

Ministry of Justice and the Danish Institute Against Torture - DIGNITY

# PRE-TRIAL DETENTION





REPUBLIC OF TUNISIA  
Ministry of Justice

# Pre-Trial Detention

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# Summary

<b>07</b>	<b>Preface</b>
<b>13</b>	<b>Introduction</b>
<b>20</b>	<b>Section 1: The Tunisian Constitution</b>
<b>27</b>	<b>Section 2: International Obligations</b>
<b>29</b>	SECTION 2.1: INTERNATIONAL INSTRUMENTS
<b>41</b>	SECTION 2.2: RELEVANT DECLARATIONS, GUIDELINES AND PRINCIPLES
<b>52</b>	SECTION 2.3: SAFEGUARDS ARISING FROM INTERNATIONAL OBLIGATION
<b>60</b>	<b>Section 3: National Legislation</b>
<b>62</b>	SECTION 3.1: THE LEGAL BASIS FOR PREVENTIVE DETENTION
<b>71</b>	SECTION 3.2: THE GUARANTEES AND RIGHTS RESERVED FOR PERSONS IN PRE-TRIAL DETENTION
<b>78</b>	SECTION 3.3: ALTERNATIVES TO PREVENTIVE DETENTION
<b>81</b>	SECTION 3.4: APPROVAL OF COMPENSATION FOR ARBITRARY DETENTION
<b>83</b>	<b>ABSTRACT</b>

# Preface

**If freedom is the original state of human beings,  
then deprivation thereto shall remain an exception.**

The 2014 Constitution, in the first Articles of the chapter on the Judiciary, states that: **The judiciary is an independent authority that guarantees the establishment of justice, supremacy of the constitution, rule of law, and the protection of rights and freedoms».**

Public and individual rights and freedoms have enjoyed an arsenal of national laws and a special status in the 26 January 2014 Constitution of the post-revolutionary Republic of Tunisia, out of the belief of the Tunisian legislator in these rights and freedoms' sanctity and out of respect for international conventions that protect Human Rights.

The Tunisian legislator provided the two institutions of police custody and pre-trial detention with a constitutional nature and made them subject to close monitoring by the judicial authority in order to avoid arbitrary practices and to safeguard the guarantees of the accused and society at the same time.

The subject of this guide has been selected within this scope, specifically within the framework of the fruitful bilateral cooperation existing between the Higher Judicial Institute and the 'DIGNITY - Danish Institute Against Torture'. This guide represents a distinguished addition about the pre-trial detention institution, which, even though it has a multitude of national and international legislations, it lacks a mechanism and means to collect and compile them in order to allow for their use, whether by the competent judges or by those trained in this field at the Higher Institute of the Judiciary.

From this standpoint, the Institute is keen to continue working, whether through its own capabilities or in cooperation with specialized international organizations, on adopting advanced pedagogical methods and tools, including the preparation of training guides in various legal and judicial fields. This guide has been drafted by a group of our best judges who have practiced public prosecution duties for a long period time, which made them gain experience and aptitude to evaluate the effectiveness of the application of laws related to pre-trial detention, to uncover their shortcomings and to suggest optimal ways, through the recommendations they have concluded, in order to avoid these shortcomings and to secure a more effective implementation of these laws, so that to respect the rights of those concerned with this procedure.

The development of this guide on pre-trial detention, in partnership with DIGNITY, should strengthen Tunisian criminal verdicts to ensure more dedication and respect for international standards on human rights, to combat all forms of torture and to support the valuing of human beings, especially prisoners and detainees.

Pre-trial detention, which is the subject of this guide, is considered one of the most dangerous measures affecting individual freedom and it is, at the same time, a differentiating and decisive stage and mechanism in the investigation; Jurist Jean Carbonnier goes even beyond that in describing it as **«an inevitable evil»**. As its name indicates, this procedure is intended to imprison the concerned person throughout the investigation period or in part thereof. Hence, the compatibility between two contradictory principles,

which are the principle of freedom and the presumption of innocence and the principle of the necessity to maintain the requirements and purposes of completing the investigation or inquiry, must be achieved.

The law is the only guarantor of harmonization between the individual's interest in terms of protecting his/her freedom and rights and the society's interest in terms of protecting its security and stability, on the one hand, and striking a balance between a multitude of conflicting freedoms and different conflicting interests to achieve order and justice, on the other hand.

The inquiry and investigation phase is the starting point for criminal prosecution, where the judiciary, through the authority of the Public Prosecution and the Investigation Office, plays the role of a custodian over the respect of the rights of any individual subject to a procedure that infringes his/her integrity and dignity or undermines his/her freedom.

Based on the aforementioned and due to the connection between the fundamentals of criminal justice and the sanctity and freedom of the individual, the legislations, whether international or national, sought to empower the judge with an integrated penal system founded on a set of procedures that guarantee human rights, which include all the stages of a criminal case from the start of the public action, through the investigation stage, reaching the sentence execution phase.

Article 29 of the new Constitution of the Tunisian Republic was the best evidence showcasing an upgrade of the national penal system in order to support rights and freedoms, as it explicitly stated that **«a person may not be arrested or detained except in the event of being caught in flagrante delicto or by a judicial decision, and s-he shall be immediately informed of his/her rights and the charges filed against him/her, and s-he has the right to appoint a lawyer. The arrest and detention periods shall be set by virtue of a law»**.

This guide is another title that came as a result of the cooperation program between the Ministry of Justice and 'DIGNITY' Institute and is an addition to many activities and training courses that led to the issuance of two guides, one on **«Combating the crime of torture in the Tunisian law»** and another on **«Detention»** in cooperation with this prestigious Institution.

We hope that this achievement will be a reference and a guide for all concerned actors and interveners in the penal system, especially the investigative judges,

because of the facilitated materials contained in this guide, which compiled international and regional standards and national texts, and highlighted the most important principles and rules enshrined thereto.

The guide also contains the trends that were included in these materials at the level of judicial application of some Articles, that are problematic in terms of interpretation or implementation, in a way that helps specialists know about the best and most successful practices in relation to limiting individual freedom in criminal procedures, specifically within the scope of pre-trial detention.

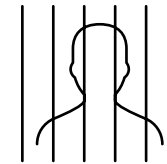
Last but not least, we would like to thank everyone who initiated, worked and made an effort to complete such guides, which we will continue supporting their issuance. We would like to present a special thanks for the DIGNITY - Danish Institute Against Torture and for all the team members who worked on preparing this guide on «**Pre-trial Detention**», consisting of the following esteemed judges:

- Mrs. Amel Wahchi, third-rank judge, inspector at the Ministry of Justice
- Mr. Hatem Hfaïdh, Judge, Criminal Chamber, Court of Appeal, Kef

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**Mr. Ahmed Yahyaoui**

Director General of the Higher Institute  
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# Introduction

The state of law derives its legitimacy from its ability to protect individual rights and freedoms and immunize them from any aggression or abuse. This is considered as the most prominent manifestation of the supremacy of the law and the absence of chaos and tyranny.

In contrast, any absence of the mechanisms that would achieve these goals necessarily departs from the culture of human rights and constitutes an obstacle that prevents access to justice. It is unquestionable that establishing true criminal justice necessarily requires the establishment of legal safeguards to provide a fair trial for anyone who finds him/herself before the courts, with the aim of ensuring that the decision taken or the judgment issued against him/her is the best possible one.

The criteria for a fair trial -as agreed upon by jurisprudence and enshrined in the constitution, legal texts and several international instruments- can be summarized in the idea of providing the procedural legal safeguards necessary for referral to an independent and impartial judicial authority who takes the necessary actions and makes suitable decisions before issuing a judicial judgment which meets all formal and substantive requirements.



The pre-trial period is considered one of the most important and most dangerous periods for an individual, given the parties which may interfere and in view of possible breaches of the procedures in force, which may directly affect the individual's liberty.

Liberty is considered to be a natural attribute inherent in every individual and can only be restricted if absolutely necessary and under very exceptional circumstances.

Since the restriction of liberty is an exceptional measure, most legislations have sought to regulate this exception with clear legal texts that guarantee the implementation of the presumption of innocence in accordance with the requirements of the Constitution and the various international instruments and laws in force.

In this context, it must be emphasized that the deprivation of liberty varies in severity according to the action taken against the suspect. Here, it is necessary to distinguish between two basic actions that can be taken before the trial, each of which leads to the deprivation of liberty: police custody and preventive detention. These two actions are considered preventive measures

taken exceptionally to restrict the liberty of an individual. The legislator has enacted them for several purposes, the most important of which is ensuring the good progress of criminal investigations, as well as protecting the society by preventing new crimes, ensuring that the suspect does not escape then tamper with the evidence of the crime, and protecting the latter from others.



## Police custody

Is a procedure carried out by the agents of the judicial police in specific cases:

- 1 **As required for the purposes of the investigation**
- 2 **Being caught committing a felony, misdemeanour or offence**
- 3 **Whenever strong evidence comes up that necessitates detention**
- 4 **Being searched for by other parties**
- 5 **Being sentenced to prison until the punishment is carried out**
- 6 **Enforcing an arrest warrant**

It should be noted that police custody was regulated through a number of proclamations issued by Ministry of Interior, the most important of which was the proclamation of 20 August 1974 and the proclamation of 02 April 1977. Police custody was legally regulated for the first time after the revision of the Code of Criminal Procedure under the Law of 26 November 1987.



The legislator first intervened under Act No. 70 of 1999 Dated August 2, 1999, which revised some Articles of the Code of Criminal Procedure, including Article 13 bis, which regulates the procedures and conditions of police custody, the rights of the detainee and the duties of the judicial police officers. The legislator then intervened again with a constitutional amendment in 2002, under which police custody became subject to judicial oversight. Then the legislator intervened again under the law of 4 March 2008 to strengthen safeguards by requiring the judiciary to justify the decision to extend the duration of police custody.

Article 13 bis has recently been revised by Law No. 5 of 2016 dated 16 February 2016, which was enacted to strengthen and expand the safeguards and gains of the suspect in the initial investigation phase.

**Police custody is considered an exceptional measure that deprives liberty and is enacted by the legislator for several purposes, the most important of which is ensuring the good progress of criminal investigations, as well as protecting the society by preventing new crimes, ensuring that the suspect does not escape or tamper with the evidence of the crime, and protecting the latter from others. It can only be taken in the abovementioned cases after meeting several conditions, namely:**

- 1 Obtaining a written authorization from the government procurator
- 2 Informing the suspect about the measure taken against him
- 3 Keeping a record of the detention
- 4 Informing one of the ascendants, descendants, siblings, spouse or another third party chosen by the suspect
- 5 Informing the diplomatic or consular authority if the suspect is a foreigner
- 6 Informing the suspect of his/her right to request a medical examination
- 7 Notifying the suspect of his/her right to appoint a lawyer to be present with him/her

The detention report must include the following specifications:

- 1 The full identity of the detainee
- 2 The subject of the crime
- 3 Informing the detainee of the action taken against him/her
- 4 Informing the detainee of the safeguards available to him or her under the law
- 5 Notifying the detainee's family or whoever he/she chooses about the detention
- 6 The request for a medical examination, if there is any, by those whom the law authorizes to make such a request
- 7 The request to choose a lawyer
- 8 In the case of a felony, the request for a lawyer to be appointed if the suspect does not choose a lawyer as the law authorizes
- 9 The specific day and hour of the start and end of detention
- 10 The specific date, day and hour, of the hearing
- 11 The signature of the judicial police officer and the detainee. If the signature of the latter is not included, then the justification for that
- 12 The signature of the detainee's attorney, if present

As for detention time limits, they differ according to the classification of the crime committed (an offence, a misdemeanour, or a felony) and its nature (a terrorist crime or a public-order crime). There are four detention time limits as follows:

- 1 5 days in the case of terrorist crimes and money laundering crimes, with the possibility of two extensions of five days each
- 2 48 hours in the case of a felony with the possibility of one extension of the same duration
- 3 48 hours in the case of a misdemeanour with the possibility of one extension of 24 hours.
- 4 24 hours for flagrante delicto infractions, not extendable

**Note that the decision to extend the detention period is made by the government procurator after he/she questions and hears the detainee; the decision must be justified.**

**After the end of the detention time limit and the extensions (if any), the judicial police officer shall refer the investigation report and the detainee to the government procurator to take whatever decision he/she deems appropriate.**

**However, despite the importance of this preventive and exceptional measure, it does not reach the severity of preventive detention, given its justifications and duration, as will be explained.**



## Preventive Detention

Preventive detention is a procedure taken by a judicial decision, under which the freedom of the suspect is taken away after being caught in flagrante delicto while committing a misdemeanour or a felony or after the emergence of strong evidence that requires detaining him/her to prevent the commission of new crimes or to ensure the execution of a penalty or to ensure the integrity of the investigation. This measure is considered more serious than police custody given the different source and duration of the decision.

The following is a historical overview of the institution of preventive detention, which has gone through three important stages in its development:

- The Code of Criminal Proceedings of 1921 distinguished between three forms of preventive detention:

**The first form:** Mandatory preventive detention in case of being caught in flagrante delicto while committing a felony.

**The second form:** Optional preventive detention for the crimes other than felonies committed in flagrante delicto. This is carried out when there is strong evidence that requires preventive detention to avoid committing new crimes or to ensure the execution of the sentence or to ensure the good progress of the investigation.

**The third form:** Prohibiting preventive detention when the punishment is less than a year of imprisonment.

- The Code of Criminal Procedure of 1968 introduced new provisions under which mandatory preventive detention is abolished and the investigating judge is given absolute discretionary authority in assessing the necessity of resorting to preventive detention or not, without specifying the possible duration.

The Law of November 26, 1987 initially limited the duration of preventive detention to six months, which may be extended once in the case of a misdemeanour and twice in the case of a felony.

- The legislator intervened again by enacting Law No. 114 of 1993 dated November 22, 1993 which limited the original duration of preventive detention to six months regardless of the nature of the crime, be it a misdemeanour or a felony, with the possibility of a one-time extension of no more than three months for the misdemeanour and two extensions, the duration of each being limited to four months, for the felony, with the requirement that it be after considering the opinion of the government procurator and pursuant to a reasoned decision.

The legislator intervened again by enacting Law No. 21 of 2008 dated 04/03/2008 to further consolidate the safeguards of those detained pre-trial, by establishing the obligation to justify the preventive detention decision and the extension decision.

In an effort to highlight the most important constitutional and international standards and the extent to which they are implemented in national legislation, the rules and principles that frame pre-trial detention in general

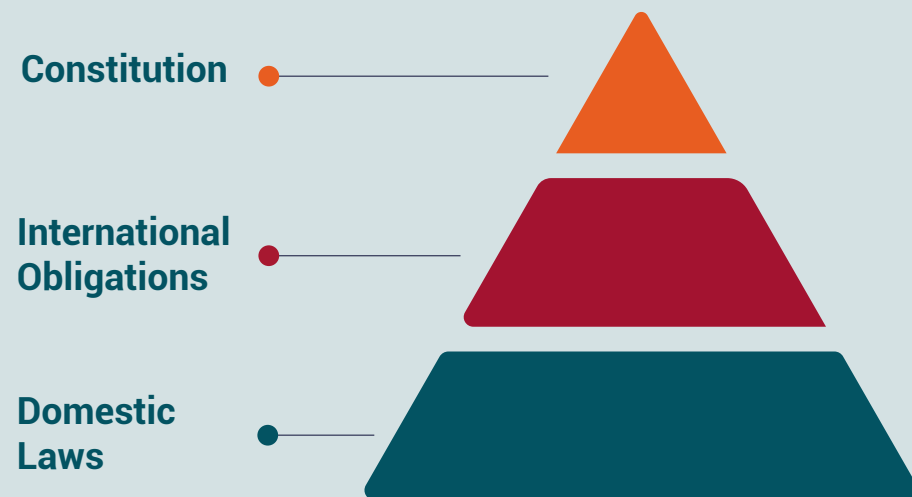
and preventive detention in particular will be reviewed in relation to the Constitution (section one), Tunisia's international obligations (section two) and finally in relation to national legislation (section three).

## Objective of the Guide

This guide aims to:

- provide a reference that includes international and regional standards as well as national texts;
- **Highlight the most important principles and rules enshrined through them, as well as good practices** in relation to the restriction of individual liberty in criminal proceedings, specifically within the scope of preventive detention; and disseminate this information to the various actors involved in the criminal system, especially the judges.

**In order to achieve this objective, the legislative framework for preventive detention will be addressed and the judicial application of these laws and known best practices will be presented at the following levels:**



## Section One The Tunisian Constitution



The Constitution is the supreme law in the State, it is at the top of the legal hierarchy. Its supremacy is only truly embodied in societies in which the constitution reflects the will of the majority and upholds universal rights and freedoms, the most important of which is the right to personal security and the recognition of individual liberty.

The Constitution of the Republic of Tunisia of 2014 enacts a set of rules and safeguards related to fundamental freedoms, and defines the rules related to the restriction of individual liberty, which are:

1

**The presumption of innocence and the right to a fair trial in which the necessary safeguards of defence are guaranteed throughout the stages of prosecution or trial**

Article 27 of the Constitution stipulates that: **"The accused is presumed innocent until proven guilty in a fair trial in which all safeguards indispensable for his/her defence are guaranteed throughout the prosecution or trial stages."**

The presumption of innocence is considered the reference point which frames the authority of the criminal court judge and his/her judgments when taking any measure that limits individual liberty. This presumption shall be enforceable in all criminal procedures until the final ruling is issued.

2

**The right to a fair trial in a reasonable time frame and ensuring the equality of all litigants before the courts**

Article 108 of the Constitution stipulates in its first paragraph that: **"Every person has the right to a fair trial within a reasonable time frame, and litigants are equal before the courts."**

Judicial time represents one of the most important challenges that the judge faces in the framework of a criminal case, considering the duty to balance between the necessity of completing the investigation and ensuring its integrity, on the one hand, and the link between deciding on a case within reasonable deadlines, the right to liberty and the presumption of innocence, on the

other hand. Judicial time becomes more important when resorting to preventive detention after taking into account the degree to which the suspect poses a threat, the complexity of the case, and the availability of sufficient preliminary evidence to infer that he has committed the crime he is accused of. In all cases, in application of Article 108 of the Constitution, it is imperative to expedite the procedures by the investigation authorities and refer the suspect to the criminal courts for trial within reasonable time.

3

**Prohibiting authorities from resorting to the decision of preventive detention except in cases of flagrante delicto or by judicial authorization**

Article 29 of the Constitution stipulates that **"a person cannot be arrested or detained except in cases of flagrante delicto or by a judicial decision."**

Considering that preventive detention is one of the most serious measures affecting individual liberty, the Constitution has set a fundamental formal condition for it, the violation of which is an infringement of that right to

liberty, which is that it be issued by virtue of a judicial authorization to give procedural legitimacy to that decision. Any preventive detention enforced without this authorization is considered a form of arbitrary detention and a violation of the foundations of the State of Law and its institutions.

4

**The right to know one's rights and the charges against him/her immediately**

Article 29 of the Constitution requires that the person against whom the measure was taken be notified **"immediately of his rights and the accusation brought against him."**

The suspect enjoys a set of rights during the criminal case that he must be informed of, including the right to appoint a lawyer. He must also be informed of the charges against him, including the alleged acts and facts for which he is brought to justice, and the legal description applicable to them, until he admits or refutes them, after they are read to him in a language he understands and in a detailed and clear way.

5

### **The right to legal assistance (Appointing a lawyer).**

Article 29 of the Constitution stipulates the right of the suspect to obtain legal assistance, that is, to choose a lawyer to represent him in order to ensure that he has access to a suitable and effective defence in the face of the accusations against him.

6

### **The necessity to determine the duration of preventive detention by a law**

Article 29 of the Constitution stipulates that **“the duration of detention must be determined by a law.”**

Under Article 29, the Constitution recognizes the necessity to determine the period of preventive detention, considering that this specification is a real guarantee against absolute preventive detention and a recognition of the temporary and exceptional character of that measure.

7

### **The right to humane treatment that respects the dignity of the prisoner and guarantees that he/she will not be subjected to any form of physical or moral torture.**

Article 30 of the Constitution stipulates that **“every prisoner has the right to humane and dignified treatment ...”**

Article 23 stipulates that **“the State shall protect the dignity of the human person and the inviolability of the body, and shall prohibit moral and physical torture ...”**

Since it is permissible to resort to the decision of preventive detention, which is considered a temporary detention of the suspect, the concerned person is placed in a prison pending a decision in his regard or his trial. The Constitution enshrines, without discrimination between detainees and sentenced prisoners, the right to humane treatment that preserves their dignity and the prohibition of subjecting them to any form of torture, whether physical or moral, so that confessions are not extracted from them through a violation of their physical sanctity.

The Constitution has fortified all rights and freedoms according to Article 49(2) of the Constitution, which stipulates that no amendment may undermine the achievements of human rights and freedoms guaranteed in the Constitution.

Article 49(2) leaves it to the law to specify the regulations relating to human rights and freedoms and their exercise without compromising their essence.

These regulations shall only be set given the needs of a civil democratic state and with a view to protect the rights of others, or for the requirements of public security, national defence, public health, or public morals, while respecting the proportionality between these regulations and the need for them. Judicial bodies must guarantee the protection of rights and freedoms from any violation.

Based on what is mentioned above, it is not possible, either in legislation or practice, to undermine the essence of rights or to set regulations for them except for when it is necessary, while respecting the proportionality between these regulations and the need for them.

Article 49 provides a reference for the judge in making decisions involving rights and freedoms guaranteed in the Constitution. The Constitution has entrusted judicial bodies with the task of preserving and protecting these rights, and Article 49 has enshrined the obligation to respect three rules when laying down legal regulations or in the practice of those rights and freedoms, which are respect of the essence of each right, necessity and proportionality.

Therefore, the judge cannot restrict the right to liberty, which is a supreme human right, except in an exceptional way if necessary and in proportion to the seriousness of the criminal act committed and its effects on individuals and on society.



## ● — The Tunisian Constitution — ●

**Article 23** : "The State shall protect the dignity of the human person and the inviolability of the body, and shall prohibit moral and physical torture. The crime of torture shall be imprescriptible."

**Article 27** : "The accused is presumed innocent until proven guilty in a fair trial in which all safeguards indispensable for his/her defence are guaranteed throughout the prosecution or trial stages."

**Article 29** : "A person cannot be arrested or detained except in case of flagrante delicto or by a judicial decision, and he shall be immediately informed of his rights and the charge against him. He has the right to appoint a lawyer, and the duration of detention must be determined by a law."

**Article 30** : "Every prisoner has the right to humane and dignified treatment. In implementing freedom-depriving penalties, the State shall take into account the best interest of the family, and it shall work on the prisoner's rehabilitation and his integration into society."

**Article 108** : "Every person has the right to a fair trial within a reasonable time frame, and litigants are equal before the courts. The right to litigation and the right to defence are guaranteed. The law facilitates recourse to the courts and guarantees legal assistance for those who have financial difficulties."

**Article 49** : "The law defines the regulations related to human rights and freedoms and their exercise without compromising their essence. These regulations shall only be set given the needs of a civil democratic state and with a view to protect the rights of others, or for the requirements of public security, national defence, public health, or public morals, while respecting the proportionality between these regulations and the need for them. Judicial bodies must guarantee the protection of rights and freedoms from any violation. No amendment may undermine the achievements of human rights and freedoms guaranteed in this Constitution."

## Section 2

# International Obligations



The right to a fair trial is considered the cornerstone of the international human rights system and a legal obligation for all states as part of customary international law that stems from general practices accepted as law. As previously shown, the founding Tunisian legislators included the principles and standards of fair trial in the Constitution, which goes in line with international treaties and conventions which are given a higher status than laws, as stated in Article 20 of the Constitution, which states that:

**"Treaties approved and ratified by the parliament are superior to laws and inferior to the Constitution."**

International texts differ in terms of their legal status. Some of them are treaties that are legally binding on the States parties, others are articles, rules and guidelines that do not have a mandatory nature, and are based on an agreement between the international community to implement them and to invite countries to observe them.

Many international texts include stipulations related to pretrial detention procedures in general and the safeguards related to it, at the level of international instruments and regional agreements on the one hand, and declarations and guidelines on the other hand.

Since its inception, the United Nations has enacted international standards for the rights of persons accused of crimes or deprived of their liberty.

There are two basic international instruments on human rights, namely the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which guarantee that people should not be subjected to arbitrary arrest and torture, as well as the right to a fair trial and the presumption of innocence of any criminal charges against them.

To highlight the importance given by international and regional texts to the issue of pretrial detention as a serious measure affecting the universal principle of human liberty, it is worth reviewing the international instruments (first paragraph) and the most important articles, rules and guidelines (second paragraph) which are considered a basic reference for law enforcement officials, those interested in human rights in general and judges in particular.

Referring to them allows a better understanding of the procedures and regulations related to preventive detention as a restriction of liberty in the pretrial stage, and then the duties imposed on the state under international obligations (third paragraph).



## SECTION 2.1 INTERNATIONAL INSTRUMENTS

In an effort to clarify the various international texts dealing with the principles of fair trial in general and the rights and safeguards related to preventive detention (pretrial detention) in particular, the most important treaties in this framework will be reviewed, which are either international or regional.

### A . Relevant ratified international conventions

Treaties are legally binding on states party to them and take many legal forms. They can be a charter, covenant or convention. Some of them are open to all countries in the world for ratification, especially those that take an international dimension, while some of them are restricted to countries that belong to a specific regional organization.

- **International Covenant on Civil and Political Rights (ICCPR).**

The International Covenant on Civil and Political Rights (ICCPR) is considered the cornerstone of international recognition and endorsement of civil and political human rights. It was approved and offered for signature, ratification and accession on 12/16/1966 and entered into force on 23 March 1976. It includes many principles that enshrine the right to liberty and the prevention of arbitrary arrest. It also stresses the need to adhere

to lawful decision-making and to provide the necessary safeguards for suspects, especially those detained before trial. The Republic of Tunisia accepted accession to the convention, by Law No. 30 of 1968 dated November 29, 1968. Article 9 of the ICCPR is considered the most important article that consecrates the foundations of individual liberty and safety and provides the basic conditions for their protection.

The Human Rights Committee (HRC) General Comment No. 35, issued on 12/16/2014 regarding Article 9 of the ICCPR is considered the most important interpretative reference explaining the rights and safeguards enshrined within that article. It recognizes that the individual does not have an absolute right to personal freedom and acknowledges that the deprivation of liberty is justified in some cases, such as in the case of law enforcement. Article 9(1) stipulates that the deprivation of liberty shall not be arbitrary and that respect for the law must be observed in its implementation.

Paragraph 34 of General Comment No. 35 states that the individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power. The physical presence of the detainee at the hearing gives the opportunity

### Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

for inquiry into the treatment that they receive in custody and facilitates immediate transfer to a remand detention centre if continued detention is ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment. In the hearing that ensues, and in subsequent hearings at which the judge assesses the continued legality or necessity of the detention, the individual is entitled to legal assistance, which should in principle be a counsel of his/her choice.

Paragraph 36 of General Comment No. 35 emphasizes that once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial. If there is no lawful basis for continuing the detention, the judge must order release.

Paragraph 38 of General Comment No. 35 also states that it should not be the general practice to subject defendants to pre-trial detention. In addition, detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, and only for such purposes as to prevent flight, interference with evidence, or **re-offending. Pre-trial detention should not be ordered for a period based on the potential sentence for the crime charged, but the duration should rather be based on a determination of necessity.** The judge must also examine whether alternatives to pre-trial detention, such as bail or electronic bracelets, would render detention unnecessary in the particular case.

In addition to Article 9 of the ICCPR, which is central to the right to individual liberty, there are also other relevant articles, the most important of which are Articles 7, 10, 11 and 14.

### Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.  
In particular, no one shall be subjected without his free consent to medical or scientific experimentation.



### Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. A. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
- B. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

### Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

### Article 14

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.
  - B. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.
  - C. To be tried without undue delay ...

### • The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (CAT)

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the United Nations General Assembly and opened for signature, ratification and accession, according to its Resolution No. 29/36 of December 10, 1984. It obligates the states party to it to take effective measures to prevent torture within their borders. The Republic of Tunisia ratified it according to the Law No. 79/88 dated 07/11/1988. It includes many articles that obligate states to prevent torture and take effective measures to achieve this, especially if the matter concerns persons deprived of their liberty, including Articles 2, 4, 10 and 11.

### Article 2

Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

### Article 4

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

### Article 10

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person

## Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

### • Convention on the Rights of the Child (CRC)

The Convention on the Rights of the Child (CRC) was adopted and submitted for signature, ratification and accession according to United Nations General Assembly Resolution 44/25 of 11/20/1989. It obligates states parties to it to respect every child under their jurisdiction without discrimination, giving priority to the best interests of the child in administrations and courts, and issuing all necessary legislations to protect the child and ensure the full enjoyment of his rights, especially the right to liberty and life. The Tunisian Republic ratified it according to Law No. 92 of 1991 dated 11/29/1991. It includes many articles that strongly protect the liberty of the child and emphasize that restricting that liberty should only be a last resort, the most important of which are Articles 37 and 40.

## Article 37

States Parties shall ensure that:

- a . No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...
- b . No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

- c . Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- d . Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

## Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - B. Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - i .To be presumed innocent until proven guilty according to law;
    - ii .To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense;

iii. To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and in the presence of his or her parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation. (...)

### ● International Convention for the Protection of All Persons from Enforced Disappearance (CED)

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the United Nations General Assembly on 12/20/2006 and entered into force on 23/12/2010. It obligates the states party to it to criminalize enforced disappearance and provide for the victims and their families the right to information and compensation. Tunisia ratified it according to Decree No. 2 of 2011 dated 02/19/2011 and Ordinance No.550 of 2011 dated 05/14/2011. It contains articles requiring states to abide by procedural legality when depriving individuals of their freedom and detaining them in recognized places, including Article 17.

#### ● — Article 17, Paragraph 2 — ●

Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:

- a. Establish the conditions under which orders of deprivation of liberty may be given;
- b. Indicate those authorities authorized to order the deprivation of liberty;
- c. Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
- d. Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

f. Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

## B . Regional treaties

Regional treaties are the conventions and charters that Tunisia has ratified within the framework of the regional organizations to which it belongs, together with its geographical neighbours, specifically the African Union and the League of Arab States. The African Charter on Human Rights and Peoples' Rights and the Arab Charter on Human Rights are among the most important regional documents that have emphasized the right to liberty and set objective regulations for the restriction of that liberty.

### ● The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights was adopted on 27 June 1981 on the occasion of the eighteenth session of the Organization of African Unity (now the African Union) and is mainly based on the Charter of the African Organization, the Charter of the United Nations and the Universal Declaration of Human Rights. It entered into force on 21 October 1986 and was ratified by the Republic of Tunisia according to Law dated 16 March 1983. Among the most relevant articles contained therein are Articles 5, 6 and 7:

#### ● — Article 5 — ●

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

### Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

### Article 7

Every individual shall have the right to have his cause heard. This comprises:

- a. The right to an appeal to competent national organs against acts of violating his fundamental rights (...)
- b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
- c. The right to defence, including the right to be defended by counsel of his choice;
- d. The right to be tried within a reasonable time by an impartial court or tribunal.

## • The Arab Charter on Human Rights

The Arab Charter on Human Rights was adopted on 23 May 2004 on the occasion of the sixteenth summit of the League of Arab States held in Tunisia. It confirms what was stated in the United Nations Charter and the Universal Declaration of Human Rights and emphasizes the international legitimacy of human rights. It entered into force on 15 March 2008 and includes articles that bind countries to respect and protect the right to liberty, the most relevant of which are Articles 14, 16 and 20.

### Article 14

1. Every individual has the right to liberty and security of person and no one shall be arrested, searched or detained without a legal warrant.

2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

3. Anyone who is arrested shall be informed at the time of arrest, in a language which he understands, of the reasons for his arrest, and shall be promptly informed of any charges against him. Anyone who is arrested has a right to contact his relatives.

4. Anyone who has been deprived of his liberty by arrest or detention is entitled to be subjected to a medical examination, and shall be informed of such right.

5. Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorized by law to exercise judicial power, and shall be entitled to trial within a reasonable time, or to release. The release may be subject to guarantees to appear for trial. It shall not be a general rule that persons awaiting trial shall be held in custody.

6. Anyone who is deprived of his liberty by arrest or detention shall be entitled to proceedings before a court, in order that a court may decide without delay on the lawfulness of his arrest or detention, and order his release if the arrest or the detention is not lawful.

7. Anyone who is the victim of unlawful arrest or detention shall be entitled to compensation.

### Article 16

The accused shall be presumed innocent until proven guilty at a lawful trial. During the investigation and the trial, the accused shall be entitled to the following minimum guarantees:

1. To be informed promptly and in detail, in a language which he understands, of the nature and cause of the charge against him.
2. To have adequate time and facilities for the preparation of his defence and to contact his relatives.

3. To be tried in his presence in front of a judge, and to defend himself or through legal assistance of his own choosing or with the assistance of his lawyer, with whom he can freely and confidentially communicate.
4. To have free legal assistance of a lawyer to defend himself if he does not have sufficient means to pay for his defence, and if the interests of justice so require. To have the free assistance of an interpreter if he cannot understand or speak the language of the court.
5. To examine, or have examined, the witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
6. Not to be compelled to testify against himself or to confess to guilt.
7. If convicted of a crime, to have his conviction and sentence reviewed by a higher tribunal according to law.
8. To have the security of his person and his private life respected in all circumstances.

### ● — Article 20 — ●

1. Persons sentenced to a penalty of deprivation of liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. Accused persons shall be separated from convicted persons and shall be subject to treatment appropriate to their status as unconvicted persons.



## SECTION 2.2 RELEVANT DECLARATIONS, GUIDELINES AND PRINCIPLES

In addition to the treaties that bind the states party to them, there are other standards related to pre-trial detention procedures. Some of them are binding considering that they are part of customary international law while others are not legally binding. They usually take different forms, namely declarations, principles, guidelines or rules. These non-binding legal instruments - as they are not treaties - derive their importance from the fact that they provide guidance to states on how to meet their obligations under binding international and regional treaties. The most important non-binding legal instruments are:

### ● Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights, which is an important historical document in the history of human rights, was issued in the form of a recommendation by the United Nations General Assembly. It was drafted by representatives of various legal and cultural backgrounds from all over the world, and was adopted by the General Assembly in Paris on 10 December 1948, as the common standard that all peoples and nations should aim to achieve in relation to the protection rights and freedoms. It is a Declaration that most international human rights law jurists consider an integral part of customary international law, and therefore the rules included in it are binding on states. It defines basic human rights in articles 3, 9 and 11.

### ● — Article 3 — ●

Everyone has the right to life, liberty and security of person

### ● — Article 9 — ●

No one shall be subjected to arbitrary arrest, detention or exile.

### Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

## • The Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment ('Body of Principles')

The Body of Principles were adopted by the United Nations General Assembly Resolution 43/173 of 9 December 1988. It includes a set of principles for the protection of all persons subjected to any form of detention or imprisonment, the most important of which are principles 1, 4, 8, 9, 11, 17, 32, 35, 36, 37, 38 and 39:

### Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

### Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

### Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

### Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

### Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

### Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

### Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

### ● ——— Principle 35 ——— ●

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.
2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

### ● ——— Principle 36 ——— ●

- 1- A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
- 2- The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

### ● ——— Principle 37 ——— ●

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

### ● ——— Principle 38 ——— ●

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

### ● ——— Principle 39 ——— ●

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

### ● **Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention ('the Luanda Guidelines')**

The Luanda Guidelines were adopted by the African Commission on Human and Peoples' Rights of the African Union at its fifty-fifth session held in Luanda Angola between 04/28/2014 and 05/12/2014 as a committee empowered by the African Charter on Human and Peoples' Rights to devise rules and guidelines that African governments can refer to when drafting laws.

The African Commission established the idea of laying down guidelines regarding arrest, pre-trial detention, and preventive detention based on its conviction that the criminal justice environment in the pre-trial stage poses major challenges in Africa in terms of human rights.

The Luanda **Guidelines** dedicate its third part to pre-trial detention from Guideline 10 to Guideline 14. Guideline 10 confirms **the exceptional nature** of pre-trial detention and that it should only be used as a last resort.

It is not permissible to submit persons accused of a criminal offence that is not punishable by imprisonment to pre-trial detention. The trial should also take place within reasonable time. Guideline 11 stipulates the mandatory determination of reasons for which a detention order can be issued, stressing the necessity to consider the alternatives to detention before issuing such order and enabling detainees to challenge the decision.

Guideline 12 asserts the need to regularly review pre-trial detention orders, giving the Judicial Authority sufficient consideration for the need to extend or renew such detention order. Guideline 14 specifies rights and safeguards for persons who are in pre-trial detention, the most important of which is that this procedure should be based on the law, without discrimination, and that the arrested person is guaranteed the right to legal assistance and to choose a lawyer to defend him. The detention order shall also be implemented in a detention facility recognized by the state.

### • **United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)**

The Tokyo Rules are the most important international document related to non-custodial measures. The Rules define non-custodial measures - their form, the safeguards for their use, and how to put them into practice. The Rules were adopted by the United Nations Assembly Resolution No. 45/110 of 12/14/1990.

Non-custodial measures shall be applied in all stages of the criminal case, up to the stage of execution of the court ruling. Their importance is evident with regard to the pre-trial stage, as the Tokyo Rules enact a number of possible alternatives in this field, including:

- Obligating the defendant to come to the court at a specific date by an order issued by the court to him, issuing an order to the defendant to refrain from interfering in the criminal case proceedings or to adhere to a certain behaviour such as leaving a place or not going to it or not meeting a specific

person, staying at a specific address, submitting a daily or periodic report to the court, accepting monitoring through a body designated by the court, accepting electronic surveillance and/or submitting financial or in-kind guarantees to ensure attendance at the trial. These rules leave room for states to devise other alternatives, taking into account their cultural and social context.

- Rule 6 is among its most important rules, as it focuses on the exceptionality of pre-trial detention and the need to establish alternatives to that measure.

**Rule 6**

1. Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.
2. Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.
3. The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

### • **United Nations Standard Minimum Rules for the Treatment of Prisoners ('the Nelson Mandela Rules')**

The Nelson Mandela Rules were adopted by the first United Nations Conference on the Prevention of Crime and the Treatment of Criminals, held in Geneva in 1955, and endorsed by the Economic and Social Council of the UN under its resolutions 666 and 2076 dated respectively on 07/12/1957 and 05/13/1977. In light of the gradual development of international laws relating to prisoners, the General Assembly of the United Nations, in its Resolution 70/175 of 12/01/1977, decided to adopt the proposed revised version of those rules and approved a recommendation to call them the Nelson Mandela Rules.



This central international document attempts to define what are generally considered the best principles and practical rules for the treatment of prisoners.

The Nelson Mandela Rules include an arsenal of rules amounting to one hundred and twenty-two; some of them are directly related to the rights of detainees in custody, the most important of which are Rules 1, 111, 112 and 119.

### Rule 1

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment

### Rule 111

1. Persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police custody or in prison custody (jail) but have not yet been tried and sentenced, will be referred to as "untried prisoners" hereinafter in these rules.
2. Unconvicted prisoners are presumed to be innocent and shall be treated as such.
3. Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners shall benefit from a special regime which is described in the following rules in its essential requirements only.

### Rule 112

1. Untried prisoners shall be kept separate from convicted prisoners
2. Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.

### Rule 119

1. Every untried prisoner has the right to be promptly informed about the reasons for his or her detention and about any charges against him or her.
2. If an untried prisoner does not have a legal adviser of his or her own choice, he or she shall be entitled to have a legal adviser assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by the untried prisoner if he or she does not have sufficient means to pay. Denial of access to a legal adviser shall be subject to independent review without delay.

#### • **United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules')**

Adopted by virtue of UN General Assembly resolution No 65/229 on 21/12/2010, the Bangkok Rules build on the Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), Body of Principles and Tokyo Rules by determining the obligations of prison authorities towards the treatment of women prisoners, including pre-trial detention.

#### • **Basic Principles on the Role of Lawyers**

The Basic Principles on the Role of Lawyers was adopted by the Eighth United Nations Conference on the Prevention of Crime and the Treatment of Criminals, held in Havana from 27 August to 7 September 1990. It mainly affirms the right to legal aid and the assistance of a lawyer for everyone subject to criminal liability, especially those deprived of their liberty, as well as the maximum period of time to allow a person to contact a lawyer, according to paragraphs 5 and 7.

### Paragraph 5

Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

### Paragraph 7

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.



## International and regional instruments

- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- The Convention on the Rights of the Child (CRC)
- The International Convention for the Protection of All Persons from Enforced Disappearance (ICED)
- The African Charter on Human and Peoples' Rights (ACHPR).
- The Arab Charter on Human Rights (ACHR)

## Relevant declarations, guidelines and principles

- The Universal Declaration of Human Rights
- The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.
- The Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention (AU: Luanda Guidelines).
- The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).
- The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)
- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)
- The Basic Principles on the Role of Lawyers.



## SECTION 2.3 SAFEGUARDS ARISING FROM INTERNATIONAL OBLIGATIONS

International human rights law consists of treaties, conventions and attached protocols that are binding on the states party to it. It also consists of declarations, guidelines, minimum standards and sets of principles that differ from treaties in terms of binding legal effect, but they serve to interpret those treaties and to express customary international law or general principles of international law and can also reflect best practices.

According to international rules and standards, the state parties have a set of obligations in relation to pre-trial detention. They are required to take the necessary measures to include them in their national law, to ensure their proper application and to create mechanisms that help in this. International human rights law recognises a number of basic rights that are supposed to be reflected in the national legislation of states parties. They are:

### A . The right to liberty: the prohibition of arbitrary arrest and detention

The right to liberty is the central focus of human rights. It is not permissible to deprive an individual of his/her liberty except for reasons specified by law and in accordance with the procedures established therein, in order to adhere to procedural legality. The detention order should also be issued by a competent judicial authority to protect the individual from any arbitrary or unlawful detention.

Article 3 of the Universal Declaration of Human Rights as well as Article 9(1) of the International Covenant on Civil and Political Rights are the two most important international texts in this context, in addition to Article 6 of the African Charter, Article 14(1) and (2) of the Arab Charter, and Article 37(b) of the Convention on the Rights of the Child.

### B . The right to the presumption of innocence

The presumption of innocence is one of the foundations of customary international law. It means that the individual is treated at all stages as being innocent until proven guilty in the framework of a fair trial in which he is guaranteed the right to defend himself. Its importance is especially evident in the pre-trial stage, in which measures to restrict the individual's liberty can be taken.

The presumption of innocence regulates criminal procedures in their entirety, and the suspect must be treated on that basis even if, eventually, a court ruling is issued against him condemning him for the crime he is charged with. This is affirmed by the European Court of Human Rights in its decision *Jázeki v. Poland* issued in 2007, which considers that the conviction of the defendant at the end of the trial does not preclude his initial right to be considered innocent until proven guilty according to the law.

International rules and standards affirm the need to respect the presumption of innocence in all stages of the trial, as stated in Article 11 of the Universal Declaration of Human Rights, Article 14(2) of the International Covenant on Civil and Political Rights, Article 16 of the Arab Charter, Article 7(b) of the African Charter and Principle 36(1) of the Body of Principles.

### C . Confirming the exceptional nature of pre-trial detention

International standards enshrined the right to liberty as a principle that can only be undermined on an exceptional basis, and pre-trial detention cannot constitute the general rule. Rather, it must be an exceptional measure that may be imposed by the requirements of public security and the protection of the integrity of investigations such as the protection of witnesses.

Article 9 of the International Covenant on Civil and Political Rights stipulates in Paragraph 3 that **detention of persons awaiting trial should not be the general rule**. This is the same principle enshrined in Article 14(6) of the Arab Charter on Human Rights.

Article 37 of the Convention on the Rights of the Child confirms that **the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.**

Emphasizing the exceptionality of the detention order, especially for vulnerable parties such as children in conflict with the law, Paragraph 17 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty affirms that “Juveniles who are detained under arrest or awaiting trial («untried») are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances.

Therefore, all efforts shall be made to apply alternative measures...” Principle 31 of the Luanda Guidelines states that **children may only be detained in police custody or pre-trial detention as a last resort and for the shortest possible period of time.**

## D . The right to basic legal safeguards

### • The right to be informed of the arrest and the charges

The right to be informed immediately of the nature of the charges, including the legal description, as well as the reasons for bringing the charges, in a way that is easy for the accused to understand is guaranteed to every person. It must be done in a language that the accused understands so that he can defend himself and to avoid any confusion during his appearance before the judge.

### • The right to be informed of your rights

In order to exercise the legally guaranteed rights, the individual needs to be aware of them in advance, given the complexity of the criminal procedure. Therefore, international law imposes a duty to inform the suspect of the rights guaranteed to him which must be interpreted for him. The most important of these rights are:

- The right to consult a lawyer
- The right to remain silent
- The right to have an interpreter
- The right to access an independent doctor
- The right to inform a third party.

Principles 13 and 14 of the Body of Principles require the authorities responsible for arresting the suspect to inform him of these rights in a language he understands.

### • The right to challenge the legality of the detention

The right to challenge the lawfulness of detention is one of the most important rights guaranteed to persons who are arrested. It is the means that enables them to request immediate review from a higher judicial authority of the decision by verifying the extent of its legality and its respect for the procedural controls that regulate it. This shall not leave room for arbitrary detention that might be exercised by the public authority.

The United Nations Human Rights Council, in its resolution 20/16 of 29 June 2012 on arbitrary detention (paragraph 6(d)) encouraged all states to: **“Respect and promote the right of every person deprived of his freedom by arrest or detention to file a case before a court in order to decide without delay on the legality of his detention and to order his release if the detention is unlawful in accordance with its international obligations”**

This right has been affirmed, whether in the body of binding international instruments or the rules and guidelines, for example in the reading of Articles 8 and 9 of the Universal Declaration of Human Rights, as well as Article 9(4) of the International Covenant on Civil and Political Rights and Article 17(2) of the International Convention for the Protection of All Persons from Enforced Disappearance, Article 37(b) of the Convention on the Rights of the Child, Article 7(1)(a) of the African Charter and Article 14(6) of the Arab Charter, as well as Principles 4, 11 and 32 of the Body of Principles.

### • The right to be considered for pre-trial release

This right is closely related to the right of the individual to liberty, to enjoy the presumption of innocence throughout the stages of the criminal case and

to the exceptional character of the decision to order pre-trial detention. This decision may not be resorted to except in accordance with necessity and ensuring that it is proportional to the acts that are the subject of the crime, especially when it comes to vulnerable groups such as children, women, and people with special needs.

Accordingly, the right to enjoy release is fundamental and is a temporary measure that guarantees that the accused will not remain for a long period of time in detention before trial, and that the right to trial must be within a reasonable period of time. It is permissible to impose conditions on the release as a guarantee for the well-functioning of the investigation proceedings and for the accused to appear before the concerned judicial authorities upon request.

This right is reflected in Article 9(3) of the International Covenant on Civil and Political Rights, Article 14(5) of the Arab Charter, and Principles 38 and 39 of the Body of Principles.

## E. The Right to Humane Treatment during Detention and Protection from torture and ill-treatment

All persons deprived of their freedom must be treated with respect with regard to their human dignity and not be subjected to torture or any other form of inhuman or degrading treatment or punishment.

The detainee must be placed in official prison institutions, separated from convicted prisoners, and treated humanely, in a way that guarantees him especially the right to an adequate standard of living (including food, water, clothing, accommodation), right to health-care services, and contact with the outside world, especially his lawyer and relatives.

It is prohibited to expose a detainee to torture or other cruel practices. The state is required not to resort to these practices even in exceptional cases and to guarantee the right of detainees to complain against any official who performs these practices. His complaint must be promptly and impartially investigated to ensure that the perpetrator is brought to justice, in accordance with the requirements of Article 13 of the Convention Against Torture (UNCAT) which states the following:

'Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.'

The individual's right not to be subjected to torture is a non-derogable right, whatever the circumstances and in any case, as referred to by Article 2(2) UNCAT. This was confirmed by the African Commission for Human and Peoples' Rights in the framework of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa (the Robben Island Guidelines). It was confirmed that **"Circumstances such as state of war, threat of war, internal political instability or any other public emergency, national or international emergencies shall not be invoked as a justification to evade the obligations imposed by international law to respect and guarantee the right to humane treatment for all persons who have been deprived of their freedom"**

International law has emphasized the consecration of this right, which emerges through Article 5 of the Universal Declaration of Human Rights, Articles 7 and 10 of the International Covenant on Civil and Political Rights, Articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, Article 5 of the African Charter, Article 20 of the Arab Charter and Rule 1 of the Nelson Mandela Rules, and Principles 1 and 6 of the Body of Principles.

## F .The right to compensation for arbitrary detention

International standards guarantee that every person who was illegally arrested or acquitted has the right to seek reparation for harm due to the seriousness of the deprivation of liberty, its impact on the individual's social and economic life and its repercussions on the stability of his material and psychological status. The state's responsibility in this framework is based on compensation for any person whose bodily freedom was violated unlawfully or whose innocence was proven, either during the criminal investigation stage or during the trial stage.

This right has been enshrined particularly in Article 9(5) of the International Covenant on Civil and Political Rights, Article 14(7) of the Arab Charter and Principle 35 of the Body of Principles.

## Section 3

# National Legislation



It is worth noting in this context that preventive detention in Tunisian law concerns the judicial criminal investigation. The legislator has mandated the investigative judge and the Indictment Chamber with this method, which is a narrower concept than pre-trial detention that is used in accordance with international standards and guidelines to denote all persons in custody who were not brought to trial. That is, those who were detained without a verdict, whether they were legally referred to as detainees, before trial, under arrest pending trial, not brought to trial, pre-trial detention, non-convicted persons, or in any similar capacity. This concept is adopted by the UN Commissioners Manual on Human Rights and Prisons.

The General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights states at paragraph 37 that the period of pre-trial detention means detention between the time of arrest and the time when the case begins in the court of first instance.

Looking at the Tunisian law, especially the Code of Criminal Procedures, it appears that the legislator mentioned many cases of deprivation of liberty in the pre-trial phase, of which preventive detention is the most important and is the focus of these guidelines. However, there are other forms of detention mentioned above that must be explained to distinguish them from preventive detention.

- **Cases where the public prosecutor has competence to authorize arrest**

The Tunisian legislator authorizes the public prosecutor to issue a decision to detain someone in three exceptional cases:

**The first example :** Article 206. ter of the Code of Criminal Procedures puts in place the procedure of immediate referral to the court by the Public Prosecutor, after simple questioning in the event of flagrante delicto. However, if there are no hearings available on the same day, the public prosecutor may, based on a warrant, have the accused detained. In this case, the prosecutor shall have the suspect referred to the next hearing.

**The second example :** In the context of extradition of foreign criminals, Article 325 of the Code of Criminal Procedures stipulates that in urgent cases and based on a direct request issued by the judicial authorities of the requesting state, public prosecutors may authorize the temporary detention of the

foreigner. This is done by issuing a written notice either by mail or by other faster means of communication and ensuring there is a written record of such notice.

**The third example :** Under Article 359 of the Code of Criminal Procedures, the legislator authorizes the prosecutor, in the form of a confirmation, to authorize the preventive detention of a person who was previously granted conditional release if he was sentenced again or violated the conditions set for his release, provided that the prosecutor immediately refers the matter to the Commission tasked with authorizing the release.

### • Cases where the Court can order pre-trial detention

The District court and Criminal court can take decisions to order pre-trial detention in the following cases:

#### **District Court :**

Article 12 of the Code of Criminal Procedures stipulates that when conducting a preliminary investigation in the capacity of his judicial authority, the District Court Judge may temporarily detain the suspect on the condition that he is immediately brought to trial.

This article is clearly inconsistent with the presumption of innocence enjoyed by the suspect and in contradiction with the logic of a preliminary investigation, which is the preceding stage for bringing charges against the accused. It is not possible to limit the freedom of the concerned person.

This is only permitted under the provisions of Law No. 5 of 2016 whereby the public prosecutor has exclusive authority to issue a written arrest warrant. Article 12 is considered to be contrary to the principle of the separation of powers between the prosecution, investigation and trial procedures on which the Tunisian procedural law is based and therefore should be repealed.

Article 202 of the Code of Criminal Procedures allows the district judge to retain at his disposal by virtue of a warrant, the suspect if they are in a state of intoxication, or unable to prove his/her identity, or have no fixed abode, or to prevent public disorder, provided that the detention does not exceed eight days.

### **Criminal Court**

Article 169 of the Code of Criminal Procedures allows the criminal court, whether it is judging a misdemeanour or criminal matter, to issue, when necessary, a decision to detain against the suspect, if it appears that the crime is under the competence of another court and it issues a ruling that the case is outside its competence. This means that the court decides to not consider the case because it is outside its jurisdiction.

Article 142 of the same code also permits the criminal court to issue an order to detain a suspect if he tries to escape justice, for example if the suspect absconds.

Article 88 of the Code of Criminal Procedures also authorizes the court before which the case is filed, after issuing a decision to release the accused, to issue a new detention order against him if the need arises due to his lack of attendance after being summoned properly or because of the emergence of new circumstances indicating that he may pose a risk to society.

The pre-trial detention situations mentioned above differ from the pre-trial detention process that occurs during the judicial investigation stage. The Tunisian legislator has made preventive detention an exceptional measure that is not resorted to except for objective reasons that are supposed to be included in the order to detain and in accordance with specific formal conditions.

The Tunisian legislator determines the initial period of preventive detention allowing the possibility of extending it where justified, provided that it does not exceed a maximum period of nine months for misdemeanours and fourteen months for felonies. It also grants rights and guarantees to the arrested persons, whether in the course of the criminal case or when they are placed in prison institutions, as well as authorizing individuals affected by pre-trial detention, but who are later acquitted, to request compensation.



## SECTION 3.1

# THE LEGAL BASIS FOR PREVENTIVE DETENTION

The Tunisian legal system includes procedural rules related to preventive detention, which must be followed to prevent unlawful detention, enshrining the principle of procedural legality and the exceptional character of the decision ruling on it, as well as establishing barriers to taking it.

### 1. Establishing the procedural legitimacy of the preventive detention

The laws of the Tunisian state allow, when the legal conditions are met, the detention or arrest of a person for committing a crime punishable by the penal code in force. Detention or arrest shall be applied in accordance with the legal procedures, provided that the detention is not malicious or arbitrary. The pre-trial detention is not legitimate unless the legally authorized judicial authority takes the substantive and formal guarantees ensured by the law which protect the principle of procedural legitimacy approved by the Tunisian Constitution and international conventions and treaties. These procedural guarantees are:

#### A . Decision to detain is issued by a judicial authority

The pre-trial detention decision must be issued by a judicial authority such as the investigating judge or the Indictment Chamber (Chambre d'Accusations).

**The Investigating Judge:** Article 85 of the Code of Criminal Procedures authorizes the investigating judge to place the suspect of a felony or misdemeanour in pre-trial detention, as well as whenever strong evidence emerges that requires detention as a means of security to avoid committing new crimes, as a guarantee for the execution of the punishment, or as a method that provides for the safety of the investigation.

**Indictment Chamber :** Article 117 of the Code of Criminal Procedures authorizes the Indictment Chamber to issue a detention order against those accused by it. It also permits it to authorize the release of the accused persons arrested, after hearing representations by the public prosecution.

#### B. Decision to detain is issued after questioning by the Judge

Upon questioning at the first appearance before a Judge, Article 69 of the Code of Criminal Procedures is applied. The investigating judge confirms the identity of the accused and informs him of the actions that necessitated his appearance and the charges applied to them according to the decision to open the investigation. The investigating judge must also inform the accused of his rights, especially the right to seek the assistance of a lawyer and the right to remain silent.

Article 80 of the Code of Criminal Procedures provides that, after interrogating the accused, the investigative judge may, based on the conclusions of the public prosecutor, issue a detention order if the offence charged carries a prison sentence or a more serious penalty. However, the legislator made an exception to the condition and authorized the investigative judge to issue a warrant against the fugitive accused. This can be deduced from the provisions of Article 81 of the Code of Criminal Procedures, which grants the warrant holder the right to search for the accused wherever there is any likelihood that he/she may be found, in accordance with the provisions of the law.

The questioning by the Judge discusses the charges brought by the Public Prosecution against the accused. This is in accordance with the decision of the Judge to open the case and to present the accused with the evidence available against him in detail so that he can either deny the accusation or confess to it.

The law does not require questioning by a Judge before making the decision to detain in cases authorized by the Indictment Chamber, in accordance with Article 117 of the Code of Criminal Procedures. This is considered contrary to the foundation on which the investigative process is based, with its two points of departure - confrontation and prosecution - as well as the right of the accused to defend himself in the face of the charges brought against him, and his right to plead his innocence and present the evidence to support his case.



### C. Decision to detain is a written decision

The detention order is written proof of the preventive detention decision. The Tunisian legislator stipulates in Article 81 of the Code of Criminal Procedures the formal conditions that must be respected, which are that the detention order must be drawn up by the investigating judge and be dated, signed and sealed. The names of the judge and the suspect, and the suspect's approximate age, occupation, place of birth, place of residence, and the subject of the charge must be clearly mentioned with reference to the applicable legal text. It must also include the order issued by the judge to the director of the prison institution to accept and admit the accused. In the event of non-observance of the legal conditions in drawing up the detention order, the law allows that disciplinary sanctions can be brought against the Judge and damages can be sought, but the decision to detain cannot be annulled.

### D. The decision to detain must be justified

The investigating judge is obligated to explain the decision to detain following the revision made to the second paragraph of Article 85 under Law No. 21 of 2008 dated 04/03/2008. This revision requires that the decision be justified and includes the factual and legal grounds on which the decision is based. These may include, strong evidence that necessitates arrest, the need for security to avoid the commission of new crimes, a guarantee for the implementation of the punishment, or as a means of protecting the integrity of the conduct of the criminal investigation.

The explanation of the preventive detention decision to ensure the implementation of the punishment is contrary to the presumption of innocence and to the principle of differentiating between investigation and trial authorities, as justifying a decision by such statement is a declaration of conviction before the completion of the investigation and before the case is considered by the court.

It is preferable that the reasoning of the arrest decision is an independent decision, which allows for the subsequent monitoring of its grounds throughout the case.

## 2. Implementation of the exceptional nature of the preventive detention decision

Article 84 of the Code of Criminal Procedures clearly states that preventive detention **is an exceptional measure**. In an effort to highlight the principle of exceptionality of preventive detention, the legislator revised Article 85 of the Code of Criminal Procedures under the Law No. 74 dated 11 December 11 2008 thereby expanding the types of mandatory release cases, requiring an explanation for an arrest decision, recognizing the necessity of authorizing the release of the accused when the maximum period of preventive detention is reached, and establishing new procedures to improve the situation of detainees.

Article 94 of the Child Protection Code stipulates that a child cannot be placed in a detention facility unless it is found that it is necessary to take this measure, or it appears that **no other measures can be taken**.

The preventive detention according to the Tunisian legal system **is an exceptional measure**, and some rules must be taken into account when resorting to it:

- It is permissible in felonies and misdemeanours, but not other crimes.
- It is permissible whenever strong evidence emerges that necessitates detention, as a security measure to avoid reoffending, as a guarantee for the execution of the punishment, or a method that protects the well-functioning of the investigation.

The exceptional character of the preventive detention decision reflects the right to the presumption of innocence that the individual enjoys, especially in the pre-trial phase.

The legislator has required in Article 50 of the Code of Criminal Procedures that the investigating judge investigates the truth without delay, as Article 69 of the Criminal Code of Procedures stipulates that if the accused shows evidence that denies the accusation, he must establish the veracity of the accusation as soon as possible. The admission of the accused does not excuse the investigating judge from searching for other evidence.

In order to expedite the consideration of cases in which detainees are held in custody, the legislator made available in Article 104 bis of the same code the possibility for the investigating judge to take a decision to separate cases where others are arrested and accused in another case, to expedite the consideration of those arrested without stopping his work regarding the other cases.

### 3. Determining the Maximum Period of Preventive Detention

A pre-trial detention decision is an exceptional and temporary measure justified by the circumstances of the investigation. It must end when it is no longer necessary, otherwise it will become a penalty imposed without judgment. The Tunisian legislator, according to the second paragraph of Article 85 of the Code of Criminal Procedures, specified the initial period of preventive detention to be six months within the framework of the judicial investigation. After taking into account the opinion of the public prosecutor, and if according to a justified decision the interest of the investigation requires that the suspects be kept in detention, the investigating judge has the authority to extend the detention period. For a misdemeanour, the detention can be extended once, for a period not exceeding three months. For a felony, detention can be extended twice -each period must not exceed four months. The legislator allows the appeal of the decision to extend the detention. The extension of the preventive detention should be periodically reviewed as part of the review of the lawfulness of the detention, by the investigating judge, the Indictment Chamber or the Appeal Chamber.

- The final paragraph of Article 85 of the Code of Criminal Procedures allows a suspect to be released with or without a guarantee, five days after questioning, if the suspect has a known residence in Tunisia and was not previously sentenced to more than three months in prison, and the maximum sentence prescribed by law for his/her acts does not exceed one year in prison.

In all cases, and upon the expiry of the legally prescribed period of preventive detention, the investigating judge must automatically release the accused.

With regard to the application of the law in practice, there are two opposing opinions regarding whether preventive detention can be extended by the Indictment Chamber after the investigating Judge has referred the case to it. One view is that the decision to extend preventive detention is the exclusive jurisdiction of the investigating judge, in accordance with Article 85 of the Code of Criminal Procedures.

However, the opposing view is that the Indictment Chamber can extend the detention when it takes over a case file, during a second stage of investigation. The Court of Cassation agreed with the latter point of view in its decision number 86626 dated 06/19/2019. It considered that "the person who is punished has exceeded the legally permissible period of preventive detention according to the provisions of Article 85 of the CCP. The lower court overlooked this breach despite its importance, its relationship to the maximum period of the detention and its failure to make the extension within the deadline stipulated by law..." It is understood through this decision that the Indictment Chamber is authorized to extend the period of preventive detention for the same period that is allowed to the Investigating Judge.

It should be noted that the Tunisian legislator, when approving the original period of preventive detention, did not take into account the difference in crimes in terms of severity, and did not distinguish between misdemeanours and felonies, nor did he establish special periods of detention for children.

It is worth noting that the application of Article 85 of the Code of Criminal Procedures leads to different interpretations in determining whether the maximum duration of pre-trial detention concerns solely the duration of investigation before the investigating judge or also the period before the Indictment Chamber. Two trends have emerged that are worth reviewing and explaining below.

#### The First Trend

The first trend considers that the maximum duration of preventive detention runs exclusively during the investigation stage before the investigative judge. This trend has justified its position with the following arguments:

- Articles 84 and 85 are mentioned in the fifth section of the second Chapter of the Code of Criminal Procedures, entitled 'Investigation', whereas the third Chapter of the Code of Criminal Procedures relates to the Indictment

Chamber. This suggests that the procedures and rules for pre-trial detention are the exclusive mandate of the investigating judge, as long as the legislator does not stipulate otherwise.

- Article 107 of the Code of Criminal Procedures includes in its second paragraph that the effect of the decision to detain continues until the Indictment Chamber decides the case.

The legislator has allowed an exception regarding the continuation of the pre-trial detention under Article 85 Code of Criminal Procedures in its penultimate paragraph, which states the following: "It is not possible for the Indictment Chamber's decision to refer the file to the investigating judge to continue the work that is required to prepare the case for dismissal, to exceed the maximum period of preventive detention for the accused. In this case, it is necessary for the investigating judge or the Indictment Chamber, whichever relevant, to authorize the detainee's temporary release while taking the necessary measures to ensure his attendance before the Court.

If the Indictment Chamber decides not to consider the substance of the case but instead decides to return the file to the investigating judge to work on the case further, and if the maximum period of pre-trial detention is reached, the detainee must be released. This case supports the first trend.

- The legislator has set a time limit within which the Indictment Chamber must decide a case referred to it by the investigating Judge. Under Article 114 of the Code of Criminal Procedures, the representative of the Public Prosecution at the Court of Appeal, must refer a case to the Indictment Chamber within ten days accompanied by his opinion. The Indictment Chamber decides on the case within a week of receipt. Therefore, the deadline for deciding the substance of a case where an individual is in pre-trial detention is subject to time limits that guarantee the speedy consideration of the case.

Article 222 of the Code of Criminal Procedures provides that the case in which an accused is detained, must be settled for hearing within a maximum of three months from the date the court has received the file. This reinforces the idea that the Tunisian legislator distinguished between the time limit for pre-trial detention and the time limit for the detainee's appearance before the court.

## The Second Trend

This trend considers that the maximum duration of preventive detention includes the two levels of investigation. This opinion is based on a number of arguments:

- The investigation is carried out in two stages and is not limited to the investigation carried out by the investigative judge. Hence, the Indictment Chamber is considered a second stage of investigation. Therefore, the duration for preventive detention cannot be exceeded even after the Indictment Chamber has taken up the case. Especially considering the exceptional nature of the measure. The detainee must be released whenever the period of his/her arrest exceeds the maximum duration of preventive detention legally permitted.
- The Tunisian Constitution recognises the presumption of innocence and the accused's right to trial within a reasonable time. Stating that the maximum duration of pre-trial detention only covers the preliminary investigation, is hence contradictory to these constitutional principles.
- The terms of Article 84 of the Code of Criminal Procedures are absolute. The article does not specifically mention the investigative judge as an exclusive competent authority when making that decision. Therefore, the rules and conditions in Article 84, including the maximum duration of pre-trial detention, are important at both levels of investigation, and the Indictment Chamber is bound by the conditions as well.

This position based on the principle of interpreting procedural texts according to the legitimate interest of the accused was supported by many decisions issued by the Court of Cassation. For example, Decision No. 777 issued on 06/12/2013 and Decision No. 77913 issued on 09/14/2018 which affirmed that "freedom is the norm, its restriction and removal is an exception that is limited by legal controls established by the legislator in Article 29 of the Constitution and in the provisions of the Code of Criminal Procedures. These require the compulsory release upon reaching the maximum period of pre-trial detention without this preventing the court from taking the necessary measures to ensure the presence of the accused".

## 4. Limiting preventive detention

The Tunisian legislature has identified cases in which the issuance of a preventive detention decision is prohibited, otherwise it would be arbitrary. These are:

### A. Limitation relating to the classification of crimes

Article 85 of the Code of Criminal Procedures stipulates that the investigating judge has the possibility of detaining suspects of felonies and misdemeanour. Additionally, Article 80 authorizes him to issue an order to detain someone in prison if the offence deserves a prison sentence or more severe punishment. It is understood from these two articles that it is not permissible for the investigating judge to take a decision of preventive detention if the acts committed are felonies and also in the case of misdemeanours that do not require a prison sentence.

### B. Procedural limitation where the release is decided by the Indictment Chamber

Article 88 of the Code of Criminal Procedures prohibits the investigating judge from issuing a new detention decision if the Indictment Chamber grants temporary release to the accused after revoking the investigating judge's decision. The investigating judge cannot take the pre-trial detention decision again, except after a decision is issued by the Indictment Chamber approving the decision, after hearing the public prosecution representative.

### C. Prohibition of detention of certain vulnerable groups

The Tunisian legislator expressly prohibits resorting to a preventive detention decision against a child under the age of fifteen years if he is accused of committing a violation or misdemeanour, in accordance with the provisions of Article 94 of the Child Protection Code.



## SECTION 3.2

# THE GUARANTEES AND RIGHTS RESERVED FOR PERSONS IN PRE-TRIAL DETENTION

There are certain rights and guarantees reserved to those arrested in pre-trial detention when they appear before the competent judicial authority, the investigative judge, and other rights and guarantees relevant upon their imprisonment. The Tunisian legal system has enshrined most of the guarantees and rights stipulated by international standards, except for the right to challenge the legality of arrest or detention, even though it is one of the most important rights that ensure non-arbitrariness in restricting individual liberty.

## 1. The Guarantees and Rights Reserved to the Accused when Appearing before the Judge for questioning

The Tunisian legislator informs the first appearance procedure and receiving the suspect's answer with a set of guarantees and rights conferred on him provided in Article 69 of the Code of Criminal Procedures. The investigating judge is obliged to inform the suspect of these rights:

- The right to inform the suspect of the acts he is pursued for and the charges against him.
- The right to legal aid: informing the suspect of his right to appoint a lawyer. If he refuses to choose a lawyer or if the latter does not attend after being summoned, the work must be carried out, and if the accusation is a felony and the lawyer expresses his inability to attend, an attorney is employed for him through the president of the Court of First Instance.
- The suspect must be informed of his right to remain silent and that he is not obligated to answer.

However, according to the fifth paragraph of Article 69 of the Code of Criminal Procedures the investigating judge has the discretion to not observe these three rights mentioned above and to conduct the questioning – including with adverse witnesses - in a timely manner if there is certainty that a witness is in danger of death, or when there is a risk that evidence will disappear, or if the suspect is caught in flagrant delicto.

## 2. The Rights and Guarantees Reserved to those Arrested in Pre-trial Detention upon Imprisonment

In addition to the basic guarantees represented in the existence of a judicial order for imprisonment and the necessity for the prison administration to keep records that include all the information of the person detained, as well as basic living rights such as the right to food, hygiene and wearing personal clothing, the most important rights and guarantees devoted to those in prison institutions are the following:

- **The right to be held separately from convicted prisoners** According to the last paragraph of Article 3 of Law No 52 of 2001 dated 14 May 2001, it is stipulated that a distinction must be made in all cases inside prisons between those arrested in pre-trial detention and those sentenced. Indeed, Article 6 requires that prisoners must be classified as soon as they are imprisoned on the basis of sex, age, type of crime and criminal status according to whether they are first-time offenders or re-offenders, taking into account the individual case. The Tunisian legislator has established a special detention system for imprisoned women in accordance with the provisions of Article 7 of the same law. Female prisoners can only be placed in women's prisons or in separate sections in mixed prisons, and they are guarded by female guards who work under the supervision of the prison director. According to Article 10 of the same law, children may not be placed in prison institutions except on an exceptional basis, and only in special sections for children, ensuring they are separated at night from the adult prisoners. Ordinance No. 2423 of 1995 dated 12/11/1995 confirms in its first article that the placement of delinquent children by the judiciary is carried out primarily in reform centres with the aim of caring for them, reforming them, refining their behaviour, and preparing them educationally, socially and psychologically for reintegration into society.

- **The right to contact the outside world**

The prison administration must inform a third party that the person has been detained in their institutions. According to Article 14 of Law No. 52 of 2001, it is obligatory to inform one of the ascendants, descendants, brothers, or spouses of the prisoner, according to his choice, as soon as he is detained, and whenever he is transferred from one prison to another. Every prisoner must provide the name and address of the person who can be contacted when an emergency occurs. Article 10 of Ordinance No. 2423 of 1995 obliges the administration of the correctional centre to inform the parent of the juvenile of the decision to detain his child in order to ensure contact between them, as well as to notify the parent of the date of his release.

Article 31 of Law No. 52 of 2001 grants the relatives of the prisoner who has been arrested in custody the right to visit him once a week under a visit license issued by the judicial authorities with the same consideration. Article 33 provides a list of relatives allowed to do so, and Article 34 authorizes children under the age of thirteen a visit to one of their parents who is imprisoned outside the usual time of the visit and without a quarantine in the presence of a prison guard in civilian clothes. Article 34, exceptionally, permits non-relatives or persons who have a moral influence on the prisoner to visit him in an office dedicated to the purpose, in the presence of the prison director or his representative. The investigating judge, based on the second paragraph of Article 70 of the Code of Criminal Procedures, may prohibit, by a reasoned and non-appealable decision, contact with those detained suspects for a period of ten days, and this ban may be renewed, but only once for the same period. This prohibition does not apply to the lawyer.

The prisoner has the right to maintain family and social ties in accordance with the provisions of Article 18 of Law No. 52 of 2001 by going out to visit relatives when severely ill or attending the funeral procession of them in accordance with the legislation governing the procedure for judges to pass sentences and the regulations in force. The suspect is also allowed to make correspondences through the prison administration and conclusions of confirmed contracts unless there is a legal prohibition, and after authorization from the judicial authority that is responsible.

In accordance with the provisions of Article 19 of the same law, the prisoner has the right to access the outside world by obtaining writing tools, reading books, magazines and daily newspapers through the prison administration and in accordance with the regulations in force. A library is found in each

prison that contains books and magazines prepared for reading. The detainee has the right to obtain other written documents that enable him to follow his study programs in educational institutions from inside the prison.

Under Article 16 of the Child Protection Code, the legislator has guaranteed the child's right to enjoy periodic leave during the implementation of temporary measures or punishment to enable them to remain connected to the outside world in order to facilitate their reintegration into society. In its last paragraph, Article 94 of the same code also authorized the child to enjoy during the period of precautionary detention leave on Saturdays and Sundays, with permission from the undertaking judicial authority.

#### • **The right to contact an attorney**

Paragraph 5 of Article 17 from Law No 52 of 2001, enshrines the right of the detainee to meet with the attorney assigned to defend him without the presence of a prison guard, based on a license from the judicial authority responsible. Paragraph 9 of the same law authorizes him to write to the attorney assigned to defend him through the administration of the prison.

In accordance with the provisions of Article 70 of the Code of Criminal Procedures, the suspect has the right to contact his lawyer at any time upon his first appearance, and it is not permissible to prevent him from this right.

#### • **Right to Health**

Persons placed in prison institutions enjoy the right to adequate health care guaranteed by the prison administration by providing means of prevention, examination and treatment in cooperation with state health institutions. Article 1 of Law No. 52 of 2001 enshrines the prisoner's right to benefit from health and psychological care. Article 13 of the same law requires for a prisoner to be presented as soon as he is admitted before a doctor in prison. If it is found that he suffers from an infectious disease, he must be isolated in a wing designated for the purpose with the advice of the prison doctor.

Article 7 of Law No. 52 of 2001 assigns a pregnant prisoner the right to medical care before and after childbirth. Mothers should give birth in hospital institutions outside prison and these children, according to Article 9, have the right to stay with their mother until they reach the age of three. Mothers are also entitled to medical and preventive services and the right to provide hygiene supplies according to Article 13 throughout that period. Children

accompanying their imprisoned mothers are subject to the same system when they are imprisoned.

Articles 20 to 24 of the decree no. 2423 dated 12/11/1995 covers procedures related to the right to health for children placed in correction centres, including a medical examination for new admissions and free treatment in public hospitals with the possibility of licensing treatment in private clinics at the child's expense if the child's parents wish to do that.

The right to health is a constitutionally guaranteed right for all, and it is considered in normal conditions one of the most important factors in which the state's good treatment of detainees is measured. The issue is further deepened when it comes to an exceptional situation similar to the sanitary conditions that Tunisia experienced in relation to the spread of the Coronavirus (Covid-19), a pandemic starting from March 2020. Hence, the question arises about the ways to deal with this new situation and the protective measures taken to prevent the spread of the virus among detainees in Tunisian prisons, especially where overcrowding and physical closeness between detainees is a factor facilitating the spread of the virus within prison settings.

Many protective measures have been taken in anticipation of the possibility of recording HIV infections inside prisons. These measures have taken many forms, judicial and administrative.

With regard to those arrested, whether in custody of investigative judges or those awaiting trial in relation to the ruling bodies, and given that the principle is freedom and the exception is its denial, the judges interact with the exceptional situation by granting a greater number of detainees temporary release, especially since the general circumstances and the measures that were taken in relation to the general health quarantine prevents them from committing other crimes.

On the other hand, it must be recalled that on the occasion of the 64th anniversary of Independence Day, the President of the Republic granted 1856 prisoners a special amnesty, which led to the release of 670 of them, while the rest enjoyed the reduction of the sentence imposed, and the right to a special pardon. While it was exercised by the President of the Republic, lists of convicts who meet the conditions for pardon are prepared by the Amnesty Committee at the Ministry of Justice. An exceptional list was added at the end of March 2020 granting 1420 prisoners a special pardon, which resulted in them all being released.

The General Authority for Prisons has taken a number of preventive and protective measures to avoid the spread of infection in prisons. These measures include the suspension of direct visits to prisoners (visits in which prisoners meet their families without a barrier), limiting the regular visits that take place through the checkpoint once a week and reducing the number of prisoners' visitors to two visitors only. The frequency of accepting food from the family was also reduced from three times a week to twice and then to once a week. Sterilizing everything that is entered into prison, improving the quality of accommodation, adding a hot meal for prisoners, in addition to providing medicines and health equipment, such as masks, gloves, and thermometers to the agents and prisoners who are brought before the court are prioritized.

The General Authority for Prisons and Reform has also designated separate spaces to receive new detainees, with the aim of preventing mixing with other prisoners to prevent the possibility of infection, during the observed quarantine period that lasts 14 days in a number of prisons.

On the other hand, it must be recalled that Tunisian prisons have become a major supplier to the market with masks (face masks) and the special suits that are prepared by prisoners participating in sewing workshops within the prison units. Various medical standards and protocols approved by the Ministry of Health have been implemented.

### 3. Absence of the Right to Challenge the Legality of Preventive Detention

The Tunisian legislator does not explicitly allow the right to appeal the decision of preventive detention for the accused. Article 80 of the Code of Criminal Procedures in its second paragraph assigns that right to the Public Prosecution rather than the accused, although the Public Prosecution initiates the proceedings. The Public Prosecution also has the right to appeal the investigation judge's decision to detain the accused whenever this contradicts its request. The failure to establish the right to challenge the legality of the detention and remedy before a higher court, as soon as possible is a clear violation of international obligations.

Article 83 of the Code of Criminal Procedures stipulates that resolving every dispute relating to orders of the court (referred to in Articles 78-83), including the decision to detain or the extent of its interference with individual liberty belongs to the jurisdiction of the judicial authority alone. However, it does not allow an explicit right to challenge the detention decision, as it does not specify any appeal procedures or deadlines, or the competent judicial authority.

The judicial application has resulted in a debate regarding the possibility of appealing the detention decision issued by the Indictment Chamber before the Court of Cassation, according to Article 117 of the Code of Criminal Procedures. This debate has arisen in light of the impossibility of appealing the pre-trial detention decision issued by the investigating judge during the first stage of the two investigation stages, and because of the exceptional nature of appealing a decision before the Court of Cassation.

The jurisprudence of the Court of Cassation has been divided into two parts: One side of the debate refuses to accept the appeal to the Court of Cassation considering that Article 258 of the Code of Criminal Procedures does not allow an appeal before the Court of Cassation, except on issues of substance. In line with this view, the detention decision is considered a formal and temporary decision unrelated to the substance of the criminal case, and therefore appealing this decision is not allowed.

The other side of the debate considers that the right to appeal to the Court of Cassation is allowed on the basis that it lies within its mandate to control the application of the law. It may monitor the extent of the application of the

law when taking that decision based on the Court of Cassation's reference decision on the matter of Criminal Procedures, issued under number 6912 on 06/04/1969. This decision stated that **"the appeal against the Indictment Chamber's decision to detain or grant temporary release is not accepted unless the appeal is based on a breach of the legal texts that applied the rules of detention or temporary release. According to the jurisprudence of the Court of Cassation and its decision issued by its chambers, further to meeting on December 3, 1966, under number 5088, there is no debate as to whether or not the detention is valid, because it is an objective argument that the Court of Cassation has no interest in."**



### SECTION 3.3 ALTERNATIVES TO PREVENTIVE DETENTION

Non-custodial measures are defined in the United Nation's Tokyo Rules as 'any decision made by a competent authority, at any stage of the administration of criminal justice, which requires a person suspected of, accused of or sentenced for an offence to submit to certain conditions or obligations that do not include imprisonment. The term refers in particular to sanctions for an offence that require an offender to remain in the community and to comply with certain conditions' .'

Decree No. 29 of 2020 dated 06/10/2020 explicitly authorizes the investigating judge to take alternative measures to preventive detention after questioning and to keep the accused in a state of release, i.e. between the first appearance and the beginning of the investigation phase. However, before the aforementioned decree was issued, the investigating judge could not use alternative measures except in situations where the suspect was released at a later stage after the initial decision to detain. These measures and obligations are:

1. **Placing the suspect under electronic surveillance for a maximum period of 6 months**, non-extendable, provided that the investigating judge follows up the implementation of this measure with the help of the escort office concerned, according to the rules and procedures stipulated in the Code on Criminal Procedures (a new measure in the Tunisian legislation)
2. Ordering the suspect to reside within the court's territorial jurisdiction,
3. Ordering the suspect to remain within a prescribed territorial boundary, determined by the judge, except under certain conditions
4. Prohibiting the suspect from going to certain places,
5. Ordering the suspect to inform the investigative judge of their movements to certain places,
6. Ordering the suspect to commit to appear before the judge whenever called, and to respond to a summons to authorities in connection with the ongoing procedures against them.

The legislator has adopted, by Decree No. 29 of 2020, some of the alternatives to pre-trial detention used in other jurisdictions under the heading of judicial control (le contrôle judiciaire) and has implemented these as measures that can be taken after the first appearance of the accused before the investigating judge or in accordance with the temporary release decision. This form of judicial control (le contrôle judiciaire) is known as a preventive measure whereby the investigating judge quashes the preventive detention decision, ordering the accused to be released during the investigation stage in exchange for the accused guaranteeing that they will comply with the conditions that are determined.

Due to the seriousness of the pre-trial detention decision, the Tunisian legislator put in place other procedures that prevent that decision from becoming absolute, as it allowed the investigating judge, the Indictment Chamber, and the criminal court to automatically release those accused. A request for release from the accused, his lawyer or the Public Prosecution must be implemented as the investigating judge is required to release the suspects upon the expiry of the maximum preventive detention



period prescribed by the law. However, Article 338 of the Customs Code sets a condition for the release of the suspects who are residents abroad and have been detained for smuggling. The condition involves providing a guarantee of the payment of the fines resulting from the misdemeanour. This is considered a restriction of the discretionary power of the judicial authorities as a guarantor of freedoms according to the Tunisian Constitution.

In the same context, Article 93 of the Child Protection Code explicitly authorizes the investigating judge to take some measures as alternatives to the pre-trial detention of a juvenile offender, such as the temporary delivery of the child:

- To his parents, sponsor, custodian, or a trustworthy person.
- To an observation centre.
- To an institution or organization concerned with vocational education, training or treatment, approved for this purpose by the concerned authorities.

Also, by virtue of the Law No. 40 of 1975 dated 14/05/1975 relating to passports and travel documents, as revised by the Basic Law No. 45 of 2017 dated 07/06/2017, the Tunisian legislator grants the investigative judge or the criminal court the power to issue a travel ban against the suspect, as a precautionary measure to ensure their presence and prevent them from attempting to evade justice. The law fixes the maximum duration for such measure, which is fourteen months, i.e. the same maximum duration for pre-trial detention.

It can be said that non-custodial measures or alternatives to preventive detention have become extremely important in modern criminal policies, especially since states are obligated to act in accordance with international human rights law which aims to achieve, amongst other things respect for human dignity and the protection of personal liberty.

It is assumed that alternative measures for preventive detention will be used in the majority of cases in which the accused persons included in the investigation are first time offenders. However, the investigating judge's inability to immediately access the criminal record of the accused represents one of the difficulties he faces when taking these measures.



## SECTION 3.4

### APPROVAL OF COMPENSATION FOR ARBITRARY DETENTION

In line with international standards, the Tunisian legislator enacted Law No. 94 of 2002 dated 29 October 2002, relating to compensation for detainees and convicts who have been proven innocent. It stipulates in Article 1 that **“anyone who has been placed in pre-trial detention or who has served a prison sentence, may request compensation from the state for the material and moral damage caused by this detention, in the following cases:**

- If a decision was made against him to keep the charge, either because the act does not consist of a crime, does not exist at all, or cannot be attributed to the accused,
- If a prison sentence was issued against him and then his innocence was proven conclusively for the above-mentioned reasons.
- If a judgment is issued against him in a matter previously determined by the judiciary.

Article 13 of the same law specifies that:

‘compensation for the damage caused to the plaintiff will be awarded to him/her, if he/she proves that the damage is real, serious, current, and resulting directly from pre-trial detention or the execution of the prison sentence.’  
When evaluating the amount of the compensation, the duration of pre-trial detention, or the effective duration of the sentence executed in prison as well as all the factual circumstances, shall be taken into consideration.

Since the entry of the abovementioned law into force, several cases have been brought before the Tunisian Court of Appeal. One example is Case No. 22 of 20 May 2005 where an individual was charged with forging currency, handling, dealing in and bringing counterfeit money into the country. He had served six months in pre-trial detention and was later acquitted by the court. He brought a case against the State under Law No. 29 of 29 October 2002

concerned with compensation for detainees and convicts whose innocence has been proven. The court ruled in his favour and ordered the government department representing the Ministry of Justice and Human Rights to pay compensation of thirteen thousand dinars for the damage caused to him.

According to Paragraph 51 of General Comment No. 35 and Article 9 of the International Covenant on Civil and Political Rights, '...the fact that a criminal defendant was ultimately acquitted, at first instance or on appeal, does not in and of itself render any preceding detention "unlawful"'.

The Tunisian Court of Cassation adopted this approach in its civil decision No. 2010-11, in which it affirmed that "the right to compensation does not arise once the innocence is proven by a court ruling, but rather is defined by the conditions included in Article 13 of the aforementioned law.

These ensure that the injury is proven to be a direct result of the preventive detention or the punishment and that the damage is severe in the sense that it exceeds the natural order by a special degree. It is also required that the innocence is clear and absolute.

This would prevent compensation for whoever was responsible, in whole or in part, in the cases that led to the detention or sentence of imprisonment. Moreover, anyone whose actions affected the direct causal relationship between the occurrence of the damage and its direct link to the pre-trial detention decision or prison sentence is also responsible, according to Article 4 of the same law."

- Articles 69, 72, 80, 81, 83, 84, 85, 86 and 107 of the Code of Criminal Procedure.
- Child Protection Code
- Law No. 52 of 2001 of 14/05/2001 related to the prison system.
- Law No. 94 of 2002 of 10/29/2002 related to compensation for detainees and convicts who have been found innocent.
- Decree No. 2423 dated December 11, 1995

# ABSTRACT

The Tunisian Constitution of 2014 enshrines guarantees and reserves rights for everyone who appears before the criminal justice system, the most important of which is the prevention of unlawful detention, by making it a judicial decision, and assuming that the accused will enjoy the presumption of innocence throughout the stages of the trial while ensuring his right to a defence.

Tunisian law is generally considered in conformity with the principles of international human rights law with regard to guarantees and rights reserved to persons in custody or subject to preventive detention in particular.

This is done through the prohibition of arbitrary detention by subjecting detention to special procedures based primarily on a judicial decision, consecrating the exceptional character of a decision of detention, granting the accused persons the right to legal aid and humane treatment, ensuring that they are not subjected to torture and other related rights, when they appear before a judge or when they are placed in prison institutions. The rights of some vulnerable groups such as children and women are to be taken into account while implementing this law. The legislator has established obstacles to preventive detention and has devoted alternatives to it through judicial control measures, especially electronic surveillance (electronic bracelet).

It also provides the right to compensation for those who prove that they have been subjected to arbitrary arrest or detention.

However, the Tunisian legal system does not conform with international law in terms of establishing the right to appeal the pre-trial detention decision before a higher court to ensure immediate and urgent consideration of the lawfulness of that decision. It has become a system that is deficient in this right even though it is one of the most important rights reserved to people deprived of their freedom.

It should be noted that the discussions that took place within the framework of the round tables that were organized in order to present the initial draft of these guidelines resulted in the judges' near unanimous agreement of the existence of many problems in relation to cases in which the accused is detained. The most important of these are:

- Investigations are delayed by the investigation office due to the lack of logistical and human resources necessary to conduct investigations, as compared to the number of open cases. This is clearly reflected in the complex cases that require technical and expert input, international letters rogatory, and technical assistance to reveal the path of communications made by suspects or to track financial flows.
- In the case of complex crimes, the period of preventive detention may be too short. The 14-month maximum period of pre-trial detention is considered

non-proportional with the requirements for investigating terrorist and money laundering crimes in particular, which often require performing complex technical tests and authorizing international letters rogatory that require a lot of time.

- The Public Prosecution resorts to opening an excessive amount of investigative cases.
- The excessive number of formal objections filed or raised on behalf of the accused, affects the well-functioning of the investigation and resorts in the defence submitting regular requests for release and the court regularly refusing these due to an absence of developments in the case.
- The gaps in the investigation work in some cases, whether these are common crimes or in particular with terrorism cases, may affect the length of the trial deadlines, given that the court is obligated to continue with the investigation before proceeding to trial.
- There are problems caused by appealing the Indictment Chamber decisions to the Court of Cassation, especially in cases that involve multiple accused persons, where some of them appeal without being joined by others in the appeal, meaning that the case is delayed pending the outcome of any appeals lodged.
- The criminal justice process is complex as it starts with the preliminary investigation stage conducted by the Judicial Police, followed by the public prosecution and the investigating judge, and the appeal to the Indictment Chamber, i.e. the two stages of the investigation phase. Thereafter, the procedure enters the trial and sentencing phase which also has two levels.
- The inability to know the defendant's history in reasonable time presents a challenge. Knowledge of the defendant's history helps to assess whether there are alternatives to pre-trial detention.





## ● ——— The Tunisian Constitution ——— ●

### **Article 23**

"The State shall protect the dignity of the human person and the inviolability of the body, and shall prohibit moral and physical torture. The crime of torture shall be imprescriptible."

### **Article 27**

The accused is presumed innocent until proven guilty in a fair trial in which all safeguards indispensable for his/her defence are guaranteed throughout the prosecution or trial stages."

### **Article 29**

"A person cannot be arrested or detained except in case of flagrante delicto or by a judicial decision, and he shall be immediately informed of his rights and the charge against him. He has the right to appoint a lawyer, and the duration of detention must be determined by a law."

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