

Tunisia: Silencing Free Voices

A briefing paper on the enforcement of Decree 54 on “Cybercrime”



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I. Introduction

The right to freedom of expression, including “freedom to seek, receive and impart information and ideas of all kinds”, is one of the essential foundations of a democratic society, as well as a human right, guaranteed, among others, by article 19 of the International Covenant on Civil and Political Rights (ICCPR), by which Tunisia is bound as a State party. The right to freedom of expression is also enshrined in the Tunisian Constitution.¹

Since his power grab on 25 July 2021 under “the state of exception”,² President Kais Saied has issued numerous decrees undermining the rule of law, the separation of powers, the independence of the judiciary and the protection of human rights in Tunisia. In particular, pursuant to these exceptional measures, the promulgation of presidential Decree-Law 2022-54 on “fighting offences related to information and communications system” on 13 September 2022 (hereinafter “Decree 54”) has allowed the Tunisian authorities to impose unlawful and arbitrary restrictions on the legitimate exercise of the right to freedom of expression.

This briefing paper analyses Decree 54 in light of Tunisia’s legal obligations under international human rights law and standards, and examines its enforcement by the Tunisian authorities. With respect to this, the ICJ is deeply concerned by the alarming prosecutions that have been initiated under Decree 54 and condemns the use of criminal proceedings against lawyers, journalists, political figures, trade unionists and all free voices, whether on the basis of this Decree or any other legal provision, solely for the legitimate exercise of their right to freedom of expression, including in the context of the recent crackdown on political dissent in Tunisia.³

¹ See article 31 of the 2014 Constitution, now abrogated, and article 37 of the 2022 Constitution, which both state: “Freedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship.”

² See ICJ, Tunisia: President’s power grab is an assault on the rule of law, 26 July 2021, available at: <https://www.icj.org/tunisia-presidents-power-grab-is-an-assault-on-the-rule-of-law/>.

³ On 11 February 2023, at dawn, a wave of arrests targeting political opponents and government critics started in Tunisia. Within the following two days, at least 11 individuals, including public opposition figures, former ministers, lawyers, former judges, a former diplomat, a private media director and a businessman, were arrested, 12 among those arrested remained in detention at the time writing. See ICJ, Tunisia: End wave of arbitrary arrests targeting critics and opposition members, 15 February 2023, available at: <https://www.icj.org/end-wave-of-arbitrary-arrests-targeting-critics-and-opposition-members/>. In a statement issued on 14 February 2023, the UN High Commissioner for Human Rights expressed concern over “the deepening crackdown against perceived political opponents.” See OHCHR, Arrest of perceived political opponents and civil society in Tunisia, 14 February 2023, available at: <https://www.ohchr.org/en/press-briefing-notes/2023/02/arrest-perceived-political-opponents-and-civil-society-tunisia>. Additional arrests took place in the following weeks.

II. Decree 54 in light of Tunisia's legal obligations under international human rights law

Promulgated without any consultation or public debate, Decree 54 threatens the right to freedom of expression, including media freedom, the exercise of human rights in the digital sphere and the right to privacy in Tunisia. Decree 54 enables the executive to use its provisions to curtail independent voices.⁴ Under the guise of combatting cybercrime and "fake news", it allows the authorities to control what people, including politicians, journalists and human rights defenders, say through surveillance and criminal penalties, in violation of Tunisia's legal obligations under international human rights law and standards.

In a joint communication sent to Tunisia and made public on 23 January 2023, five UN Special Rapporteurs expressed "deep concerns" about:

- the compatibility of Decree 54 with international human rights law and standards with respect to the rights to freedom of expression, of the press, of peaceful assembly and of association, to privacy and the independence of lawyers;
- its drafting process, which was carried out "without consultation with civil society organizations";
- the timing of its adoption, "only three months before the legislative elections of 17 December 2022 and a few days before the start of the electoral campaign period, posing immense risks to public debate during a pivotal moment in Tunisian democratic life", and
- the context of its adoption, as part of a "general trend of increasing restrictions on fundamental freedoms, freedom of expression, and free and pluralistic debate, which are the hallmarks of a free and democratic society," particularly since the declaration of a "state of exception" on 25 July 2021.⁵

Despite these serious concerns, during the adoption of Tunisia's latest Universal Periodic Review (UPR) on 24 March 2023, Tunisia rejected all recommendations calling for the revocation of Decree 54.⁶

⁴ See ICJ, Tunisia: Repeal Draconian Cybercrime Decree, 20 September 2022, available at: <https://www.icj.org/tunisia-repeal-draconian-cybercrime-decree/>; see also ICJ, Tunisia: ICJ urges the authorities to halt attacks on the rule of law and address the concerns raised during the Universal Periodic Review, 9 November 2022, available at: <https://www.icj.org/tunisia-icj-urges-the-authorities-to-halt-attacks-on-the-rule-of-law-and-address-the-concerns-raised-during-the-universal-periodic-review/>.

⁵ United Nations Special Procedures joint communication to Tunisia, Mandats de la Rapporteuse spéciale sur la promotion et la protection du droit à la liberté d'opinion et d'expression; du Rapporteur spécial sur le droit de réunion pacifique et la liberté d'association; de la Rapporteuse spéciale sur la situation des défenseurs des droits de l'homme; de la Rapporteuse spéciale sur l'indépendance des juges et des avocats et de la Rapporteuse spéciale sur la promotion et la protection des droits de l'homme et des libertés fondamentales dans la lutte antiterroriste, 23 January 2023, JOL TUN8/2022 (hereinafter "UNSP Joint Communication to Tunisia"), available in French only at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27796>, pp. 1 and 7 (ICJ's unofficial translation).

⁶ See Oral Statement of the International Commission of Jurists (ICJ) at the adoption of Tunisia's UPR outcomes under agenda item 6, 24 March 2023, available at: <https://www.icj.org/the-icj-denounces-tunisias-failure-to-accept-recommendations-calling-for-an-end-to-the-use-of-military-courts-to-try-civilians-and-the-repeal-of-cybercrime-decree-law/>.

a. Restrictions to free speech through criminal offences open to very broad interpretation

Article 24 of Decree 54 criminalizes the following conduct:

- “deliberately us[ing] communication and information systems and networks to produce, spread, diffuse, send or write fake news, false information or rumours, false or forged or falsely attributed documents with the aim of infringing the rights of others or threatening public security or national defence or spreading terror among the population;” and
- “us[ing] information systems to publish or distribute fake news, false or forged documents or information containing personal data or falsely attributed data with a view to defaming others, to damaging their reputation or harming them financially or morally, to inciting assaults against them or to inciting hate speech.”⁷

The provisions of article 24 are overbroad and vague as they do not define “fake news” and “rumours”. As a result, they constitute a serious threat to the exercise of the right to freedom of expression. Because of their vague and overbroad terms, they fail to meet the requirements of article 19(3) of the ICCPR, according to which restrictions on the exercise of the right to freedom of expression must be “provided by law”; the “law”, in turn, “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”.⁸ This lack of specificity, in particular, also violates the criminal corollary of the principle of legality,⁹ enshrined in article 15 of the ICCPR, which requires that criminal offences be defined by law with precision and be narrowly construed.

The purported fight against “fake news” may thus be used to legitimize arbitrary attacks on free expression, including freedom of the press and the right to inform and be informed. As demonstrated by the Tunisian authorities’ recent enforcement of article 24 (see below under section III), this provision enables the arbitrary targeting of journalists, human rights defenders, political opponents and lawyers for prosecution solely for their legitimate exercise of the right to freedom of expression.

These prosecutions, in turn, threaten people’s right to liberty and security of person, as individuals may risk being arbitrarily detained as a result of being arrested, charged, prosecuted and convicted on the basis of article 24. As underscored by the UN Human Rights Committee in its General Comment No. 35, “[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), freedom of association (art. 22), freedom of religion (art. 18) and the right to privacy (art. 17)”.¹⁰

⁷ All the extracts of Decree-Law 2022-54 quoted in this Briefing Paper are ICJ’s unofficial translation.

⁸ UN Human Rights Committee (HRC), General comment No. 34, Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34, available at: <https://www.refworld.org/docid/4ed34b562.html> [accessed 7 March 2023], para. 25.

⁹ See e.g., ICJ, The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty, 8 March 2023, available at: https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf, Principle 1 - Principle of Legality, p. 15: “No one may be held criminally liable for any act or omission that did not constitute a criminal offence, under national or international law, at the time when such conduct occurred. The principle of legality also requires that the law be publicly and sufficiently accessible and the criminal liability foreseeable and capable of being clearly understood in its application and consequences. Thus, crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence with a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is not criminally proscribed. Criminal law must not proscribe any act or omission in terms that are vague, imprecise, arbitrary or overly broad. Criminal law must not be construed broadly to an accused person’s disadvantage. In the case of ambiguity, the definition of a particular offence should be interpreted in favour of the accused.”

¹⁰ UN Human Rights Committee (HRC), General comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, available at: <https://www.refworld.org/docid/553e0f984.html> [accessed 25 May 2023], para. 17.

Moreover, article 34 of Decree 54 provides that the “offences” under the Decree, including under article 24, may be prosecuted in Tunisia, even if committed abroad, if they have been “committed against Tunisian parties or interests”, terms that, in and of themselves, are vague, overbroad and, therefore, open to arbitrary interpretations. In this connection, foreign journalists, who have published articles, etc., about the situation in Tunisia abroad, have had their work qualified as “fake” and a purpose qualified as contrary to Tunisian interests has been attributed to them. As a result, they could be prosecuted under article 34 of the Decree.

b. Heavy penalties likely to dissuade critics of the authorities

Article 24 of Decree 54 provides for a penalty of five years’ imprisonment and a fine of 50,000 Tunisian dinars (about 16,000 USD) upon conviction in connection with the “offence” as described above. The penalty is “doubled” whenever the “crime” has been purportedly perpetrated against “State officials”.

As a result, for all intents and purposes, article 24 establishes an offence of criminal defamation of State officials. However, such a “crime” is incompatible with international human rights law and standards, which forbid the imposition of imprisonment for defamation. In particular, the UN Human Rights Committee, in its General Comment No. 34, stated that with respect to defamation, “the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”¹¹

More generally, the severity of the penalties upon conviction for offences under Decree 54 raises concern with respect to the principle of proportionality, according to which (i) criminal law may only be applied to restrict any human right as a last resort, when other less restrictive means of achieving the legitimate interests it pursues are insufficient,¹² and (ii) the sanctioning of certain offences must be proportionate to the severity of the offence itself,¹³ a principle which applies to all offences, including those arising from the exercise of fundamental freedoms, such as the right to freedom of expression.¹⁴

With respect to laws on defamation of or insults against public figures, international human rights law and standards also forbid “for more severe penalties solely on the basis of the identity of the person [whose reputation] may have been impugned”.¹⁵ In this respect, in the abovementioned communication to the Tunisian authorities, the UN Special Rapporteurs expressed concern about the fact that the doubling of sanctions in cases where the target is a public official “poses an immeasurable risk to the freedoms of opinion, expression, the press, the independence of the judiciary, association, and assembly online and offline, which are essential for pluralistic public debate, for ensuring accountability and transparency in governance, for informing public opinion, and for ensuring free, fair and transparent elections.”¹⁶

¹¹ HRC, General Comment No. 34, op. cit., para. 47.

¹² See ICJ, 8 March Principles, op. cit., Principle 7 – Human rights restrictions on criminal law, p. 18.

¹³ See ICJ, 8 March Principles, op. cit., Principle 13 – Criminal Law Sanctions, p. 19: “Criminal law sanctions must be consistent with human rights, including by being non-discriminatory and proportionate to the gravity of the offence. Custodial sentences may only be imposed as a measure of last resort.”

¹⁴ International human rights law requires any restrictions on the right to freedom of expression, as protected by article 19 of the ICCPR, to which Tunisia is a State party, to be lawful, necessary for a legitimate purpose, and proportionate to that end.

¹⁵ HRC, General Comment No. 34, op. cit., para. 38.

¹⁶ UNSP Joint communication to Tunisia, p. 3 (ICJ’s unofficial translation).

c. Surveillance powers threatening the right to privacy

Article 8 of Decree 54 gives wide surveillance powers to the Ministry of Defence and the Ministry of Interior by entrusting civilian and military law enforcement (judicial police) officers with the power “to detect offences” under the Decree and, to this effect, allowing them to “access the data stored in any information system or device or data pertaining to telecommunications traffic or its users or any other data that can help establish the truth”. Such extensive powers can be used in violation of the right to privacy.

Moreover, article 9 of Decree 54 gives the judicial authorities, including “judicial police officers authorized in writing” by an unspecified source, the power to seize any information system or device, including stored data that can help establish the truth, to collect or record data pertaining to telecommunications traffic, and to directly access any information system or device and to inspect them to collect any stored data “that can help establish the truth.”

Under article 10, prosecutors and investigating judges, as well as judicial police officers acting upon a written and reasoned decision of either of the latter two authorities, may, “where required by the needs of the investigation”, intercept the communications of suspects and access the related data.

These overbroad provisions, which do not precisely define the circumstances under which, and the persons against whom, these surveillance measures are allowed, threaten the right to privacy as enshrined in article 17 of the ICCPR. The UN Human Rights Committee’s General Comment No. 16 provides that interferences with privacy authorized by States must be provided for by a law that “specif[ies] in detail the precise circumstances under which such interferences may be permitted.”¹⁷

In addition, article 9 of Decree 54 may apply to data held by journalists without any safeguards. This constitutes a serious threat to the confidentiality of journalistic sources, an element of the right to freedom of expression protected under article 11 of Decree-Law No. 2011-115 on the freedom of press, printing and publishing, which prohibits violating the secrecy of sources, directly or indirectly, including through communications monitoring, except for imperative reasons related to State security or national defence and subject to judicial scrutiny.

In the aforementioned communication, the UN Special Rapporteurs expressed concern that “the surveillance permitted by articles 9 and 10 of Decree 54 could deter people from using telecommunications networks, such as the Internet and mobile networks, to communicate, report news or seek information, as protected by articles 19, 21 and 22 of the ICCPR,”¹⁸ thereby highlighting the threats involved, in turn, against the rights to freedom of expression, peaceful assembly and association.

¹⁷ UN Human Rights Committee (HRC), CCPR General Comment No. 16, Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, HRI/GEN/1/Rev.9 (Vol. I), available at: <https://www.refworld.org/docid/453883f922.html> [accessed 7 March 2023], para. 8.

¹⁸ UNSP Joint communication to Tunisia, p. 5 (ICJ’s unofficial translation).

III. Enforcement of Decree 54 to stifle dissent and freedom of expression

Soon after Decree 54 was enacted, the Tunisian prosecutorial and judicial authorities started relying on its provisions to target journalists, political opponents and human rights activists solely in connection with their legitimate exercise of freedom of expression and freedom of peaceful assembly. The Decree has also been used to target several lawyers, including some in connection with public statements they had made arising from the legitimate discharge of their duties towards clients they represent.

This section provides a chronological overview of cases arising from the enforcement of article 24 of Decree 54 according to information available to the ICJ.

Mehdi Zagrouba

On 28 October 2022, after informing the Bar Association, the Public Prosecutor's Office at the Tunis Court of First Instance initiated criminal proceedings against **Mehdi Zagrouba**, a lawyer, based on the potential charges of spreading "fake news" with the aim of defaming the Minister of Justice, under article 24 of Decree 54. Pursuant to article 23 of the Code of Criminal Procedure,¹⁹ the Minister of Justice, Leila Jaffel, had ordered the initiation of prosecutions based on a Facebook post published on 23 October 2022 in which Mehdi Zagrouba stated that the said Minister had fabricated judicial documents against the 57 judges whom the President had summarily dismissed on 1 June 2022.²⁰ At the time of writing, proceedings against Mehdi Zagrouba were pending.

While Mehdi Zagrouba's Facebook post was not related to his professional duty as a lawyer towards any client (he does not represent any of these dismissed judges), the ICJ is concerned that he is being prosecuted pursuant to Decree 54, which, for the reasons mentioned above, violates international human rights law binding on Tunisia, rendering his prosecution arbitrary; the organization is also concerned that Mehdi Zagrouba may have been targeted for prosecution because of his role as the lawyer of the opposition political party Al Karama, as well for his denunciation of the ongoing attacks against the independence of the judiciary in Tunisia, which, in turn, constitutes the legitimate exercise of his right to freedom of expression. Mehdi Zagrouba is currently serving an 11-month prison sentence and has been banned for five years from practising law following his conviction by a military court on 20 January 2023 for "assaulting on duty public officials".²¹

¹⁹ For more details on the powers of the Minister of Justice over prosecutions pursuant to this provision, see section IV-a below.

²⁰ Fifty-seven judges were summarily dismissed by the President on 1 June 2022. See ICJ, Tunisia: Arbitrary dismissals a blow to judicial independence, 10 June 2022, available at: <https://www.icj.org/tunisia-arbitrary-dismissals-a-blow-to-judicial-independence/>.

²¹ See ICJ, Tunisia: Criminal trials of lawyers and politicians before military courts must stop, 27 January 2023, available at: <https://www.icj.org/tunisia-criminal-trials-of-lawyers-and-politicians-before-military-courts-must-stop/>.

Ahmed Hamada

On 28 October 2022, Ahmed Hamada, a law student and blogger, was arrested after the police raided his home and seized his phone and laptop. The Prosecutor of the Tunis Court of First Instance initiated criminal proceedings against Hamada based on the potential charges of "spreading fake news with the aim of spreading terror among the population", pursuant to article 24 of Decree 54, and with "joining or helping a gang formed to prepare or commit attacks on people or property", under articles 131 and 132 of the Tunisian Criminal Code.

Hamada had published information on the social protests in the municipality of Ettadhamen, greater Tunis, which had started in early October 2022, on a Facebook page that he had created to denounce police violence and the inability of the authorities to address the causes of social protests sweeping the country. According to information available to the ICJ, after an initial extension of his deprivation of liberty within 48 hours of his arrest, his detention in police custody ended on 1 November 2022. His phone and laptop, however, have not been returned to him. At the time of writing, criminal proceedings against him were still pending and there had not been any further developments.

The ICJ is concerned that the arrest and prosecution of a blogger on the basis of posts criticizing policies on social issues, which constitutes a legitimate exercise of his right to freedom of expression, are arbitrary and likely to have a chilling effect on other bloggers commenting on issues of public interest and therefore negatively impact free speech and democratic debate.

Nizar Bahloul and Business News

On 11 November 2022, the Minister of Justice filed a complaint with the Public Prosecutor's Office at the Tunis Court of First Instance, accusing **Business News**, a news website, of "defamation, publication of false information, false allegations against a public official and insults against the Prime Minister" on the basis of article 24 of Decree 54. This followed the publication on the news website, on 10 November 2022, of an article that was critical of the Prime Minister.

On 14 November 2022, the Criminal Brigade of El Gorjani, a municipality of the Tunis governorate where the judicial police headquarters are located, summoned **Nizar Bahloul**, the director of Business News, for interrogation. Mr Bahloul was interrogated in the presence of his lawyer about the 10 November article for an hour and a half, following which the police released him after consulting the Public Prosecutor. Albeit there had not been any further development, at the time of writing the case against him was still open.

On 13 December 2022, Business News received a warning letter from the President of the High Independent Authority on Elections (Instance Supérieure Indépendante pour les Élections, ISIE) regarding an article criticizing ISIE's mandate published on 26 November 2022. The correspondence stated that this type of articles was contrary to the provisions of article 54 of Decree-Law 2011-115 on freedom of press, printing and edition²² and to article 24 of Decree 54, and concluded with a warning not to publish such articles again to avoid legal action.

The ICJ is concerned that the actions against Business News violate the right to freedom of opinion and expression, including the right of the media to operate without censorship or restraint and the public's right to access information.

²² This provision criminalizes the dissemination of false information likely to undermine public order.

Ghazi Chaouachi

On 22 November 2022, after informing the Tunis Bar Association, the investigating judge at the Tunis Court of First Instance charged **Ghazi Chaouachi**, a lawyer and former Secretary General of the *Courant Démocrate*, a political party, with “spreading fake news with the aim of threatening public security through audio-visual media”, and “attributing false information to a public official” on the basis of article 24 of Decree 54 and article 128 of the Tunisian Criminal Code,²³ respectively, following a statement Ghazi Chaouachi made during a public broadcast on a Tunisian TV channel in which he asserted that the Ministry of Justice had been harassing the dismissed judges.²⁴

On 20 February 2023, Ghazi Chaouachi indicated in a Facebook post that he had been summoned to appear before the investigating judge of the Tunis Court of First Instance, following an instruction issued pursuant to article 23 of the Code of Criminal Procedure by the Minister of Justice, for “using communication systems to spread fake news, false information with the aim of infringing the rights of others, of damaging their reputation and of inciting assaults against them” under article 24 of Decree 54, in relation to interviews he had given in November 2022 to a radio and a TV channel in which he had stated that the said Minister was fabricating cases against opposition figures and the dismissed judges. His appearance before the investigating judge was initially postponed to 16 March 2023 to allow him to prepare his defence. Following his arrest in another case (see below), he was summoned to appear before the investigative judge of Tunis Court of First Instance on 26 April 2023 (postponed). On 30 June 2023, the investigative judge ordered his release pending investigation. However, he remain in pre-trial detention in the context of the other case.

On 25 February 2023, Ghazi Chaouachi was arrested and placed in pre-trial detention in a distinct case, as part of a wave of arrests targeting political opponents accused, among other things, of plotting against the State,²⁵ while he was himself member of the defence team representing the arrested political opponents.

The ICJ is deeply concerned by the use of criminal proceedings to harass and disrupt the work of lawyers, who are the last line of defence against the increasing crackdown on the rule of law and human rights.

Sami Ben Slama

On 21 December 2022, **Sami Ben Slama**, a former ISIE’S member, indicated in a statement to TAP news agency that he was interrogated as a suspect by the Criminal Brigade of El Gorjani in relation to two complaints based on article 24 of Decree 54 filed by ISIE’S President, following publications on social media in which he criticized ISIE’S mandate and denounced alleged wrongdoings by the President of the ISIE.²⁶ The ICJ was not aware of any further development in this case at the time of writing.

This is the second occurrence, after the warning letter to Business News (see above), of ISIE using Decree 54 to try to silence criticism against it. With respect to this, it should be noted that since the adoption of presidential Decree-Law 2022-22 of 21 April 2022 reforming the composition of ISIE and the appointment of its members, the executive exercises control over this body. The ICJ is concerned that the executive, through ISIE’S recent steps, triggers arbitrary criminal proceedings aimed at preventing any pluralistic debate on elections, which, in turn, undermines democracy.

²³ Article 128 of the Tunisian Criminal Code criminalizes any public statement attributing illegal acts to a public employee in relation to their duties without providing evidence.

²⁴ See ICJ, Tunisia: Authorities must stop using criminal law to target lawyers, 5 January 2023, available at: <https://www.icj.org/tunisia-authorities-must-stop-using-criminal-law-to-target-lawyers/>.

²⁵ See ICJ, Tunisia: End wave of arbitrary arrests targeting critics and opposition members, 15 February 2023, available at: <https://www.icj.org/end-wave-of-arbitrary-arrests-targeting-critics-and-opposition-members/>.

²⁶ See Sami Ben Slama’s statement to TAP agency on 21 December 2022, <https://www.tap.info.tn/fr/Portail-Politique/15854013-audition-de-sami>.

Ayachi Hammami

On 2 January 2023, the Bar Association informed **Ayachi Hammami**, a lawyer and human rights defender, that he would be prosecuted pursuant to article 24 of Decree 54. The investigation was instigated following an instruction from the Minister of Justice, pursuant to article 23 of the Code of Criminal Procedure, to the Public Prosecutor of the Tunis Court of First Instance on 30 December 2022 purportedly in connection with statements that Ayachi Hammami had made during a radio interview on 29 December 2022 in his capacity as a defence lawyer and coordinator of the Defence Committee for the dismissed judges.²⁷ On 10 January 2023, Ayachi Hammami was summoned to appear before the investigating judge of the Tunis Court of First Instance, who questioned him in the presence of his lawyers. The judicial investigation in this case is still ongoing.

The ICJ stresses that the statements of Ayachi Hammami constitute speech protected by the right to freedom of expression under international human rights law and cannot be subject to criminal prosecution. As a lawyer, Ayachi Hammami is entitled to the right to freedom of expression and should not be prosecuted for the discharge of his professional duties as a lawyer (for more details, see section IV-b below).

Hamza Abidi

On 4 January 2023, the Public Prosecutor of the Court of First Instance of Kasserine's Governorate stated to Business News²⁸ that his Office had ordered the arrest of activist **Hamza Abidi**, pursuant to article 24 of Decree 54, for having published a Facebook post in which he allegedly incited citizens to protest, stating that "the revolution was ongoing". On 5 January 2023, according to information available to the ICJ, the Public Prosecutor's Office decided to drop the charges against Hamza Abidi and to release him immediately.

The ICJ is concerned that the Prosecutor's public announcement of the arrest of a citizen calling for protests under Decree 54, even if not followed by prosecution, may have an intimidating effect and deter anyone from openly criticizing public policies. In addition, the organization is concerned that any arrest on the basis of Decree 54 is arbitrary given the vagueness and the breadth of the conduct liable to prosecution under the Decree.

Chaima Issa

In January 2023, following a complaint from the Minister of the Interior, **Chaima Issa**, an academic, human rights activist, journalist and member of the political committee of the National Salvation Front, a political coalition, was prosecuted before the Tunis first instance military court, in connection with a statement she had made on Radio IFM on 22 December 2022 referring to "the constitutional and political deadlock in which the country has found itself since the *coup* of 25 July 2021," and expressing "doubts as to whether the country's defence institutions [i.e., the military] would continue to support such a process."

On 19 January 2023, the Tunis first instance military investigating judge summoned Chaima Issa for questioning before the Criminal Brigade of the National Guard (a law enforcement entity with military status that may act as judicial police) of Ben Arous, a

²⁷ The defense committee, composed of about forty lawyers, including former presidents of the Bar Association, was created to defend the judges who have been dismissed, prosecuted and harassed or who will be in the future. See <https://www.businessnews.com.tn/magistrats-revoques-creation-dun-comite-de-defense-compose-danciens-batonniers,520,124903,3>.

²⁸ See <https://www.businessnews.com.tn/D%EF%BF%BDcret-54---Un-jeune-homme-plac%EF%BF%BD-en-garde-%EF%BF%BD-vue-pour-un-statut-Facebook,520,125713,3>.

municipality of greater Tunis. According to information available to the ICJ, she was then informed that the investigating judge had banned her from travelling.

On 27 January 2023, Chaima Issa was summoned to appear before the military investigating judge, who questioned her in the presence of her lawyers and charged her with: (i) inciting the army to disobey orders, pursuant to article 81 of the Tunisian Code of Military Justice;²⁹ (ii) offending the Head of State, according to article 67 of the Criminal Code;³⁰ and (iii) spreading false information with the aim of threatening national security, under article 24 of Decree 54; upon convictions, these offences carry six years', three years' and ten years' imprisonment, respectively.³¹ Article 5(1) and (7) of the Code of Military Justice, read in light of article 8(G) of the same, allows military courts to try civilians for offences of a "military nature", such as the offence provided in article 81 of the same code, as well as for "ordinary" offences committed "against the military".³² At the time of writing, Chaima Issa remained under investigation in connection with the above-mentioned charges.

On 23 February 2023, the police arrested Chaima Issa, pursuant to an arrest warrant issued by the investigating judge of the anti-terrorist judicial unit, in the same case as lawyer Ghazi Chaouachi and other political opponents and journalists, in which they are all charged with, among other things, of "plotting against State security", according to provisions under the 2015 anti-terrorism law and the Criminal Code.³³

The ICJ is concerned that the prosecution of Chaima Issa is solely based on the exercise of her right to freedom of expression and her status as a political opponent and is, therefore, arbitrary. The organization emphasizes that trying civilians before military courts is prohibited by international standards on the right to a fair trial, as further detailed below under section IV-c.

Wajih Zaidi

On 15 February 2023, following complaints filed by the Minister of Transport on 12 October 2022, **Wajih Zaidi**, the General Secretary of the Tunisian Public Transport General Labour Union, was questioned by the Criminal Brigade of the National Guard of Ben Arous, for "spreading 'fake news' with the aim of infringing the rights of others", pursuant to article 24 of Decree 54, based on a statement he had made on the Diwan FM Radio on 2 January 2023 purportedly criticizing the deterioration of the Tunis Transport Company's equipment and the Ministry of Transport's performance.

On 24 February 2023, he was summoned to appear before the investigating judge of the Tunis Court of First Instance and, on 17 March 2023, the Court acquitted him of the charges based on Decree 54. However, on the same day, following other complaints filed by the Minister of Transport, the same Court sentenced Wajih Zaidi, along with 14 other trade unionists, to four months of imprisonment for "work obstruction", under article 136 of the Criminal Code,³⁴ against the background of recent acts of protest affecting the transport sector.

²⁹ As established by Decree No. 9 of 10 January 1957 and amended by Decree-Laws No. 2011-69 and 2011-70 of 29 July 2011. This provision criminalizes incitement of a group of more than three military officers to disobey orders from their superior or chief, to resist them or to exercise violence against them.

³⁰ This article criminalizes "offending the head of State".

³¹ See statement of Hatem Nafti, Journalist and member of Chaima Aissa's support committee, 24 January 2023, available at: <https://www.facebook.com/hatem.nafti/posts/pfbid0qkvQiD9kaYVU95GK2ecApXNFEiR5HErb1p6n7YfaY9vnsS29Sasu1QrdNEcJQepFI>.

³² For more details, see section IV-c below.

³³ See Inkyfada, "Conspiracy Against State Security": Empty Files to Eliminate Opposition, 24 March 2023, available at: <https://inkyfada.com/en/2023/03/24/conspiracy-state-security-opposition-tunisia/>

³⁴ This provision criminalizes the fact of "by means of violence, assault, threats or fraudulent maneuvers, initiating or maintaining, or attempting to initiate or maintain, an individual or collective work stoppage" (ICJ's unofficial translation).

The ICJ is concerned that the executive, once again, played a role in initiating an arbitrary prosecution under Decree 54 based on criticism of public policies. Subjecting trade unionists to criminal proceedings in relation to statements critical of economic policies or peaceful protests infringes the right to freedom of expression, as well as the right to freedom of peaceful assembly and association, which includes the right to form trade unions.

Monia Arfaoui

On **23 March 2023**, **Monia Arfaoui**, a journalist, former editor-in-chief of the news website Assabah News and human rights trainer, was summoned to appear before the Criminal Brigade of El Gorjani in relation to two complaints filed by the Minister of Religious Affairs accusing her of:

- Harming or disturbing third-parties through public telecommunications networks under article 86 of the Telecommunications Code, for publishing an article on 8 July 2022 on the Assabah News website concerning suspicions of corruption in connection with a pilgrimage to Mecca; and
- Publishing "fake news" with the aim of defaming the Minister of Religious Affairs under article 24 of Decree 54, in relation to a Facebook post in which she stated that the said Minister failed in his mission.

After the Brigade questioned her in the presence of her lawyers about the first complaint on the basis of article 86 of the Telecommunications Code, the Public Prosecutor decided to release her.

However, on 31 March 2023, Monia Arfaoui was summoned to appear again before the Criminal Brigade of El Gorjani for questioning in relation to the second complaint on the basis of article 24 of Decree 54 mentioned above. Following questioning, she was released once again.

The ICJ is concerned that the summoning of Monia Arfaoui for questioning upon request of the executive violated her right to freedom of expression, as well as the freedom of press and the right of the public to freely access information. The arbitrariness allowed by Decree 54 may prevent journalists from exercising their profession independently, which is an essential element of a pluralist and democratic society. Monia Arfaoui is also prosecuted with another journalist in the context of a distinct case described below in relation to her work.

Mohamed Boughalleb

Following a complaint filed by the Minister of Religious Affairs, **Mohamed Boughalleb**, also a journalist, was summoned to appear before the Criminal Brigade of El Gorjani on **7 April 2023** for "spreading fake news with the aim of defaming others and damaging their reputation", pursuant to article 24 of Decree 54, in relation to his investigative work and statements on the case of a vehicle confiscated by customs and allegedly made available to the said Minister.

Boughalleb was questioned by the Brigade in the presence of his lawyers and the public prosecutor decided to release him. The investigation was still ongoing at the time of writing.

Monia Arfaoui and Mohamed Boughalleb

On **12 April 2023**, both Monia Arfaoui and Mohamed Boughalleb were summoned to appear again before the Criminal Brigade of El-Gorjani, following another complaint filed by the Minister of Religious Affairs, for "joining or helping a gang formed to prepare

or commit attacks on people or property",³⁵ under articles 131 and 132 of the Tunisian Criminal Code, in relation to their statements as investigative reporters about the confiscated vehicle at the disposal of the Minister mentioned above in connection with Mohamed Boughalleb. According to information available to the ICJ, Monia Arfaoui and Mohamed Boughalleb emphasized during questioning that they had never met in person and that they did not even know each other, denying the accusations of forming a criminal gang. The investigation was still ongoing at the time of writing.

The judicial harassment of journalists for their investigative and reporting work on allegations of corruption against executive's members, whether on the basis of Decree 54 or other provisions, is a concrete illustration of the authoritarian drift of the Tunisian authorities and of their drive to restrict the legitimate exercise of the right to freedom of expression and to pressure journalists into self-censorship.³⁶

Mohamed Zantour

On **26 April 2023**, Mohamed Zantour, a photographer and political activist, was arrested at his home by police officers who seized his phone. According to information available to the ICJ, his lawyer was not allowed to represent him at the police station, as the judicial police authorities were investigating Mohamed Zantour on the basis of the anti-terrorism law, which prohibits the accused from communicating with his lawyer for 48 hours upon arrest.

On 27 April 2023, the public prosecutor of the Sousse First Instance Court decided to charge Mohamed Zantour with "spreading false news with a view to defaming the head of the State", under article 24 of Decree 54, for his posts on Facebook criticizing the escalation of violations of the right to freedom of expression and expressing solidarity with a leader of an opposition political party. His lawyer was finally allowed to meet him and the prosecutor decided to keep Mohamed under pre-trial detention, until his appearance before the investigating judge.

On April 29, Mohamed Zantour appeared before the investigating judge of Sousse first instance court, who confirmed the charge against him, and decided to remand him in pre-trial detention and refer the case to the Indictment Division of Sousse First Instance Court.

On 6 June 2023, Mohamed Zantour appeared before the indictment chamber of Sousse First Instance Court, represented by his lawyer; at the hearing the Court decided to extend his pre-trial detention pending further investigations.

The ICJ is seriously concerned about the indictment of Mohamed Zantour and considers that the renewal of his pre-trial detention illustrates the systematic repression, through intimidation and prosecution, used against political activists and all dissenting voices in the country. The organization is concerned about the renewal of his remand in detention pending trial. According to international human rights law and standards, detention pending trial should be the exception. For example, Rule 6.1 of the United Nations Standard Minimum Rules for Non-custodial Measures, known as the "Tokyo Rules", states that "pre-trial detention shall be used only as a measure of last resort in criminal proceedings, with due regard to the investigation of the alleged offence and the protection of society and the victim".³⁷

³⁵ ICJ's unofficial translation.

³⁶ See Article 19, The Tunisian government continues to undermine press freedom, escalating its policy of harassing journalists and stifling freedom of expression, 11 April 2023, available at: <https://www.article19.org/resources/tunisia-government-drop-policy-of-undermining-press-freedom/>.

³⁷ UN General Assembly, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): resolution / adopted by the General Assembly, 2 April 1991, A/RES/45/110, available at: <https://www.ohchr.org/sites/default/files/tokyorules.pdf>.

Islem Hamza

On 14 June 2023, the Bar Association informed Islem Hamza, a lawyer and member of the defence committee for political prisoners,³⁸ that a criminal investigation was opened against her for "spreading fake news" pursuant to article 24 of Decree 54.

According to information available to the ICJ, the investigation against Islem Hamza was initiated by the General Committee of Prisons and Rehabilitation³⁹ on 5 May 2023, following a statement she had made on Radio Shems FM on 6 April 2023 in her capacity as a defence lawyer of arrested political opponents, in which she had stated that "the detainees are transferred to a kind of vehicle dedicated to terrorists. This vehicle contains a very narrow metal cage that can barely accommodate one person where the detainees are installed crouching, head down, handcuffed, unable to keep their balance".⁴⁰

At the time of writing, criminal proceedings against Islem Hamza were pending.

IV. The enforcement of Decree 54 violates Tunisia's obligations under international human rights law and standards

The immediate initiation, following the adoption of the Decree, of multiple prosecutions based on article 24 of Decree 54 against lawyers, political opponents, trade unionists, journalists, as well as human rights defenders, for the legitimate exercise of their right to freedom of expression, such as their criticism of public officials, shows that the threats to the right to freedom of expression, peaceful assembly and association have indeed materialized. Although at the time of writing nobody had yet been convicted of an offence under Decree 54, the resort to Decree 54 and the enforcement of its arbitrary provisions have already had a chilling effect on civil society.

Furthermore, the fact that some of the people targeted for prosecution under Decree 54, such as Chaima Issa and Ghazi Chaouachi, are also being prosecuted and detained in the context of the recent wave of arrests in relation to a purported conspiracy against the State further illustrates how Decree 54 is used as part of systematic, politically-motivated investigations and prosecutions to crackdown on political opponents.⁴¹ Such crackdown has been made possible by the dismantlement of the independence of the Tunisian judiciary, as demonstrated by the recurrent role of the executive in the initiation of proceedings under Decree 54.

a. The lack of independence of prosecutors and of the judiciary as a whole in Tunisia enables arbitrary and politically motivated criminal prosecutions

In several cases, such as the criminal proceedings against Mehdi Zagrouba, Nizar Bahloul, Ghazi Chaouachi and Ayachi Hammami, the prosecution was initiated by a complaint or an instruction from the Minister of Justice. In other cases, prosecutions were triggered by complaints from other government Ministers (e.g., in the cases against Chaima Issa, Monia Arfaoui, Mohamed Boughalleb and Wajih Zaidi) or by institutions controlled by the executive, such as ISIE (e.g., in the case against Sami Ben Slama) and the General Committee of Prisons and Rehabilitation (e.g., in the case of Islem Hamza). Articles 21 to 23 of the Code of Criminal Procedure allow the Ministry of Justice to give instructions to the Prosecutors General, including to initiate prosecution in individual cases, instructions that Prosecutors General are bound to

³⁸ A group of lawyers representing political opponents arrested and accused, among other things, of plotting against the state

³⁹ A Tunisian public authority in charge of prisons and rehabilitation, under the supervision of the Ministry of Justice

⁴⁰ Islem Hamza statements to Shems FM : https://www.shemsfm.net/amp/fr/actualites_shems-news/407245/islam-hamza-20-nouveaux-noms-seraient-ajoutes-l-affaire-de-complot-contre-l-etat

⁴¹ See Inkyfada, "Conspiracy Against State Security": Empty Files to Eliminate Opposition, 24 March 2023, available at: <https://inkyfada.com/en/2023/03/24/conspiracy-state-security-opposition-tunisia/>.

follow in their written submissions, although they can freely develop oral submissions during hearings. In addition, pursuant to article 22 of the Code of Criminal Procedure, prosecutors are not independent as they are subject to the authority and supervision of their direct superiors and the authority of the Minister of Justice.

While, under international standards the independence or autonomy of the prosecutor's office is not as imperative in nature as that of the courts,⁴² at the very least, prosecutors are required to act with impartiality and objectivity, and there is a growing tendency towards a requirement of independence.⁴³ Moreover, acknowledging that it is common for both the prosecution service itself (internally) and non-prosecutorial authorities (externally) to issue guidelines to prosecutors with a view to ensuring a fair and consistent approach in criminal justice policy, international standards set out a number of conditions and limits to ensure that such guidelines are not politically motivated.⁴⁴ With respect to external instructions, the Special Rapporteur on the independence of judges and lawyers has cautioned against case-specific instructions, and has stated that, "they should be in writing and formally recorded and carefully circumscribed to avoid undue interference or pressure."⁴⁵ The "Standards of professional responsibility and statement of the essential duties and rights of prosecutors", adopted by the International Association of Prosecutors and endorsed by the UN, additionally state that any instructions from non-prosecutorial authorities should be transparent; consistent with lawful authority; subject to established guidelines to safeguard the actual and the perceived prosecutorial independence.⁴⁶ In addition, international standards provide that prosecutors must be able to challenge instructions on the basis of professional or ethical duties.⁴⁷ The Tunisian Code of Criminal Procedure, however, fails to meet these requirements, thereby enabling politicized prosecutions.

This situation is aggravated by the fact that, since the adoption of Decree-Law 2022-11 of 12 February 2022, as amended by Decree-Law 2022-35 of 1 June 2022, the independence of the judiciary as a whole has been seriously undermined. As detailed in ICJ's Questions and Answers on Decree 11,⁴⁸ the said Decree allows the Tunisian President to interfere, directly or indirectly, through the President's control over the composition of the temporary High Judicial Council, in judges' appointments, careers and discipline. Decree 2022-35 even empowers the President to unilaterally and summarily dismiss judges, automatically triggering prosecutions against the judges concerned, a power he has used against 57 judges whom he dismissed on 1 June 2022.

⁴² International standards recognize and cater for the fact that the status and role of prosecutors differ in some national legal systems, and that their role bears upon the State's prosecution policy.

⁴³ See ICJ report, *The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future*, 13 May 2014, pp. 68-72, available at: <http://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

⁴⁴ See Guidelines on the role of prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. See also International Association of Prosecutors (IAP), *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, adopted by the International Association of Prosecutors on 23 April 1999 and endorsed by the UN Commission on Crime Prevention and Criminal Justice, resolution 17/2 (2008) "Strengthening the rule of law through improved integrity and capacity of prosecution services" ("IAP Standards").

⁴⁵ Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012, UN Doc. A/HRC/20/19, para. 116.

⁴⁶ IAP Standards, art. 2.2 and 2.3.

⁴⁷ See IAP Standards, art. 6.9, stating that prosecutors in general should be entitled "to relief from compliance with an unlawful order or an order that is contrary to professional standards or ethics." Similarly, the UN Special Rapporteur on the independence of judges and lawyers recommends that prosecutors should have the right to challenge instructions received and that a mechanism should also be established to properly and duly investigate any allegation of improper interference. See Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012, UN Doc. A/HRC/20/19, para. 116.

⁴⁸ See ICJ, *Tunisia: Q&A on the High Judicial Council and judicial independence in light of Decree 11*, 05 May 2022, available at: <https://www.icj.org/tunisia-qa-on-the-high-judicial-council-and-judicial-independence-in-light-of-decree-11/>.

This mass dismissal, along with the criminal proceedings initiated against the judges concerned, have created a highly intimidating environment for the judiciary.⁴⁹

In light of the above, the ICJ is concerned that the executive is resorting to arbitrary investigations, prosecutions and future trials under Decree 54 safe in the knowledge that both the prosecuting and judicial authorities will not longer dare to act independently.

b. The increased targeting of lawyers through prosecutions under Decree 54

The new Tunisian Constitution adopted in 2022 regrettably no longer protects the independence of the legal profession, which was enshrined in the former 2014 Tunisian Constitution.⁵⁰ According to the information available to the ICJ, no less than four lawyers, such as Mehdi Zagrouba, Ghazi Chaouchi, Ayachi Hammami and Islem Hamza, have been targeted for prosecution based on Decree 54. UN experts, including the Special Rapporteur on the independence of judges and lawyers, highlighted the risk that this Decree be used to undermine the independence of lawyers, to silence them and to prosecute lawyers acting on behalf of their clients.⁵¹ This takes place in the context of other attacks against lawyers, as reflected in the cases against Ghazi Chaouchi, pursuant to article 128 of the Criminal Code, and Lazhar Akermi, under article 128 of the Criminal Code and article 86 of the Telecommunications Code, for giving statements similarly critical of the Ministry of Justice in media interviews.⁵²

Lawyers act as the last line of defence against the growing repression of the rule of law and human rights. It is all the more important that they be protected against the arbitrariness, as required by international law and standards.

Pursuant to international standards, States have a duty to ensure that lawyers be able to perform their functions “without intimidation, hindrance, harassment or improper interference” and “shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”⁵³ Where the security of lawyers is threatened as a result of discharging their functions, it must be adequately safeguarded by the authorities.⁵⁴ Furthermore, lawyers must not be associated with their clients or their clients’ cause as a result of discharging their functions.⁵⁵ The UN Basic Principles on the Role of Lawyers specify that, “[l]awyers must also enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.”⁵⁶ The Principles on Fair Trial in Africa also make clear that lawyers “shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”⁵⁷

⁴⁹ See ICJ, Tunisia: Arbitrary dismissals a blow to judicial independence, 10 June 2022, available at: <https://www.icj.org/tunisia-arbitrary-dismissals-a-blow-to-judicial-independence/>.

⁵⁰ Article 105 of the 2014 Constitution provided: “The legal profession is a free and independent profession that contributes to the establishment of justice and the defence of rights and liberties. Lawyers enjoy the legal guarantees that protect them and enable them to fulfill their functions.”

⁵¹ UNSP Joint communication to Tunisia, pp. 1, 3 (ICJ’s unofficial translation).

⁵² See ICJ, Tunisia: Authorities must stop using criminal law to target lawyers, 5 January 2023, available at: <https://www.icj.org/tunisia-authorities-must-stop-using-criminal-law-to-target-lawyers/>.

⁵³ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 32; UN Basic Principles on the Role of Lawyers, principle 16(a) and (c); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, principle I(b)1.

⁵⁴ UN Basic Principles on the Role of Lawyers, Principle 17, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, principle I(f).

⁵⁵ *Id.*, principle I(g).

⁵⁶ UN Basic Principles on the Role of Lawyers, principle 20; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, principle I(e).

⁵⁷ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle I(b)(iii). See also, Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, principle I.4.

Moreover, the UN Basic principles on the Role of lawyers provide that “[l]awyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”⁵⁸

The ICJ considers that the proceedings initiated under Decree 54 against the four lawyers mentioned above violate these international standards as they clearly aim to intimidate those lawyers who criticized the executive’s attacks against the independence of the judiciary, including the judicial harassment against the dismissed judges, some of whom in the context of the representation of their clients.

The ICJ is extremely concerned by the recent wave of criminal proceedings against lawyers, which constitutes an attack on the independence of the legal profession insofar as they have a significant dissuasive effect on the work of members of the legal profession and undermine their ability to defend the human rights of their clients, in line with international standards on the role of lawyers.

c. The increased use of military courts to try civilians in Tunisia violates the defendants’ right to be tried by a competent, independent and impartial tribunal

As reflected in the case of Chaima Issa, article 5(1) and (7) of the Code of Military Justice,⁵⁹ read in light of article 8(G), allows military courts to try civilians for “criminal offences” of a “military nature”, such as the offence provided in article 81 of the same code (inciting the army to disobey orders) for which Chaima Issa is being prosecuted, as well as for “ordinary” criminal offences committed “against the military”. Since President Kais Saied assumed sweeping new powers on 25 July 2021, prosecutions of civilians for purported “criminal offences” of a “military nature” are increasingly used to target civilians, including lawyers, in some cases for the legitimate exercise of the right to freedom of expression, including for publicly criticizing the President.⁶⁰

As detailed in ICJ previous reports,⁶¹ military courts in Tunisia cannot be considered independent and impartial, as required by, among others, article 14 of the ICCPR guaranteeing the right of everyone accused of a criminal offence to “a fair and public hearing by a competent, independent and impartial tribunal established by law”. In particular, due to the role of the Minister of Defence in the recruitment, appointment and disciplinary process of military judges, and the fact that military prosecutors and investigating judges remain embedded in the military chain of command, military courts lack the required independence and impartiality necessary to comply with international standards for the trial of civilians.⁶² For example, the UN Basic Principles on the

⁵⁸ UN Basic Principles on the Role of Lawyers, principle 26.

⁵⁹ As established by Decree No. 9 of 10 January 1957 and amended by Decree-Laws No. 2011-69 and 2011-70 of 29 July 2011.

⁶⁰ See ICJ, Tunisia: criminal trials of lawyers and politicians before military courts must stop, 27/01/2023, available at: <https://www.icj.org/tunisia-criminal-trials-of-lawyers-and-politicians-before-military-courts-must-stop/>.

⁶¹ See ICJ, The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, 13 May 2014, available at <http://www.icj.org/wp-content/uploads/2014/05/TunisiaStrengthen-Judicial-Independence-Report-2014-ENG.pdf>, p. 62. See also ICJ, Tunisia: Upholding the Recommendations of the Truth and Dignity Commission on Justice Reform, November 2021, available at <https://icj2.wpunepowered.com/wp-content/uploads/2021/12/Tunisia-IVD-recommendations-publications-briefing-paper-2021-ENG.pdf>, p. 14.

⁶² See Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 57. See also Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/27/48, 30 June 2014, paras 66-68, noting “the irregularity of judges who are under military command trying civilians.”

Independence of the Judiciary provide: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".⁶³

The new Tunisian Constitution adopted in 2022 regrettably no longer restricts the jurisdiction of military courts to military offences, a restriction that the 2014 Tunisian Constitution previously guaranteed.⁶⁴ International human rights law and standards prohibit the trial of civilians before military courts; they also dictate that only military personnel charged with offences of a strictly military character may be tried before military courts.

Relevant international standards in this context include the following:

The African Commission on Human and Peoples' Rights' Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa state that military courts should not "in any circumstances whatsoever have jurisdiction over civilians" and that "the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel".⁶⁵ The Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles) provide: "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts."⁶⁶

The UN Human Rights Committee has called on a number of countries to prohibit trials of civilians by military courts.⁶⁷ The Special Rapporteur on the independence of judges and lawyers has taken the position that military courts are incompetent to try civilians.⁶⁸ The Working Group on Arbitrary Detention concluded that "[t]he trial of civilians or decisions placing civilians in preventive detention by military courts are in violation of the International Covenant and customary international law", recalling that "[t]he experience of the Working Group is that military tribunals are often used to deal with political opposition groups, journalists and human rights defenders."⁶⁹

Accordingly, the ICJ is of the view that Chaima Issa cannot receive a fair trial before the military court.

⁶³ UN Basic Principles on the Independence of the Judiciary, Principle 5.

⁶⁴ Article 110 of the 2014 Constitution provided: "[...] No special courts may be established, nor any special procedures that may prejudice the principles of fair trial. Military courts are competent to deal with military crimes. [...]"

⁶⁵ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (2003), Section A, Principle L(c).

⁶⁶ Draft Principles Governing the Administration of Justice through Military Tribunals ("Decaux Principles"), UN Doc. E/CN.4/2006/58 (2006), Principle 5.

⁶⁷ Human Rights Committee, Concluding Observations on Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20; see also Human Rights Committee, Concluding Observations on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 14; Human Rights Committee, Concluding Observations on Chile, UN Doc. CCPR/C/CHL/CO/5, para. 12; Human Rights Committee, Concluding Observations on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 18; Human Rights Committee, Concluding Observations on Ecuador, UN Doc. CCPR/C/ECU/CO/5, para. 5.

⁶⁸ Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Peru, UN Doc. E/CN.4/1998/39/Add.1, paras 78-79. See also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 36.

⁶⁹ Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/27/48, 30 June 2014, para. 66.

V. Recommendations

In light of the concerns detailed above, the ICJ calls on the Tunisian authorities to comply with their legal obligations under international human rights law and standards and immediately end their crackdown on freedom of expression. To this end, the organization recommends that the Tunisian authorities:

- (i) revoke Decree 54;**
- (ii) drop all charges against anyone being prosecuted under this Decree for the legitimate exercise of their freedom of expression and provide reparation for the harm suffered as a result of such arbitrary prosecution and, as applicable, unlawful pre-trial detention;**
- (iii) refrain from further trying civilians before military courts, and limit the jurisdiction of these courts to trying military personnel for criminal offences of a strictly military nature;**
- (iv) end all attacks against lawyers, political opponents and journalists, including politicized judicial proceedings, abusive prosecutions and all instances of arbitrary detention;**
- (v) immediately and unconditionally release all lawyers currently detained pending trial or imprisoned upon conviction solely on the basis of the peaceful exercise of their human rights and/or the legitimate discharge of their professional duties; and**
- (vi) halt attacks on the judiciary as an institution and against individual judges, and ensure that judges be able to act independently and impartially in defence of the rule of law, the separation of powers and human rights.**

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July 2023

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