced. As specified in the Paris Principles, the Law should state clearly that the Higher Committee's tasks shall also include recommendations regarding amendments to legislation and administrative measures, the adoption of new legislation and administrative measures, and ratification of relevant international law instruments. The Higher Committee should also monitor implementation of such legislation and instruments. The Law should generally, in line with the Paris Principles, establish the Higher Committee as an autonomous and independent body with wide competences to respond to all aspects of potential human rights abuse. It is essential that the actual and perceived independence of

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<sup>8</sup> See, e.g., the powers of inquiry of human rights commissions in Scotland and Ireland (Section 8 of the Scottish Commission for Human Rights Act, and Article 9 of the Irish Human Rights Commission Act), see also Article 17 of National Human Rights Commission of Mongolia Act.

<sup>9</sup> See Articles 4, 5 and 7 of the Royal Decree on the creation of the National Human Rights Council of Morocco.

<sup>10</sup> See Chapter 2, Protection Strategies, ODIHR Recommendations, Handbook for National Human Rights Institutions on Women's Rights and Gender Equality, 2012.

<sup>11</sup> See, in this context, Article 13 of the Scottish Commission for Human Rights Act.

national human rights institutions, covering their composition, powers, financial autonomy and methods of operation, is envisaged in national legislation, including at the constitutional level.

28. Next to its general tasks, the Law should also outline explicitly the relationship between the Higher Committee, and the President, parliament and government, and other relevant public institutions. In this context, the independent nature of the institution would require it to assist all state powers, while maintaining an appropriate distance to the executive and legislative branches of state. Additionally, it is essential that such institution assume its proper place within the constitutional system.

29. At the same time, the Law should specify that all public institutions and state officials are obliged to cooperate with the Higher Committee. Any lack or ability to do so should be appropriately justified. The Law should include specified deadlines for responding to the Higher Committee's requests. It is of key importance also that the Law clearly states that medical confidentiality and other reasons for maintaining confidentiality of data may not be invoked in response the Higher Committee's requests for information. As foreseen in the Paris Principles, the Law should state explicitly that the Higher Committee shall be empowered to "hear any person and obtain any information and any documents necessary for assessing situations falling within its competence".

30. In relation to the report-writing tasks of the Higher Committee outlined in Article 3 of the Law, it should be noted that, rather than draft the government's submissions to UN human rights bodies, the role of a national human rights institution is habitually to advise on and review such reports, but not to write them. In line with the Higher Committee's standing as an autonomous and independent institution, it would be advisable to amend this provision; at the same time, national human rights institutions may always be encouraged to prepare shadow reports for relevant proceedings before the above bodies.

31. It is welcomed that the Chairman of the Higher Committee can visit rehabilitation, penal and detention facilities, centres for housing and watching over children, and social institutions for people with specific needs (Article 5). At these visits, he/she may be assisted by two members of the aforesaid Committee in the course of his assignment. It is particularly laudable that Article 5 covers a wide array of institutions where persons are deprived of their liberty, and that such visits may be undertaken *ex officio*, and without prior notice.

32. The Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "OPCAT"), which Tunisia acceded to in mid-2011, sets up "a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment" (Article 1 of the OPCAT). Given the formulation of Article 5, the Higher Committee could well be, or become the designated national preventive mechanism that Article 3 of the OPCAT requires signatory States to set up.<sup>12</sup>

33. Regardless of whether the Higher Committee shall become, or continue to be, the designated national preventive mechanism for Tunisia, Article 5 should be amended so that not only the Chairman, assisted by two Committee members, may visit places where people are deprived of their liberty. Instead, this right should be granted to the Committee as a whole and such visits should be undertaken by specific Committee members selected due to their relevant knowledge and expertise in different areas, e.g. torture, health, psychology, among others, while ensuring gender, and perhaps also regional balance (see Article 18 par 2 of the OPCAT). Such visits should be conducted regularly; the lack of prior notice, and the ability to conduct them at a time of the Higher Committee's choosing should be maintained. The aim of such visits should not only be the enforcement of national laws, as currently stated in Article 5, but also of relevant international standards.

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<sup>12</sup> According to information provided by Tunisian official sources, the National Constituent Assembly may soon adopt a law establishing a separate national preventive mechanism under the OPCAT, which will involve a separate body.

34. Should this remain part of the Higher Committee's tasks, then the Law should include the above as a guarantee for all individuals deprived of their liberty; in their interests, the Law should further specifically state that meetings, and generally all forms of correspondence between the Higher Committee and individuals deprived of their liberty, should take place in private, with no supervision. This principle should be included in the Law.

35. Furthermore, in the event that the above is retained among the Higher Committee's tasks, then the Law should also foresee the possibility for the Higher Committee to issue independent findings and recommendations on how to solve, in due time, problems and shortcomings identified in the facilities visited<sup>13</sup>, and to make proposals for legal reform, as required by the OPCAT.

36. If, however a national prevention mechanism is established separately under the OPCAT, then the Law should provide an adequate framework to enable effective institutional cooperation between the two bodies, including a smooth circulation of information.

37. It is also noted that, under Article 6 of the Law, the Higher Committee Chairman "carries out by special order of the President of the Republic, missions of inquiry and investigation into human rights and fundamental freedoms issues, and submits reports on this to the President of the Republic". Clarification should be provided on what is understood by such missions, which, in any case, should be the task of the Higher Committee as such and not only of its Chairman. Additionally, the Higher Committee should be able to carry out any missions or tasks related to the promotion and protection of human rights also on its own initiative, as well as upon the request of Parliament and other competent bodies.

### **3. Composition of the Higher Committee. Appointment/Dismissal of its Members**

38. Currently, according to Article 7, the Higher Committee is composed of a Chairman and the following members: 15 individuals known for their integrity and competence in the field of human rights "who represent different currents of thought, universities and expertise", one representative from the Chamber of Deputies, one from the Chamber of Advisors, 12 representatives from national human rights NGOs, and one representative each from the Ministries of Justice and Human Rights, the Interior, Foreign Affairs, Education, Higher Education, Social Affairs, Health, Culture, Youth, Children, Women and Communications. In total, the Higher Committee is thus made up of more than 40 persons. The representatives of ministries shall provide coordination between the Higher Committee and their respective ministries on issues pertaining to human rights and fundamental freedoms. They may attend meetings, but may not vote.

39. It is noted that with more than 40 members, and two subcommittees, the Law appears to follow the model of the French National Consultative Human Rights Commission, which has 64 members, and is also broken down into sub-committees and working groups. Within the region, the Moroccan National Human Rights Council has 30 members, different topical working groups, and regional commissions.

40. By contrast, human rights commissions in the United Kingdom and Ireland have fewer members – the Scottish Human Rights Commission has up to 5 members (including the President), and the Northern Ireland Human Rights Commission has 8 members (including the President); the Irish Human Rights Commission has 9 members (again including the President).

41. Both larger and smaller commissions have their advantages and disadvantages – while it is easier for the former to properly reflect all parts of the population, and have a truly pluralist nature, smaller commissions may be more flexible, and have shorter decision-making processes. In the case of the Tunisian Higher Committee, it may be helpful, in order to enhance the efficiency and timeliness of investigation reports and decisions on complaints,

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<sup>13</sup> See also the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, p. 10.

to increase the frequency of plenary meetings (e.g., the French National Human Rights Consultative Commission meets about six times a year, which would amount to meeting every second month). Generally, regardless of the size of a human rights commission, it is essential that it is supported by a strong body of highly professional support staff. Legislation should permit the assistance of independent, including international, experts where needed.

42. The Chairman and members of the Higher Committee are appointed by the President by decree for three years on a renewable basis (Article 8 of the Law). Members representing public institutions and NGOs are appointed based on the suggestion of the bodies which they are representing. The Law does not set out a specific procedure for appointing the Chairman and other members of the Higher Committee.

43. The tenure of three years for members of the Committee would appear to be too short. To better ensure the independence and impartiality of the Higher Committee and its members, it would be advisable to extend the term to 5 or 6 years, without the possibility of renewal; this way, members would not be affected by considerations of future re-appointment. For the sake of continuity, the first term may be extended for some of the Committee's members if its entire composition is renewed.

44. The Paris Principles specify that the composition of the Higher Committee and the appointment of its members shall be established in accordance with a procedure affording all necessary guarantees to ensure "the pluralistic representation of social forces (of the civilian society) involved in the promotion and protection of human rights". The composition of the Higher Committee would thus need to reflect diverse segments of Tunisian society, professions, and backgrounds, as well as, as far as possible, an equal representation of women and men<sup>14</sup>, and a balance of different regions of the country. The same should apply to its support staff.<sup>15</sup> Guarantees for ensuring such pluralism should be included in the Law. At the same time, an appropriate level of lawyers and other highly qualified professionals would help ensure an effective performance and appropriate level of interventions.

45. Pluralism can likewise be enhanced via the appointment process (e.g. diverse societal groups suggest or recommend candidates), and procedures enabling effective cooperation with diverse societal groups.<sup>16</sup> The selection and appointment process should be fully transparent, and should be based on broad consultation throughout. Vacancies for members should be advertised broadly, and the number of potential candidates from a wide range of societal groups should be maximized. Finally, members should be selected based on their individual capacity, rather than on behalf of a specific organization.<sup>17</sup>

46. At the moment, the President of the Republic exercises considerable influence on who is appointed as member of the Committee; it would appear that he/she currently has the power to single-handedly select and appoint the 15 individual members to the Higher Committee, as well as its Chairman. At the same time, the procedure whereby human rights experts, and individuals considered competent for the position of Chairman are brought to the President's attention is not outlined in the Law. Furthermore, while Article 8 states that representatives of national human rights NGOs are appointed at the suggestion of these NGOs, it is not clear whether these shall always be the same 12 NGOs, or whether a larger number of NGOs may propose representatives, from which the President or another body shall then select 12 members to the Committee.

47. It would be preferable if the selection procedure were not only more transparent, but would also do more to guarantee pluralism in membership, so as to promote the independence of, and public confidence in the Higher Committee.<sup>18</sup> Guarantees for this

<sup>14</sup> See Article 5 par 2 of the Irish Human Rights Commission Act, requiring that no less than four members of the Commission shall be men, and no less than four shall be women.

<sup>15</sup> See the General Observations of the ICC Sub-Committee on Accreditation, par 2.1.

<sup>16</sup> *Ibid.*

<sup>17</sup> See the General Observations of the ICC Sub-Committee on Accreditation, par 2.2. See also the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, pp. 13, 18, 26, and 29.

<sup>18</sup> See also the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, pp. 26 and 29.

should be set out clearly in the Law. Such transparency and pluralism could be achieved by creating an open selection process based on applications and/or nominations received from a wide array of stakeholders of diverse backgrounds and professions, possibly by installing an independent selection committee, or by placing this process under the auspices of the National Assembly or Parliament. Such body should then rank incoming proposals to ensure diversity and pluralism, in particular with regard to gender, professional background, and geographical and societal representation. Another way to select members would be for a certain number of members to be appointed by the President, and a certain number by the National Assembly or Parliament; in such situation, the latter should play the main role in selection proceedings.

48. Once a selection has been made, the President or other body could still appoint the members of the Committee, but only following a wider consultative and transparent process. In case the National Assembly or Parliament should elect or appoint members of the Higher Committee, this should be done by qualified majority decision. The main parameters of the appointment process, namely which body shall be competent to appoint members, and the length of their tenure, should be outlined in the Constitution as well.

49. All aspects of this process should be publicized as much as possible, to ensure neutrality and impartiality throughout. Further, members should be selected due to their individual skills and experience, not as representatives of specific organizations or public institutions. This means that also those candidates that are proposed by the parliament, government, or NGOs should be selected for high professional and ethical standards, and not merely to represent their office or organization. Candidates should be assessed on the basis of pre-determined, objective and publicly available criteria. Interviews with candidates may help select the potential members. Civil society and other independent actors should play an active role in suggesting candidates, and challenging or supporting individual candidates.

50. As for the manner in which the Chairman is selected, it would be preferable if the above procedure would merely focus on selecting and appointing members of the Higher Committee, who would then elect their Chairman from the members of the Higher Committee. This is a very important aspect to ensure the independence of this body.

51. To additionally enhance independence and impartiality of the members of the Higher Committee, and reduce the potential for external influence, it is further advised to include in the Law a provision guaranteeing them immunity from legal liability for actions undertaken in their official capacity.<sup>19</sup> Both members of the Committee, and support staff acting on behalf of and under the authority of the Higher Committee, shall enjoy such immunity even after the expiry of their terms of office or work contracts. The Law should also specify in which cases such immunity may be waived, and by which body (ideally, provided the Law is changed accordingly so that the Higher Committee is accountable to the National Assembly or Parliament<sup>20</sup>, it should be the latter, following a fair and transparent procedure, by qualified majority).

52. The immunity granted shall also cover baggage, correspondence, and means of communication belonging to the Higher Committee. In this context, it is stressed that the Law should also include guarantees as to the inviolability of the Higher Committee's property, documents and premises.

53. The Law should further specify that members of the Higher Committee shall not seek or receive instructions in connection with the performance of their duties from any government and other public body, or public official.

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<sup>19</sup> See the General Observations of the ICC Sub-Committee on Accreditation, par 2.5. See also the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, pp. 8, 14, and 17.

<sup>20</sup> See, in this context, the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments, adopted in Belgrade at the 2012 International Seminar on the relationship between National Human Rights Institutions (NHRIs) and Parliaments (22-23 February 2012), which speak of a closer relationship between NHRIs and Parliaments.

54. Moreover, a certain number of members of the Higher Committee should be full-time members, to ensure the Committee's independence, and avoid actual or perceived conflicts of interest. This would also help enhance the stability of the members' mandates, and guarantee the ongoing and effective fulfillment of their tasks.<sup>21</sup> Upon the end of their tenure, full-time members of the Higher Committee who previously worked in the public service should have the right to resume their previous, or at least a similar post.

55. It is noted that the Law does not foresee cases in which members of the Higher Committee end their term prematurely, e.g. in the cases of resignation, or dismissal. These cases should be set out clearly, and the procedures for dismissing members of the Committee should be transparent and objective.<sup>22</sup> Where appropriate, the Law should specify that the application of a ground for dismissal by the competent body (ideally the National Assembly or Parliament, should it be responsible for appointing members of the Committee following a change in legislation) should be supported by the decision of an independent body with appropriate jurisdiction. Generally, both before the dismissing body, and before the independent body, the member being dismissed should have the right to be heard prior to a decision on dismissal being taken. Also, to ensure security of tenure and overall independence of the Higher Committee, dismissal should not be based solely on the discretion of the appointing body.<sup>23</sup>

56. Generally, members of the Committee should only be dismissed in exceptional cases, namely in cases where they have committed serious crimes, or otherwise severely damaged the reputation of the Committee. In case this responsibility lies with the National Assembly or Parliament, decisions on dismissal shall be taken by a qualified, possibly a two-thirds majority of members of the National Assembly/Parliament. In this context, it is also recommended to include in the Law clear provisions on impermissible conflicts of interest in the exercise of one's mandate as member of the Higher Committee, and the consequences of such conflict of interest.<sup>24</sup> More generally, laying down, at the constitutional level, the basic rules governing not only appointment, but also termination of the term of office of the Higher Committee members would enhance the guarantees of independence and pluralism of both the Higher Committee and its individual members.

#### **4. Working Procedure of the Higher Committee**

57. While the Law contains some main parameters of how the Higher Committee operates, the Committee shall, under Article 10, also lay down its own rules of how it "organizes, operates and runs, and its internal regulation", which are then approved by Presidential Decree. Currently, the Committee has developed Rules on the Organization of the Higher Committee, and an Internal Regulation of the Higher Committee.

58. It is noted that the Law gives the Chairman quite extensive powers, in comparison to the other Committee members: he/she runs and represents the Committee and is "invested with every power" for this purpose (Article 8 of the Law). Furthermore, he/she is appointed directly as Chairman of the Committee by the President, with little indication of a wide, inclusive and transparent selection and appointment process. According to Article 5 of the Law, only the Chairman visits facilities where people are deprived of their liberty (though he/she may designate other members to assist him/her), and under Article 6 of the Law, he/she carries out missions of inquiry and investigation into human rights issues by special order of the President. According to the Internal Regulation of the Higher Committee, he/she has a casting vote in the case of a tied vote.

<sup>21</sup> See the General Observations of the ICC Sub-Committee on Accreditation, par. 2.8. See also the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, p. 26.

<sup>22</sup> See the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, p. 14.

<sup>23</sup> *Ibid.*, pp. 14 and 18. See also the General Observations of the ICC Sub-Committee on Accreditation, par 2.9

<sup>24</sup> See the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, pp. 14 and 31.

59. While the running and coordination of the Committee lie within the usual mandate of a Chairman, tasks such as visits to detention centres or inquiry missions should be part of the responsibilities of the Higher Committee as such. They should, within this framework, be undertaken by those members of the Committee that are the most qualified to do so based on their background, expertise and capacities, not only by the Chairman merely as a result of his/her functions. All members of the Higher Committee should be, as far as possible, equally involved in and informed of its activities and tasks, including “missions of inquiry and investigation into human rights issues”. It is recommended to amend the Law to reflect this.

60. Furthermore, instead of having the oldest member of the Committee with a voting right replace the Chairman in times of absence, as stated in Article 2 of the Internal Regulation of the Higher Committee (hereinafter “the Internal Regulation”), the appointment of a Deputy Chairman could be considered, given the size of the Committee.

61. Based on Article 9 of the Law, the Higher Committee decides on its opinions and suggestions in a consensual manner; if this is not possible, by a majority of its members. The necessary quorum for decisions is indicated in Article 8 of the Internal Regulation (half of the members with voting rights should be present). Article 8 of the Internal Regulation also states that in case such quorum could not be met at a meeting, then the meeting shall be postponed. The postponed meeting will then be attended regardless of the quorum present. It should be clear that in cases where a meeting is held without the necessary quorum present, the Higher Committee will not be in a position to take important decisions on, e.g., complaints, inquiries, legal reform, or other key areas of its mandate; such decisions should then be deferred to the next meeting at which a quorum will be present.

62. The ability of the Higher Committee to establish relations with NGOs, and other human rights movements (Article 11), is much welcomed, and directly reflects the guidance provided in the Paris Principles.

63. It is further noted that financial autonomy is set out in Article 1, which presumably is meant to afford the institution the financial independence that the Paris Principles speak of. Generally, financial independence implies that other public authorities should be prevented from having control over the allocation of budgetary funds to the Higher Committee in a manner that interferes with the independence of the latter. To guarantee the Committee’s proper functioning and development, it is important to secure a clear legal basis for it to receive additional subsidies from external, including international donors. In this context, it is important to stress that the grants received may not, however, threaten the Higher Committee’s independence or affect allocations from the state budget; thus, donations should never be linked to or associated with the donors in such a way as to compromise the independence and effectiveness of the Higher Committee. In any case, full transparency for any donation needs to be ensured. Issues concerning the budget of the High Committee should be decided without any involvement of the government.

64. Under Article 12 of the Law, the Higher Committee shall submit an annual report to the President of the Republic, and an annual report on the situation of human rights and fundamental freedoms which is relayed to the public. The difference between the two annual reports is not clearly outlined in the Law, and could perhaps be clarified (though Article 17 of the Rules of Organization states that the former is an annual report on the activities of the Committee). Further, while it is commendable that the report on human rights issues will be published, submitting the report on activities of the Committee only to the President could compromise the Committee’s independence, as it could be seen to be, and may indeed consider itself to be, only accountable to the President. Such report should not only be submitted to the President, but also to other relevant parts of government, the National Assembly or Parliament<sup>25</sup>, as well as to the public. Possibly, the report on activities of the Committee, and the human rights report could be merged into one annual report. It may also

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<sup>25</sup> See pars 14 and 15 of the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments.

enhance awareness of the work of the Higher Committee if the Law would require the National Assembly or Parliament to conduct a parliamentary debate on this report<sup>26</sup>.

65. Under Article 12, the Higher Committee may issue press releases, which is a welcome attempt at ensuring transparency of this body's work. However, this transparency could go even further – it would be preferable if all reports and opinions issued by the Committee would be published, to raise awareness of human rights issues across the country, and ensure accountability of the government. The Paris Principles specify that “public opinion [shall be addressed] directly, or through any press organ, particularly in order to publicize [a national institution's] opinions and recommendations”. This principle should also be outlined in the Law.

66. As mentioned earlier, the Committee gives itself its own rules of organization and rules of procedure (internal regulation), which then need to be approved by decree of the President. Also amendments to these rules need to be approved by presidential decree. Such requirement to have internal regulations approved by the executive should not compromise the Higher Committee's independence and efficiency, and should, if at all, constitute a mere formality.<sup>27</sup> It is recommended to consider deleting this requirement from Article 10 of the Law, or otherwise specify the functional nature of such decree, which should not be a legal requirement for the validity and applicability of internal rules and regulations of the Higher Committee. Generally, to ensure the largest possible autonomy of such institution in shaping its internal organization and procedures, the Law should be limited to regulating merely the fundamental and general legal framework. Only the Committee itself should be allowed to regulate its own detailed work procedures and organization, and this should be unambiguously reflected in the Law.

67. According to Article 3 of the Rules of Organization, the Higher Committee shall meet at least every three months, and each time the need arises to take decisions and issue opinions. General meetings may be called on an exceptional basis following a written request of at least one-third of those members with voting rights to the Chairman, outlining the subject to be discussed.

68. Currently, the Higher Committee has two permanent sub-committees dealing with requests and complaints, and general reports respectively (Article 4 of the Rules of Organization), and special working groups or commissions may be constituted to deal with issues submitted to the Higher Committee, as needed. Any member of the Higher Committee may take part in all commissions and working groups. In relation to the sub-committee responsible for dealing with requests and complaints, the ability for ministry representatives to participate also in these sub-committee's meetings should be revisited, to avoid a potential conflict of interest. Even if the latter are not able to vote when decisions are taken, their presence could compromise the confidentiality thus effectiveness of the proceedings in cases involving individual complaints.

69. As stated earlier, it would be advisable to include the main aspects of complaints proceedings in the Law, so that potential complainants will be aware of the procedures for processing complaints (see par. 24 supra). Generally, everyone (including designated legal representatives) should be able to have easy access to the Higher Committee, to complain about his/her grievances.

70. According to Articles 5 and 8 of the Rules of Organization, the allowances granted to Committee members and staff shall be fixed “in accordance with the legislative and regulatory provisions in force”. At least the level of remuneration for Committee members and staff should be fixed in the Law. Especially in the case of full-time staff members, such remuneration should be at a competitive level, and should reflect the special human rights oversight nature of the Higher Committee; it could, e.g., correspond to the salaries of higher court staff.

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<sup>26</sup> Ibid., par 16.

<sup>27</sup> See the Reports and Recommendations from the Session of the ICC Sub-Committee on Accreditation of 19-23 November 2012, Chapter 2, Specific Recommendations, p. 14. See, on a more general note, the General Observations of the ICC Sub-Committee on Accreditation, par 2.10.

71. The Internal Regulation of the Higher Committee specifies the modalities of meetings and other work processes. Article 6 of the Internal Regulation states that Committee members who are absent from ordinary general meetings three consecutive times in a row without a justified reason, shall be considered to have given up their membership. In this case, they are replaced for the remaining term of office "in accordance with the legislation in force" (presumably the Law).

72. The dismissal and replacement of members of the Committee should not be laid down in internal working procedures such as the Internal Regulation, but rather in the text of the Law. Habitually, members shall be dismissed in the same manner by which they are appointed. Ideally, based on previous recommendations to have members of the Higher Committee appointed by the National Assembly or Parliament, this should thus also happen via a qualified majority decision taken by the National Assembly/Parliament, though the appointing body should not have sole discretion in such matters (see pars 55-56 *supra*). In order to preserve the independence of the Higher Committee, the dismissal of its members shall under no conditions be based on the mere presumption of a person having given up his/her membership in the Higher Committee. Should a member not attend numerous consecutive meetings in a row without proper justification, then the Chairman should first raise this with the respective member, and then with the National Assembly or Parliament. The National Assembly/Parliament shall then take the appropriate decision, following a transparent procedure set out in the Law, which shall include other relevant bodies as well, and which shall also allow the respective individual to be heard.