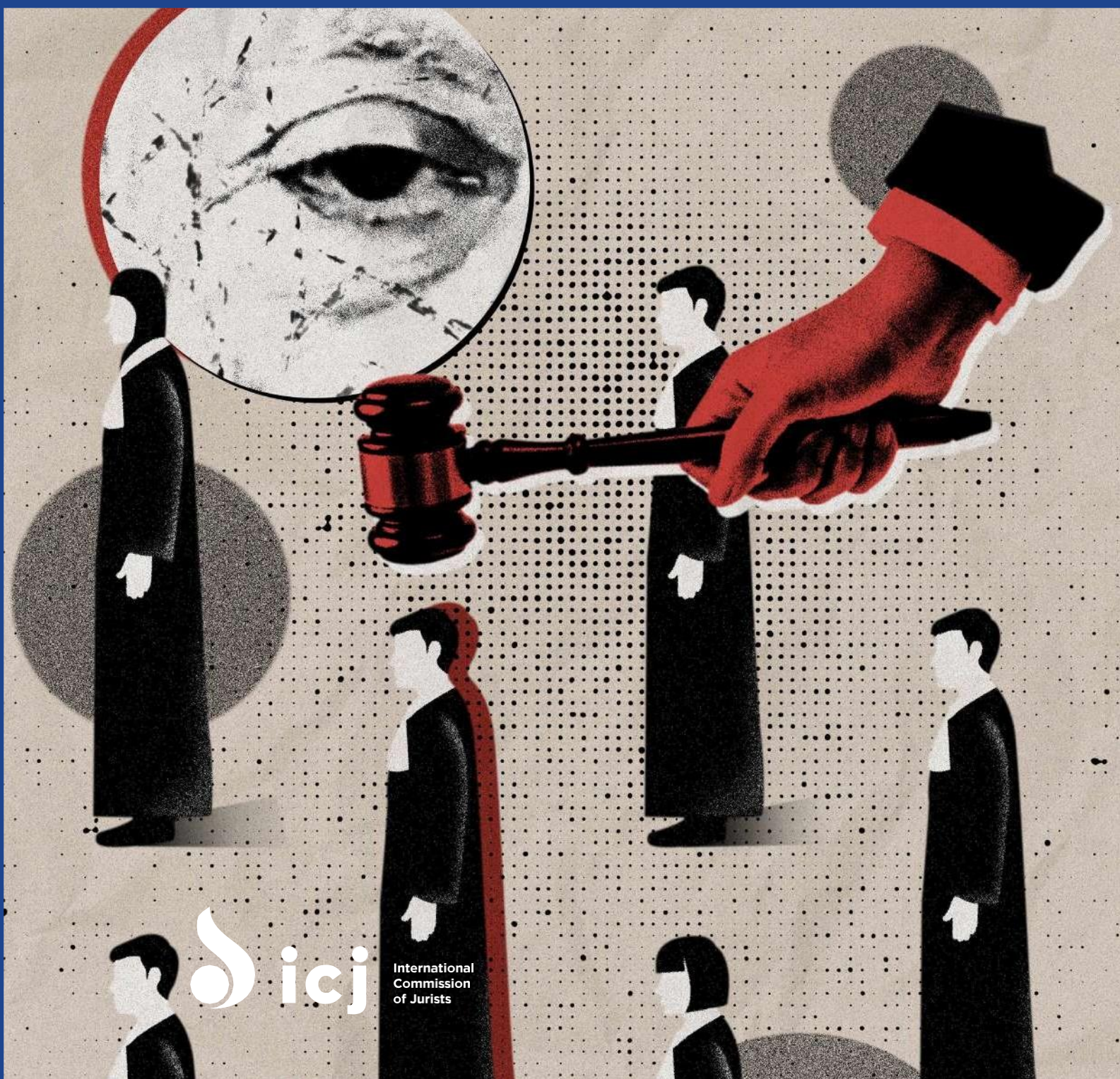


Attacks on Judges and Prosecutors in Tunisia:

Arbitrary dismissals and prosecutions



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Attacks on Judges and Prosecutors in Tunisia

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December 2023

Introduction

Prior to the 2011 Tunisian revolution, laws, policies and practices effectively subordinating individual judges and the judiciary, as an institution, to the executive, including through sustained attacks against independent judges, had long undermined the independence of the judiciary in the country.¹ The executive's effective control over the judiciary resulted in its instrumentalization against perceived political opponents and human rights activists, and as a tool to enforce repressive government policies.² As a result, the judiciary became complicit in grave human rights violations committed by State officials, including through its role in entrenching impunity for such violations.³

In the aftermath of the 2011 revolution, reform efforts strived to address the legacy of past abuses and the judiciary's role in their perpetration by providing the required institutional guarantees for judges to act independently, and for the judiciary to be protected against undue executive interference. Albeit incomplete,⁴ these efforts reached meaningful milestones, including through the adoption of the country's 2014 Constitution and the establishment of an independent High Judicial Council (hereinafter "HJC").⁵

Since President Kais Saied's power grab on 25 July 2021,⁶ however, the reforms undertaken have been reversed. Concentrating all powers in his hands and dismantling the rule of law and judicial independence, the President has rolled back the democratic gains of the last decade. Invoking article 80 of the 2014 Constitution on "the state of exception", he dismissed the government, declared himself the head of the executive branch and of the Public Prosecution Service and suspended the country's elected Parliament.⁷ To cement his control, on 22 September 2021, President Saied issued Presidential Decree 2021-117 suspending most of the 2014 Constitution, prolonging the suspension of Parliament and empowering himself with full executive and legislative prerogatives, including to rule by decree on matters related to the functioning of the judiciary.

In the aftermath of his speech on 25 July 2021 announcing exceptional measures, the President promised to "cleanse" and "purify" the judiciary, which he accused of complicity with political parties in power before July 2021, as well as of inefficiency, corruption and political bias,⁸ and attacked the HJC and its members,⁹ limiting certain of their financial benefits.¹⁰ Since then, the President has followed up on his rhetoric with successive decisions and measures aimed directly at dismantling the judiciary's institutional independence.

1. See, e.g., ICJ, Tunisia Attacks on Justice, 13 August 2001: <https://www.icj.org/tunisia-attacks-on-justice-2000-tunisia/>; ICJ, Judges intimidated in Tunisia, 13 December 1994: <https://www.icj.org/judges-intimidated-in-tunisia/>; ICJ, Tunisia: situation of the Association of Tunisian Judges (Association des Magistrats Tunisiens, AMT), 3 November 2010: <https://www.icj.org/tunisia-situation-of-the-association-of-tunisian-judges-association-des-magistrats-tunisiens-amt/>; ICJ, The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future, May 2014: <https://www.icj.org/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.
2. See, e.g., ICJ & FIDH, La CIJ et la FIDH condamnent l'instrumentalisation de la justice dans le procès de Me Abbou, 2 May 2005: <https://www.icj.org/la-cij-et-la-fidh-condamnent-linstrumentalisation-de-la-justice-dans-le-proces-de-me-abbou/> (French only).
3. See, e.g., Instance Vérité Dignité, Executive Summary, May 2019: http://www.ivd.tn/rapport/doc/TDC_executive_summary_report.pdf, pp. 175-199.
4. ICJ, Tunisia: Upholding the Recommendations of the Truth and Dignity Commission on Justice, 2 December 2021: <https://www.icj.org/tunisia-uphold-judicial-independence/>.
5. ICJ, The Tunisian Law on the High Judicial Council in Light of International Law and Standards, May 2015: <https://www.icj.org/wp-content/uploads/2015/05/Tunisia-Tunisian-Law-on-HJC-Advocacy-Position-Paper-2015-ENG.pdf>.
6. ICJ, Tunisia: President's power grab is an assault on the rule of law, 26 July 2021: <https://www.icj.org/tunisia-presidents-power-grab-is-an-assault-on-the-rule-of-law/>.
7. Ibid.
8. See, e.g., Meeting between President Kais Saied and the President of the HJC on 4 October 2021, https://www.youtube.com/watch?v=aASeWtHj25Q&ab_channel=WataniaReplay; Meeting between President Kais Saied and members of the HJC on 6 December 2021: <https://www.facebook.com/watch/?v=897148007667462>.
9. See, e.g., Tunisie : Kais Saïed fait le procès de la justice, 8 December 2021: <https://www.jeuneafrique.com/1278365/politique/tunisie-kais-saied-fait-le-proces-de-la-justice/> (French only).
10. Tunisia - President Kais Saied Ends the Privileges of the Supreme Judicial Council, 20 January 2022: <https://www.arabobserver.com/tunisia-president-kais-saied-ends-the-privileges-of-the-supreme-judicial-council/>.

In response to these attacks, the HJC denounced the President's attempts to control the Public Prosecution Service and stressed the importance of protecting the judiciary against political interference.¹¹ In a statement published on 5 January 2022, the HJC contested the use of measures undertaken pursuant to "the state of exception" to undermine judicial independence.¹² Similarly, the Association of Tunisian Magistrates (*Association des magistrats tunisiens*, hereinafter "AMT"), a leading professional association of judges and prosecutors, urged respect for the Constitution and the principles of the separation of powers and the independence of the judiciary and the Public Prosecution Service.¹³

However, on 12 February 2022, President Saied dissolved the HJC and replaced it by decree¹⁴ with a provisional body, the Temporary High Judicial Council (hereinafter "THJC"), subordinated to him. Then, on 1 June 2022, he unilaterally and summarily dismissed 57 magistrates¹⁵ – namely, 34 judges and 23 prosecutors – based on vague accusations of "moral and financial corruption" and "obstruction of judicial proceedings".¹⁶ In response to these dismissals, the AMT led a four-week nation-wide strike.

In seeking to fully control and subordinate the judiciary to the executive's will, President Kais Saied and the Minister of Justice have relied on and made use of two key institutions: the General Inspection Service (hereinafter "GIS")¹⁷ and the Public Prosecution Service. With respect to this, when in August 2022, the First President of the Tunis Administrative Court ordered the suspension of the dismissal of 49 of the 57 magistrates dismissed by the President because of the absence of evidence of any criminal or disciplinary misconduct on their part, the Ministry of Justice announced the opening of 109 criminal cases against the dismissed magistrates.¹⁸ According to the findings outlined in this report, these criminal proceedings relate to, among other alleged offences, "terrorism-related" crimes and were based on, among others, security reports, decisions by the concerned magistrates taken in the course of the legitimate discharge of their professional duties, and individual complaints and denunciations against some of the magistrates concerned. Around the same period, in August 2022, the authorities opened disciplinary and criminal proceedings against Anas Hmedi, a judge at the Monastir Court of Appeal and the AMT's President, in relation to the above-mentioned strike. As detailed below, these cases illustrate the executive's instrumentalization of the GIS and the Public Prosecution Service.

According to ICJ's findings outlined in this report, the organization considers that the conduct of the dismissed magistrates, on the basis of which they have apparently been subject to criminal proceedings, did not amount to recognizably criminal offences under general principles of criminal law and international human rights law and standards. On the contrary, the ICJ's analysis of these cases establishes that these magistrates were arbitrarily dismissed and then subject to criminal proceedings in relation to serious offences for the mere exercise of their prosecutorial and judicial functions in compliance with the law and ethical standards, as well as for the sole exercise of human rights protected by international human rights law, including the rights to freedom of expression and freedom of association, and for their private conduct, unrelated to their performance of their duties, which, in any event, was not criminal in nature. Similarly, the ICJ considers that the disciplinary and criminal proceedings against Anas Hmedi are based on the sole legitimate exercise of his rights to freedom of expression and freedom of

11. HJC Statement of 26 July 2021, see: <https://zoomtunisia.net/article/10/105788.html>.

12. HJC statement of 5 January 2022: <https://www.csm.nat.tn/%D8%A3%D8%AE%D8%A8%D8%A7%D8%B1-%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%B3/%D8%A8%D9%84%D8%A7%D8%BA9> (Arabic only).

13. AMT Statement of 27 July 2021: <https://www.facebook.com/AmtTunisie/posts/2068456843294519> (Arabic only).

14. Decree-Law 2022-11 of 12 February 2022 creating a Temporary High Judicial Council.

15. In the Tunisian justice system, both judges and prosecutors form part of the judiciary and are called "magistrates", all being subject to Law 67-29 of 14 July 1967 on the organization of the judiciary and the statute of magistrates. They have a similar status, except in terms of hierarchy, and may move from one position to the other.

16. Order 2022-516 of 1 June 2022, based on Decree-Law 2022-35 of 1 June 2022 amending Decree-Law 2022-11.

17. The GIS is the Ministry of Justice's body in charge of investigating magistrates' disciplinary matters.

18. See <https://www.facebook.com/ministere.justice.tunisie/posts/pfbid02XYUMKoZxxwa318w6J9Afb4LudQ5Y-9S5uV2CVazW7a91GPAfyxPHBGFvq5wF472pgl> (Arabic only).

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peaceful assembly and association in solidarity with the dismissed magistrates.

Methodology

This ICJ report analyzes the process of arbitrarily dismissing and prosecuting judges and prosecutors in Tunisia since the President's power grab on 25 July 2021 in light of the country's obligations under international human rights law. Among other things, the report is based on:

- (a) a review of 20 criminal cases opened by the authorities against 18 dismissed magistrates and of the case of Anas Hmedi;
- (b) 15 interviews with judges, prosecutors and their lawyers;
- (c) an analysis of the First President of the Administrative Court's decisions to suspend the dismissal of 49 magistrates and to dismiss the request for suspension of seven other magistrates; and
- (d) an analysis of decisions and reports by the GIS, the HJC and the THJC.

I. The dismantling of the institutional independence of the judiciary

Under the 2014 Constitution and the Organic Law 2016-34 of 28 April 2016 on the HJC, the HJC was an independent body composed of a majority of magistrates elected by their peers, with a mandate to oversee the organization of the judiciary and to manage the career of both judges and prosecutors. The HJC was responsible for the appointment, removal, promotion, transfer and disciplining of magistrates. It assessed the needs of each court and established the annual rotation of magistrates.¹⁹

On 6 February 2022, President Saïed announced his intention to dissolve the HJC by decree. One day later, the police closed down the HJC's offices preventing its members from access and from carrying out their constitutional duties. On 12 February 2022, the President issued Decree-Law 2022-11_(hereinafter "Decree 11"), declaring the HJC's dissolution and replacing it with a provisional body, the THJC.

Decree 11 put an end to the HJC and empowered the President of the Republic to appoint the members of the THJC and interfere with the functioning of the judiciary and the management of judges' and prosecutors' career, including their appointment and disciplining.²⁰

The United Nations Basic Principles on the Independence of the Judiciary provide that the independence of the judiciary "shall be guaranteed by the State and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary".²¹ Furthermore, "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."²²

International standards require that independent bodies be responsible for the appointment, promotion and discipline of judges through transparent processes, in line with the principle of separation of powers, which, in turn, ensures effective checks and balances among the executive, legislative and judicial branches of the State and guards against excesses and abuses.²³

The ICJ considers that, in violation of Tunisia's obligations under international human rights law and standards and of the principle of the separation of powers, Decree 11 has ended any semblance of institutional or individual independence of the judiciary in the country. With respect to this, the UN Human Rights Committee has affirmed: "[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."²⁴ Furthermore, the Committee has also clarified that, "[t]he requirement of independence [in the sense of article 14, paragraph 1 of the ICCPR] refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to

19. The annual rotation consists in the appointment, promotion and transfer of judges and prosecutors within the court system. A list to this effect is supposed to be published each year.

20. ICJ, *The Dismantling of Judicial Independence in Tunisia: Decree 11 on the Temporary High Judicial Council*, May 2022: <https://www.icj.org/tunisia-qa-on-the-high-judicial-council-and-judicial-independence-in-light-of-decree-11/>.

21. UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of November 1985 and 40/146 of 13 December 1985: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary#:~:text=6.,of%20the%20parties%20are%20respected>, principle 1.

22. *Id.*, principle 2.

23. See, e.g., Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/38/38, 2 May 2018: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/122/81/PDF/G1812281.pdf?OpenElement>; Universal Charter of the Judge, approved by the Central Council of the International Association of Judges in Taipei, Taiwan Province of China on 17 November 1999 and updated in Santiago on 14 November 2017: https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf, art. 2-3.

24. UN Human Rights Committee (HRC), General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>, para. 19.

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their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.”²⁵ To this effect, the Human Rights Committee has accordingly recommended the establishment of an independent body.²⁶

Echoing Decree 11, the new Constitution, adopted by referendum in July 2022 in the aftermath of a process that lacked transparency, inclusivity and democratic legitimacy,²⁷ further cements the control of the executive over the judiciary. With respect to this, the ICJ has criticized the new Constitution for failing to enshrine the necessary institutional safeguards to guarantee the independence of the judiciary and of the HJC.²⁸ Specifically, the 2022 Constitution does not feature any provisions guaranteeing the independence of the HJC through the election of at least a majority of its members by their peers or to ensure the irremovability of magistrates. Article 107 of the 2014 Constitution, which provided for magistrates not to be suspended or subject to dismissal or disciplinary measures without a “reasoned decision from the HJC”, does not appear in the 2022 Constitution, enabling the disciplining and removal of magistrates by the executive to become the norm.²⁹

25. Ibid. Article 14, para. 1 of the ICCPR provides, inter alia, that “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

26. HRC, Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, 13 December 2006: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/459/46/PDF/G0645946.pdf?OpenElement>, para. 16.

27. ICJ, Fundamentally flawed: Tunisia’s 2022 ‘constitution-making’ process, June 2022: <https://www.icj.org/fundamentally-flawed-tunisia-constitution-making-process/>.

28. ICJ, Codifying Autocracy The Proposed Tunisian Constitution in Light of International Law and Standards, July 2022: <https://www.icj.org/tunisia-proposed-constitution-codifies-authoritarianism/>, pp. 4-5.

29. Ibid.

II. The dismissal of judges and prosecutors by executive decree

A. Arbitrary dismissals

On 1 June 2022, President Saïed issued Decree-Law 2022-35 amending Decree 11 (hereinafter "Decree 35"), through which he granted himself the power to unilaterally dismiss any magistrate based on vague criteria and without due process. Pursuant to Decree 35, criminal proceedings are automatically initiated against any magistrate dismissed under its provisions.³⁰ The magistrates against whom criminal proceedings have been initiated pursuant to Decree 35 following their dismissal may only challenge their removal after the courts have handed down a final verdict in the criminal cases against them.

On the same day, through Presidential Order 2022-516 (hereinafter "Order 516"), President Saïed dismissed 57 magistrates.³¹ The 57 dismissed magistrates included senior Tunisian judges and prosecutors, such as:

- Youssef Bouzakher, President of the HJC, and General Attorney at the Court of Cassation;
- Malika Mzari, Member of the HJC, President of the Council of Judicial Order³² and President of the Bizerte Tribunal of First Instance;
- Rafiaa Naouar, Member of the HJC, First President of the Tunis Court of Appeal;
- Riad Essid, General Inspector at the Ministry of Justice;
- Boubaker Jeridi, General Prosecutor of the Tunis Court of Appeal;
- Mohamed Kammoun, Dean of the investigating judges at the Tunis Tribunal of First Instance;
- Romdhana Rahali, First President of the Bizerte Court of Appeal;
- Khaled Abbes, General Prosecutor of the Nabeul Court of Appeal;
- Imed Jomni, Public Prosecutor of the Tunis Tribunal of First Instance;
- Sami Ben Houidi, Public Prosecutor of the Zaghouane Tribunal of First Instance;
- Mongi Boulaaras, Public Prosecutor of the Manouba Tribunal of First Instance;
- Neji Dermeh, Public Prosecutor of the Bizerte Tribunal of First Instance;
- Maher Krichen, Public Prosecutor of the El-Kef Tribunal of First Instance;
- Daoud Zantani, Public Prosecutor of the Nabeul Tribunal of First Instance;
- Abdelkarim Al Aloui, Public Prosecutor of the Gafsa Tribunal of First Instance; and
- El Hadi Moucheeb, Public Prosecutor of the Ariana Tribunal of First Instance.

While Order 516 did not list any grounds, let alone outline any evidence, for such dismissals, in a televised speech on the same day, without naming them, President Saïed accused the dismissed magistrates of, among other accusations, "financial" and "moral" corruption, complicity in "terrorism-related" offences and obstruction of investigations.

Decree 35 is a clear assault on judicial independence, the rule of law and due process, and runs counter to Tunisia's obligations under international human rights law and standards.³³ Under such standards, any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly; judicial misconduct ought to be adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge's due process rights are respected.³⁴ The disciplining of judges must be based on established standards of judicial conduct.³⁵ Judges cannot be removed or punished for *bona fide* errors or for disagreeing with a particular interpretation of the law that the authorities may favour.³⁶

30. Art. 20 of Decree 11, as amended by art. 1 of Decree 35.

31. ICJ, Tunisia: Arbitrary Dismissal a Blow to Judicial Independence, 10 June 2022: <https://www.icj.org/tunisia-arbitrary-dismissals-a-blow-to-judicial-independence/#:~:text=Judges%20may%20be%20dismissed%20only,the%20constitution%20or%20the%20law.>

32. The HJC comprised three councils responsible for each category of judges and prosecutors: the Council of judicial order, the Council of administrative order and the Council of financial order.

33. ICJ, Tunisia: Arbitrary dismissals a blow to judicial independence, 10 June 2022: <https://www.icj.org/tunisiaarbitrary-dismissals-a-blow-to-judicial-independence/>.

34. UN Basic Principles on the Independence of the Judiciary, principle 17.

35. Id., principle 19.

36. See for e.g., Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc. A/HRC/26/32, 28 April 2014: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/139/18/PDF/G1413918.pdf?OpenElement>, paras 84, 87; Council of Europe (CoE), Judges: Independence, Efficiency and

Sanctions, including disciplinary measures, suspension or removal, must be proportionate and subject to appeal before an independent judicial body.³⁷

As confirmed by the UN Human Rights Committee: “[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.”³⁸

In a case concerning the dismissal of judges by a presidential decree on the grounds that they were “immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions”, the UN Human Rights Committee concluded that the judges concerned “did not benefit from the guarantees to which they were entitled in their capacity as judges”. By virtue of these guarantees, the Committee held that, “the judges should have been brought before the Supreme Council of the Judiciary in accordance with the law.”³⁹

With respect to Viet Nam, the UN Human Rights Committee urged the State to “ensure that judges may not be removed from their posts unless they are found guilty by an independent tribunal of inappropriate conduct”.⁴⁰ The Human Rights Committee has also determined that summary removals are incompatible with the Covenant,⁴¹ and that “judges should be removed only in accordance with an objective, independent procedure prescribed by law”.⁴²

In a case concerning Belarus, the UN Human Rights Committee considered that the dismissal of a constitutional court judge by presidential decree as a result of the replacement of the constitutional court with a new court pursuant to a newly adopted constitution, several years before the expiry of the term for which the concerned judge had been appointed, and without effective judicial protections available to contest his dismissal, constituted an attack on the independence of the judiciary and that there had consequently been a violation of article 25(c) of the [ICCPR] [on the right to have access, on general terms of equality, to public service in one’s country], read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2 [on the right to a remedy].⁴³ In a concurring opinion, one member of the Committee added that the presidential decree dismissing the judge “violated the rights guaranteed to him and to the people of Belarus under Articles 14 and 25 of the

Responsibilities, Recommendation CM/Rec(2010)12, adopted by the Committee of Ministers on 17 November 2010: <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d>, para. 66.

37. UN Basic Principles on the Independence of the Judiciary, principles 17-20.

38. HRC, General Comment No. 32, para. 20.

39. HRC, *Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Siby Matubuka et. al. v. Democratic Republic of the Congo*, Views adopted on 31 July 2003, Communication No. 933/2000, UN doc. CCPR/C/78/D/933/2000: <https://documents-dds-ny.un.org/doc/UNDOC/DER/G03/440/94/PDF/G0344094.pdf?OpenElement>, para. 5.2.

40. HRC, Concluding Observations of the Human Rights Committee on Vietnam, UN Doc. CCPR/CO/75/VNM, 5 August 2002: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CCPR%2FCO%2F75%2FVNM&Lang=en, para. 10.

41. HRC, Concluding Observations of the Human Rights Committee on The Gambia, UN Doc. CCPR/CO/75/GMB, 12 August 2004: <https://www.refworld.org/docid/42ce6c004.html>, para. 14.

42. Concluding observations of the Human Rights Committee on Republic of Moldova, UN Doc. CCPR/CO/75/MDA, 5 August 2002: <https://tinyurl.com/2p8stemff>, para. 12.

43. HRC, *Mr. Mikhail Ivanovich Pastukhov v. Belarus*, Views adopted on 19 August 2003, Communication No. 814/1998, UN Doc. CCPR/C/78/D/814/1998: <https://documents-dds-ny.un.org/doc/UNDOC/DER/G03/439/55/PDF/G0343955.pdf?OpenElement>, para. 7.3. Article 2(3) mandates States Parties to ensure “that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,” and “that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy”; article 14(1) provides, inter alia, that “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”; article 25(c) guarantees the right “To have access, on general terms of equality, to public service in his country”.

Covenant".⁴⁴

When they are suspected of having failed to carry out their professional duties, prosecutors must be held accountable through disciplinary proceedings. The UN Guidelines on the Role of Prosecutors establish clear criteria on both the grounds for disciplining prosecutors, as well as the guarantees they ought to enjoy when facing such proceedings. According to the guidelines, "disciplinary offences of prosecutors shall be based on law or lawful regulations", and "disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision."⁴⁵

In the African context, the African Commission on Human and Peoples' Rights' Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also include strict criteria for removal affirming that: "Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties".⁴⁶ With respect to removal proceedings, the Guidelines provide that: "Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings."⁴⁷ Furthermore, a disciplinary charge or a complaint should be processed expeditiously.⁴⁸ Similarly, with respect to prosecutors, the said Principles and Guidelines provide that disciplinary proceedings shall be fair, processed expeditiously and subject to independent review.⁴⁹

The Council of Europe lays down similar clear guidelines on the grounds that may lead to the removal of a judge⁵⁰ and clear requirements on removal proceedings, in particular the creation of a special body subject to judicial control and the enjoyment by judges of all procedural guarantees.⁵¹

44. *Id.*, Individual Opinion of Committee Members Mrs. Ruth Wedgwood and Mr. Walter Kaelin.

45. UN Guidelines on the Role of Prosecutors, adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>, paras 21 and 22. See also, Universal Charter of the Judge, arts 2-2 and 7-1 on removal of and disciplinary proceedings against judges, read in light of art. 9-2, which states: "In countries where members of the public prosecution are assimilated to judges [as is the case in Tunisia], the above principles apply mutatis mutandis to these public prosecutors."

46. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, adopted as part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of African union, Maputo, 4-12 July 2003: https://archives.au.int/bitstream/handle/123456789/2065/Right%20to%20a%20Fair%20Trial_E.pdf?sequence=1&isAllowed=y, principle A-4(p).

47. *Id.*, principle A-4(q).

48. *Id.*, principle A.4(r). See also, UN Basic Principles on the Independence of the Judiciary, principle 17.

49. *Id.*, principle F(n) and (o).

50. CoE, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies: <http://www.euromed-justice-iii.eu/document/coe-1994-recommendation-n%C2%BA-r-94-12-committee-ministers-member-states-independence>, principle VI.2: "Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules". The Recommendation also contemplates other sanctions short of removal: "Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance: a. withdrawal of cases from the judge; b. moving the judge to other judicial tasks within the court; c. economic sanctions such as a reduction in salary for a temporary period; d. suspension." (principle VI.1).

51. CoE, Recommendation No. R (94) 12, principle VI.3: "Where [disciplinary] measures need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the [European] Convention [on Human Rights], for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."

12 | Attacks on Judges and Prosecutors in Tunisia

Arbitrary dismissals and prosecutions

The ICJ condemns the dismissal of Tunisian judges and prosecutors as a serious violation of Tunisia's obligations under international human rights law and standards and as an assault on the separation of powers in light of the fact that their dismissals by the executive were unrelated to either incapacity or behaviour rendering them unfit to discharge their duties, and because their dismissals took place outside any objective, independent procedure prescribed by law.

In particular, the ICJ is concerned that three members of the dissolved HJC, including its President, Youssef Bouzakher, the President of the Council of Judicial Order, Malika Mzari, and the First President of the Tunis Court of Appeal, Rafiaa Naouar, are among those dismissed in what appears to be an act of reprisal against the HJC's stance against the President's attempts to control the judiciary.

Similarly, the ICJ is concerned that the dismissal of Mourad Massouadi, a judge at the Tunis Court of Appeal and the President of the Tunisian Association of Young Magistrates, appears to be an act of reprisal against the association's denunciation of the President's attempts to control the judiciary.

The ICJ is also deeply concerned that the dismissal of 57 magistrates, including 23 prosecutors, has purged Tunisia's Public Prosecution Service of their leadership, thus paving the way for the executive's exercise of political control over prosecutions, including through the initiation and continuation of arbitrary criminal proceedings against perceived government critics and/or opponents. With respect to this, the ICJ notes that, under Tunisian law, the Public Prosecution Service is subject to the authority of the Minister of Justice who may give instructions in individual cases,⁵² as detailed further below.

This situation has been compounded by the President's refusal to approve the magistrates' annual rotation, that is, the appointment, promotion and transfer of judges and prosecutors within the court system for 2022-2023. Under the now abrogated Organic Law 2016-34 on the HJC, the HJC was responsible for preparing and adopting the rotation by September each year. However, through Decree 11, the President empowered himself to approve such rotations, but he failed to do so in 2022. As a result, the positions of the dismissed magistrates have mostly remained vacant since 1 June 2022, which, in turn, has had a significantly detrimental impact on the daily functioning of the affected courts. Presidential Order 2023-574 of 29 August 2023, which was published in the official gazette on 30 August 2023, eventually adopted the annual rotation. In parallel, however, the executive's interference in the work of prosecutors has also continued thanks to the role played by the Ministry of Justice.

According to information available to the ICJ, the dismissed magistrates learned about their dismissal on 1 June 2022 when Order 516, featuring their names, was published in the Official Gazette. None of them was formally notified of the criminal proceedings against them, including of any actual charges they were facing, if any, let alone of the grounds for their dismissal. They were also not given access to any purported evidence in support of their dismissal.

For example, Ramzi Bahria, assistant prosecutor at the Mahdia Tribunal of First Instance, told the ICJ: "I did not watch the news on TV and was not online that day, so I only heard about the Decree and the dismissal order when colleagues and people I know started calling me that night after they saw my name on the list. I could not have expected anything like this to happen. I did not receive any notification that my performance was under review or that I was under any formal disciplinary procedure."⁵³

Mohamed Taher Kanzari, a family judge at the Siliana Tribunal of First Instance, told the ICJ that the news was shocking to him. "I watched the President's speech on TV the evening of 31 May [2022]. I was very alarmed by it but did not suspect I might be one of the judges he was referring to. I was not being investigated and to my knowledge none of the accusations that the President mentioned could have related to me or my performance."⁵⁴

52. Law 67-29 of 14 July 1967 on the organization of the judiciary and the statute of magistrates, art. 15; Code of Criminal Procedure, arts 21 to 23.

53. Interview with Ramzi Bahria on 24 December 2022.

54. Interview with Mohamed Taher Kanzari on 10 January 2023.

During a meeting convened by some Tunisian professional associations of magistrates on 4 June 2022, many of the dismissed magistrates provided testimonies in which they confirmed that they were not notified of the reasons for their dismissal or of any pending disciplinary or criminal charges against them at the time. In these interventions, the dismissed magistrates shared their analysis of the possible reasons behind their dismissals.

For example, Kais Sabbahi, assistant prosecutor at the “counter-terrorism” specialized judicial office (*Pôle judiciaire spécialisé de lutte contre le terrorisme*), stated that he had been asked by government authorities to “order the arrest and detention of political opponents without grounds,” and that “his dismissal might be related to him refusing to comply with these orders.”⁵⁵ In his statement, which he later confirmed to the ICJ, Sabbahi recounted how police investigators had come to his house four times to ask him to order the arrest and detention of “certain people” whom they were investigating, claiming that “they were under pressure to execute the arrests [of these people].”

In the same meeting, Ramzi Bahria, assistant prosecutor at the Mahdia Tribunal of First Instance, stated that he had been summoned for questioning by the GIS only once in the course of his career, following a complaint against him filed by a police brigade. According to Bahria, “the inspection [GIS] asked [him] about [his] refusal to issue warrants to the police brigade to raid houses of individuals suspected of terrorism without providing justification and claiming that this raid would be preventive.” Bahria stressed that as a prosecutor, “it is not [his] role to order prevention measures,” and that he refused such requests because “[his] duty as prosecutor is to assess cases based on evidence and material elements, and not treat any allegation of terrorism by police as a fact.”⁵⁶ Bahria confirmed to the ICJ that, after the GIS had questioned him, he heard nothing more and, therefore, thought the matter had been resolved.⁵⁷

In the same vein, Abdel Karim Aloui, Public Prosecutor of the Gafsa Tribunal of First Instance, stated that he suspected his dismissal to be related to his refusal to comply with requests from local authorities in Gafsa. According to Aloui, representatives of local authorities had attempted to “control” the prosecutor’s office and the work of investigating judges, which he had contested. Additionally, Aloui stated that “members of security forces often requested warrants to carry out raids that he found unjustified and hence did not grant.” Aloui added that, “by doing so [he] was following the law. Search warrants are only granted in certain instances prescribed by law and cannot be issued based on unjustified suspicions or even in the context of settling personal scores.”

Under international standards, “prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights...”; they “shall not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.”⁵⁸

In light of this, the ICJ is concerned that the dismissal of several prosecutors, as outlined above regarding the cases of Kais Sabbahi, Ramzi Bahria and Abdel Karim Aloui, was an act of reprisal against them for carrying out their work independently, impartially and in full compliance with the law and their ethical duties.

Hamaddi Rahmani, a judge at the Court of Cassation, who also had not received any prior notification that his dismissal was being considered, told the ICJ that, “like my colleagues, I was left to infer the reasons of my dismissal which, in my opinion, are clearly related to the stance that I have taken publicly in defence of the independence of the judiciary. This was not the first time that the President referred to my convictions in his speeches without naming me by saying that a judge has no business to say that a *coup d’état* happened in the country. That was a clear reference to my public statements, and it is my role to denounce what I consider as an attack

55. See <https://twitter.com/KashfMedia/status/1640455886173876228>.

56. See https://www.facebook.com/watch/?v=1896678317366974&extid=NS-UNK-UNK-UNK-IOS_GK0T-GK1C&mibextid=2Rb1fB&ref=sharing.

57. Interview with Ramzi Bahria on 24 December 2022.

58. UN Guidelines on the Role of Prosecutors, paras 12 and 14.

on the Constitution.”⁵⁹

Under international human rights law and standards, judges and prosecutors, like everyone else, are entitled to exercise their human rights, including, in particular, their rights to freedom of expression and freedom of opinion. The Universal Charter of the Judge and the ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recognize specifically judges’ and prosecutors’ rights to freedom of expression, freedom of belief, freedom of association and peaceful assembly.⁶⁰

Expressing views about the breakdown of the rule of law is protected by international human rights law and cannot be legitimately considered as a valid ground for dismissing members of the judiciary making their views on such matters known. To the contrary, under international human rights law and standards, “if judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, or attacked, the judiciary must be resilient and defend its position fearlessly.”⁶¹ This duty particularly arises “when democracy is in a malfunctioning state, with its fundamental values disintegrating, and judicial independence is under attack.”⁶²

The UN Basic Principles on the Independence of the Judiciary provide that, in accordance with the Universal Declaration of Human Rights, members of the judiciary are like other individuals entitled to exercise their right to freedom of expression, belief, association and peaceful assembly; provided, however, that in exercising such rights, judges always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.⁶³

As highlighted by the Special Rapporteur on the independence of judges and lawyers, “[...] judges and prosecutors have special duties and responsibilities that justify the introduction of specific restrictions on their fundamental freedoms. However, such restrictions “[...] are only legitimate when provided by law and when they are necessary in a democratic society to pursue a legitimate aim, such as the protection of the independence, impartiality and authority of their institutions.”⁶⁴ The Special Rapporteur has further emphasized that, “[t]he jurisprudence of regional courts has established that in situations where there is a breakdown of constitutional order, judges may even have a duty to speak out in favor of the restoration of democracy and the rule of law.”⁶⁵ Furthermore, the Commentary to The Bangalore Principles of Judicial Conduct emphasizes that, “there are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge”.⁶⁶

In light of the above, the ICJ is concerned that several magistrates, like Hamaddi Rahmani, were dismissed for the sole legitimate exercise of their right to freedom of expression, in violation of the above-mentioned international human rights standards.

According to information available to the ICJ at the time of writing, among the 57 dismissed

59. Interview with Hammadi Rahmani on 11 January 2022.

60. Respectively art. 3-5 read in light of art. 9-2, and principles A-4(s) and (t) and F(d) and (e). See also, with respect to judges, UN Basic Principles on the Independence of the Judiciary, principles 8 and 9.

61. Consultative Council of European Judges (CCJE), Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy: <https://rm.coe.int/16807481a1>, para. 41.

62. CCJE Opinion No. 25 (2022) on freedom of expression of judges: <https://rm.coe.int/opinion-no-25-2022-final/1680a973ef%0A%0A>, para. 60. In Tunisia, prosecutors are part of the judiciary.

63. Principle 8.

64. Independence of judges and lawyers: Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/41/48, 29 April 2019: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/118/68/PDF/G1911868.pdf?OpenElement>, para. 80.

65. Id., para. 90.

66. UNODC, Commentary to The Bangalore Principles of Judicial Conduct, September 2007: https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf, para. 138.

magistrates, only eight were in fact the object of disciplinary and/or criminal proceedings at the time of their dismissal. Of the eight, three had been suspended at the time of their dismissal, two of them were awaiting both criminal and disciplinary proceedings, and one was in pre-trial detention on corruption charges for which she was later convicted. The five others were being investigated at the time of their dismissal, by the HJC or by the courts, for alleged misconduct unrelated to their work as judges or prosecutors. For example, Khira Ben Khelifa, a judge at the Sousse Tribunal of First Instance, was being prosecuted at the time of her dismissal on “adultery charges”.⁶⁷

In his speech of 1 June 2022 announcing the dismissal of the 57 magistrates, President Saïed specifically referred to some dismissed magistrates being involved in “moral corruption” and “adultery”, without mentioning the names of the concerned magistrates. Ben Khelifa told the ICJ: “I can only guess that I was dismissed based on the ‘adultery charges’ against me because the President mentioned it directly in his speech, but I still do not understand what that has to do with my performance as a judge. I have not been investigated about anything in relation to my duties or cases that I have worked on.”⁶⁸ Ben Khelifa confirmed to the ICJ that she had not been informed of any accusations of judicial misconduct against her or of the reasons for her dismissal. Eventually, on 19 January 2023, the Tunis Court of Appeal acquitted her of the “adultery charges” against her.

Under international human rights law and standards and general principles of criminal law, consensual sexual conduct, irrespective of the type of sexual activity, the sex/gender, sexual orientation, gender identity or gender expression of the people involved or their marital status, may not be criminalized in any circumstances. Consensual sexual activities, including in such contexts as sex outside marriage – whether pre-marital or extramarital – may, therefore, never be criminalized.⁶⁹ The criminal proscription of “adultery” violates Tunisia’s legal obligations under the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the African Charter on Human and Peoples’ Rights and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

In its February 2023 Concluding observations following its examination of Tunisia’s seventh periodic report under the Convention on the Elimination of All Forms of Discrimination against Women, the UN Committee on the Elimination of Discrimination against Women noted “with concern the issuance on 1 June 2022 of presidential decrees Nos. 35-2022 and 516-2022, dismissing 57 judges, including seven women, of whom two faced gender-based harassment and online smear campaigns,” who include Khira Ben Khelifa, and recommended that the Tunisian authorities “ensure the protection of women judges from gender-based violence, threats and harassment and ensure the prompt, independent and impartial investigation and prosecution of those responsible, including in the cases of the two women judges, who faced harassment in the context of their dismissal by decree No. 516-2022.”⁷⁰

Ben Khelifa’s dismissal, based on charges arising from conduct that should not have been criminalized in the first place and for which she was eventually acquitted, is perhaps the most emblematic case among the arbitrary dismissals of the 57 magistrates.

67. See <https://www.businessnews.com.tn/une-maqrstrate-livree-en-pature-a-cause-dune-affaire-dadultere,534,119798,3>.

68. Interview with Khira Ben Khelifa on 24 December 2022.

69. See, among others, 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, March 2023, Principle 16 – Consensual Sexual Conduct, p. 22. Whether in law or in practice or both, criminalizing adultery constitutes a violation of women’s human rights, including, in particular, of their rights to: freedom from gender-based discrimination, including with respect to marital or family status; equality before the law and equal protection of the law without discrimination; liberty and security of person; freedom of expression; and private and family life.

70. UN Committee on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of Tunisia, UN Doc. CEDAW/C/TUN/CO/7, 28 February 2023: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCEDAW%2FCOC%2FTUN%2F51819&Lang=en.

B. Violations of the right to an effective remedy and denial of justice

Numerous international and regional human rights treaties by which Tunisia is bound specifically guarantee the right to an effective remedy for human rights violations.⁷¹ The right to an effective remedy for human rights violations pertains to violations of civil, political, economic, social and cultural rights, albeit the specific modalities of each remedy may vary depending on the right in question and the character of the violation.⁷²

The right to an effective remedy guarantees to everyone whose human rights have been violated the right to bring proceedings before an independent and impartial body – including in certain circumstances a judicial body – capable of ensuring a fair hearing and formally determining whether the violation/s took place, and bringing the violation to an end, if it is continuing, and of ensuring that victims receive adequate redress in all its forms, as appropriate.⁷³ As the UN Human Rights Committee has identified, reparation will generally entail appropriate compensation but might also involve, where appropriate, “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”⁷⁴

In *Adrien Mundy Busyo et al. v. Democratic Republic of the Congo*, a case where a presidential decree led to the illegal dismissal of judges, the UN Human Rights Committee found that the applicants had been “deprived of all remedies” because they could not appeal the decree pronouncing their dismissal, and ruled that, pursuant to article 2(3)(a) of the ICCPR, the applicants were entitled to an appropriate remedy, which should include, *inter alia*: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts; and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.⁷⁵

In *Yevdokimov and Rezanov v. Russia*, having found that legislation enshrining a blanket deprivation of the right to vote of anyone sentenced to a term of imprisonment could not be challenged, the Human Rights Committee held that the said law violated article 25 [on the right to participate in the conduct of public affairs] in conjunction with article 2(3) of the ICCPR, and concluded that article 2(3) required amending the legislation to comply with the Covenant, among other measures to prevent similar violations in the future.⁷⁶

In *Allan Brewer-Carías v. Bolivarian Republic of Venezuela*, a case in which a lawyer was prosecuted in a context where the Human Rights Committee found that judges and prosecutors did not

71. See e.g., the ICCPR, article 2(3); the CERD, article 6; the CAT, articles 13 and 14; the CRC, article 39; the ICPEL, articles 8(2), 17(2)(f), 20(2) and 24; and the African Charter on Human and Peoples’ Rights (ACHPR), article 7(1)(a).

72. In addition to sources cited above, see e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 9, UN Doc. E/C.12/1998/24 (1998), para. 2. See also, General Comments No. 12, UN Doc. E/C.12/1999/5 (1999), paras 32-35; No. 14, UN Doc. E/C.12/2000/4 (2000), paras 59-62; No. 15, UN Doc. E/C.12/2002/11 (2002), paras 55-59; No. 18, E/C.12/GC/18 (2006), paras 48-51; and No. 19 E/C.12/GC/19 (2008), paras 77-81; and Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28, UN Doc. CEDAW/C/GC/28 (47th session 2010), paras 17, 32, 34 and 36. See also, General Recommendations No. 19 (11th session 1992), para. 24; No. 25 (13th session 2004), para. 7; No. 26 (42nd session 2008), para. 26; and No. 27 (47th session 2010), paras 33-34.

73. See e.g., Inter-American Court of Human Rights, Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, 6 October 1987, para. 24; see also European Court of Human Rights, *Silver v. the United Kingdom*, Judgment, 25 March 1983, para. 113.

74. HRC, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>, para. 16.

75. HRC, *Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Sibú Matubuka et. al. v. Democratic Republic of the Congo*, Views adopted on 31 July 2003, Communication No. 933/2000, UN Doc. CCPR/C/78/D/933/2000, paras 5.2 and 6.2.

76. HRC, *Yevdokimov and Rezanov v. Russia*, Views adopted on 21 March 2011, Communication No. 1410/2005, UN Doc. CCPR/C/101/D/1410/2005: <https://www.un-ilibrary.org/content/books/9789210567732s001-c007/read>, paras 7.5-9.

enjoy security of tenure guarantees that allowed them to perform their duties independently,⁷⁷ the Human Rights Committee held that, in circumstances in which the author had “a well-founded fear of being subjected to arbitrary criminal proceedings that violate his rights and guarantees”, “a remedy that gives effect to the right to due process cannot be predicated on him not receiving due process” and, accordingly, found a violation of “the author’s right to an effective remedy in respect of his right to due process, in particular, access to an independent tribunal, as enshrined in article 2(3), read in conjunction with article 14(1) of the Covenant”.⁷⁸

In this regard, it is recalled that, pursuant to Decree 35, the dismissed magistrates may only challenge their removal after the courts have handed down a final verdict in the criminal cases opened against them. It is further recalled that their dismissal was pronounced by Order 516, without any form of due process. Moreover, pursuant to article 7 of Presidential Decree 2021-117 adopted under “the state of exception”, there is no possibility to challenge the decree-laws adopted by the President. In particular, there was and is no constitutional court in place and the provisional instance in charge of reviewing the constitutionality of laws was dissolved by article 20 of Decree 2021-117. There was thus no possibility for the dismissed magistrates to challenge the constitutionality of Decree 35 on the basis of which Order 516 has been promulgated.

In light of the above, the ICJ considers that, in a clear violation of Tunisia’s obligations under international human rights law, the right of the dismissed magistrates to an effective remedy was violated. Their dismissal resulted from an assault on the separation of powers and judicial independence and took place outside any objective, independent procedure prescribed by law, without due process. Moreover, not only did Decree 35 deprive them of the possibility to challenge their dismissal until the completion of the criminal proceedings against them, which are themselves arbitrary, but also Decree 2021-117 excluded the possibility to challenge the constitutionality of the decree-law on which their dismissal was based.

In late June 2022, 56 of the 57 dismissed magistrates challenged their dismissal before the Administrative Court. The Court requested the executive and the THJC to provide information about the reasons for the dismissal and the supporting evidence. In 49 cases, the authorities failed to provide the Administrative Court with information about any existing proceedings, whether criminal or disciplinary, against the concerned magistrates or about the reasons for their dismissal. In particular, the President of the THJC indicated that no judgment had been rendered against 49 petitioners in relation to criminal proceedings, and that there were no criminal proceedings pending against them.

On 9 August 2022, in a series of rulings on requests for suspension of the dismissal pending judgment on the merits of the challenges,⁷⁹ the First President of the Administrative Court found that “given the reasons for the dismissal and the acts and facts supporting it have not been disclosed [...]; whereas there is no judgment or criminal proceedings against the petitioners and since the latter were deprived of [their] fundamental right to defend [themselves], [their] dismissal lacks sound factual grounds, which bases the present request on prima facie serious grounds and the implementation of the dismissal would lead to consequences that are difficult to reverse.” Consequently, the First President of the Court issued decisions in favour of the 49 dismissed magistrates, suspending the President’s order, pending the judgment on the merits of the challenges.⁸⁰ The First President also denied the requests for suspension of the dismissal of seven magistrates against whom there were ongoing criminal and/or disciplinary proceedings in relation to: traffic offences in two cases; hunting offences in one case; “adultery” in one case; cheque bouncing in one case; and allegation of corruption in two cases.

77. HRC, *Allan Brewer-Carías v. Bolivarian Republic of Venezuela*, Views adopted on 18 October 2021, Communication No. 3003/2017, UN Doc. CCPR/C/133/D/3003/2017: https://digitallibrary.un.org/record/3965459?ln=zh_CN, paras 9.2 and 9.3.

78. *Id.*, para. 9.8.

79. Pursuant to article 39 of Law 72-40 of 1 June 1972 on the Administrative Court, upon request of the petitioners challenging a decree or other administrative acts, the First President of the Court may suspend the contentious act pending judgment on the merits of the challenge if the request is based on prima facie serious grounds and if the execution of the said act would have consequences that would be difficult to reverse. Suspension requests are addressed pursuant to the procedure for urgent matters and without delay.

80. See <https://www.reuters.com/world/africa/tunisian-court-suspends-presidents-dismissal-50-judges-lawyer-2022-08-10/>; see also <https://www.amnesty.ca/urgent-actions/tunisia-reinstate-revoked-judges-and-prosecutors/>.

The First President's decisions must be enforced immediately by the administration and cannot be appealed according to article 41 of Law 72-40 of 1 June 1972 on the Administrative Court. Moreover, the willful failure to implement the Administrative Court's decisions constitutes a gross fault engaging the liability of the administrative authority concerned pursuant to article 10 of the same Law.

In addition, one of the 49 dismissed magistrates who obtained the suspension of their dismissal before the Administrative Court sought the suspension of his dismissal before the Chamber of urgent matters (*référé*) of the Tunis Tribunal of First Instance on 1 July 2022, pending the determination of his professional status by litigation or consent or, subsidiarily, pending the final judgment in the criminal proceedings referred to by Decree 35. The Tribunal granted the request on 22 August 2022, ordering the judge's reinstatement pending the HJC's determination of his professional status. Pursuant to articles 207 and 209 of the Tunisian Code of Civil and Commercial Procedure, "urgent matters" orders must be enforced within 24 hours and appeals are not suspensive.

However, to date, none of the 49 magistrates whose dismissal has been suspended has been reinstated. On 23 January 2023, 37 of them filed criminal complaints against the Minister of Justice – based on article 315 of the Penal Code⁸¹ and article 2 of Organic Law 2017-10 of 7 March 2017 on reporting acts of corruption and the protection of whistleblowers⁸² – for failing to comply with the First President of the Administrative Court's decisions suspending their dismissal. To date, no progress has been made in these complaints.

The ICJ considers that the Tunisian authorities' refusal to reinstate the 49 dismissed magistrates, as directed by the First President of the Administrative Court and the Chamber of urgent matters of the Tunis Tribunal of First Instance, constitutes a violation of the right of the individuals concerned to an effective remedy, and amounts to a denial of justice.

81. Article 315 of the Penal Code criminalizes, *inter alia*, the failure to comply with the prescriptions of regulations adopted by the competent authority and disrupting the administration of justice.

82. Article 2 of Organic Law 2017-10 defines corruption as, *inter alia*, undermining judicial decisions.

III. Arbitrary criminal prosecutions against judges and prosecutors

On 14 August 2022, shortly after the issuance of the First President's decision, the Ministry of Justice issued a statement indicating that, consistent with "the provisions of Decree 2022-35 of 1 June 2022, the magistrates covered by the dismissal order are subject to criminal proceedings."⁸³ On 20 August, the Ministry of Justice issued another statement claiming that, "contrary to what [was] being circulated on some social media by parties seeking to disrupt the accountability process and claiming that there [were] no files", 109 criminal proceedings had been initiated against the dismissed magistrates, including in relation to alleged financial, economic and "terrorism-related" crimes, and that it had notified the THJC of the list of dismissed magistrates subject to criminal proceedings, explaining that the GIS, the Ministry of Justice's body in charge of investigating magistrates' disciplinary matters, had been working since 1 June 2022 to transmit reports to the public prosecutors.⁸⁴

Under Tunisian law, the Minister of Justice is granted broad supervisory powers over the Public Prosecution Service. For example, pursuant to article 22 of the Code of Criminal Procedure (CCP) and article 15 of Law 67-29 of 14 July 1967 on the organization of the judiciary and the statute of magistrates, the Prosecutor-General is placed at the head of the Prosecution Service but specifically "under the authority of the Minister of Justice". Article 23 of the CCP provides that the Minister of Justice may "report to the Prosecutor-General the criminal offences within his knowledge, may require him to initiate, or ask someone to initiate, the prosecution or to seize the competent jurisdiction with the written submissions considered desirable". In addition, by virtue of article 21 of the CCP, all public prosecutors are "required to comply with written submissions in accordance with instructions given to him under the conditions set out in article 23". These provisions serve to consolidate the control of the Minister of Justice over the prosecution service as a whole.

While the 2014 Constitution sought to guarantee the Public Prosecution Service's independence, implementing legislation was never adopted. The Minister of Justice may thus order prosecutors to initiate and carry out politicized criminal proceedings against magistrates, government's critics and other individuals simply for the exercise of their human rights, even when the evidence establishes that such proceedings are based on unfounded accusations. In this regard, the dismissal of at least 11 high-level prosecutors on 1 June 2022, as listed above, has further strengthened the subordination of the Public Prosecution Service to the executive.

While the ICJ was unable to review the 109 cases announced by the Ministry of Justice against the dismissed magistrates, the organization has examined 20 criminal cases initiated against 18 of them in the aftermath of the First President of the Administrative Court's decision. Some magistrates face multiple criminal proceedings simultaneously. The following sections provide an analysis of some of the cases against the dismissed magistrates that the ICJ has examined, as well as the case against the President of the AMT, which is directly linked to his solidarity actions in support of the dismissed magistrates.

A. Prosecutions based on "terrorism-related" charges

In more than half of the cases examined by the ICJ, the dismissed magistrates are being investigated and prosecuted based on "terrorism-related" charges.

For example, on 13 September 2022, the "counter-terrorism" specialized judicial office (*Pôle judiciaire spécialisé de lutte contre le terrorisme*) opened a criminal judicial investigation against Ramzi Bahria, a deputy prosecutor at the Mahdia Tribunal of First Instance, in relation to purported accusations of "establishing a terrorist enterprise" and "failure to report on terrorist crimes", under articles 1, 13bis, 31, 37, 39 and 40 of "counter-terrorism" Law 2015-26 of 7 August 2015 (hereinafter the "counter-terrorism" Law),⁸⁵ as well as of "non-compliance with

83. See <https://www.facebook.com/ministere.justice.tunisie/posts/pfbid0VBtB6tdX8fyM5zwR9prifycqJMq7DdRtvHUWXfJGtrPcBvUhxYMoURC9xBwjixU4I> (Arabic only).

84. See <https://www.facebook.com/ministere.justice.tunisie/posts/pfbid0TiopTn3z6Yi9RyhpHxuViRztGWtpne26sU5Q9f11CubP95vjtiAKCEwzg5wnBN4sl> (Arabic only).

85. Organic Law No. 2015-26 of 7 August 2015 on combating terrorism and preventing money-laundering as amended by Organic Law No. 2019-09 of 23 January 2019.

orders and decisions of relevant authorities”, under articles 32 (on complicity) and 315 of the Penal Code. The criminal investigation against Ramzi Bahria had started on 18 August 2022 based on an unsigned police report of 25 November 2021 claiming that he had refused to issue a search warrant to the “counter-terrorism” police brigade on 10 May 2021. The report was submitted to the “counter-terrorism” specialized judicial office on 17 August 2022. Since the opening of this investigation, no progress has been made in the criminal proceedings against Ramzi Bahria.

Similarly, the “counter-terrorism” specialized judicial office initiated criminal proceedings against the Public Prosecutor of the Tunis Tribunal of First Instance, Imed Jomni, in relation to offences of “establishing a terrorist enterprise” and “failure to report terrorist crimes” under articles 1, 13bis, 31, 37, 39 and 40 of the “counter-terrorism” Law. The purported accusations are based on a police report of 24 December 2021 claiming that Imed Jomni had failed to open an investigation in a timely manner in a “terrorism” case. Imed Jomni is also being criminally investigated by the same “counter-terrorism” specialized judicial office following another police report claiming that he had refused to issue search warrants to the police brigade in 20 cases.

In the same vein, the “counter-terrorism” specialized judicial office opened criminal proceedings against Boubaker Jeridi, the General Prosecutor of the Tunis Court of Appeal, on 12 September 2022 in relation to offences of “establishing a terrorist enterprise” and “failure to report terrorist crimes” under articles 1, 13bis, 31, 37, 39 and 40 of the “counter-terrorism” Law, as well as “non-compliance with orders and decisions of relevant authorities” under articles 32 and 315 of the Penal Code. Boubaker Jeridi is being criminally investigated following a report by the Ministry of Justice claiming that he had failed to open an investigation ordered by the Ministry of Justice according to article 23 of the CCP.

Abdelkarim Al Aloui, the Public Prosecutor of the Gafsa Tribunal of First Instance, was also criminally investigated in relation to accusations of “establishing a terrorist enterprise” under the “counter-terrorism” Law based on a police report claiming that Abdelkarim Al Aloui did not treat requests for search warrants by security forces seriously.

Another prosecutor⁸⁶ was criminally investigated based on a report submitted by the Ministry of Interior to the Ministry of Justice claiming that he is suspected of colluding with certain political parties in “terrorism-related” cases. According to information provided by the prosecutor’s lawyers, the Ministry of Interior’s report did not include any evidence to support the claims against the prosecutor, nor did it refer to any specific offences allegedly committed by the prosecutor. In September 2022, the “counter-terrorism” specialized judicial office instigated criminal proceedings against the prosecutor in relation to offences of “establishing a terrorist enterprise” and “failure to report terrorist crimes” under articles 1, 13bis, 31, 37, 39 and 40 of the “counter-terrorism” Law.

On 13 September 2022, the “counter-terrorism” specialized judicial office opened a criminal judicial investigation against Hammadi Rahmani, a judge at the Court of Cassation, Bechir Akermi, General Attorney at the Court of Cassation, Youssef Bouzakher, General Attorney at the Court of Cassation and President of the dissolved HJC, and against two other judges in relation to purported accusations of establishing a “terrorist enterprise”; instigating and participating in “terrorism-related” offences; criminal conspiracy; failure to immediately notify the competent authorities of “terrorism-related” acts that came to their knowledge; conspiring against the State’s internal security; attributing a reprehensible act to the head of State; and giving and receiving bribes as a public official, under articles 1, 13 (new), 32, 37, 40, 92, 93, 94, 95, 96 and 97 of the “counter-terrorism” Law, and articles 32, 67, 68, 69, 82, 83, 84 and 91 of the Penal Code.

This criminal judicial investigation was based on a denunciation by a former judge who had been subject to a disciplinary procedure by the dissolved HJC. In a letter sent to President Saied on 25 November 2021, he accused Hammadi Rahmani of illicit enrichment with the complicity of Bechir Akermi, and alleged that Hammadi Rahmani had formed a group to defend Bechir Akermi and oppose the President as well as used social media to set the people and the army against

86. This magistrate did not want to be named.

the President. The former judge further stated that Youssef Bouzakher, as the President of HJC, failed to act upon this and opposed the President's measures "to cleanse the judiciary". While the letter was accompanied by screenshots of social media posts by Hammadi Rahmani following President Kais Saied's power grab on 25 July 2021 – where Hammadi Rahmani had denounced the President's actions as unconstitutional and contrary to the principle of the separation of powers – it failed to provide any information or evidence to support such claims. The letter did not result in any investigation until it was referred by President to the Ministry of Justice, and by the Ministry of Justice to the prosecution on 14 September 2022, that is, after the First President of the Administrative Court's decision suspending the dismissal of the magistrates concerned, except for Bechir Akermi.

Based on the same letter, another criminal investigation was opened against Hammadi Rahmani on 15 August 2022 in relation to accusations under article 67 of the Penal Code of "attributing a reprehensible act to the head of the State".

Three other cases reviewed by the ICJ in which dismissed magistrates⁸⁷ are criminally investigated in relation to "terrorism-related" and corruption offences were based on an inventory process carried out by the GIS. Following their dismissal, the GIS had access to the dismissed magistrates' offices in their absence. The GIS collected files in the cases on which these magistrates were working at the time, including any evidence contained in those files. Based on this, the Ministry of Justice ordered the initiation of criminal cases against these magistrates. In one of these cases, an investigating judge in the "counter-terrorism" specialized judicial office is accused of concealing evidence found in a recording device in relation to a "terrorist" crime, despite the existence of a report about the content of the recording device in the case files.

According to article 22 of Law 67-29 on the organization of the judiciary and the statute of magistrates, a judge or prosecutor can only be prosecuted or arrested after the HJC decides to lift their immunity following a request from the courts. Pursuant to the decisions of the First President of the Administrative Court in favour of 49 of the dismissed magistrates, the dismissal order has been suspended. Accordingly, these magistrates are entitled to be reinstated pending judgment on the merits of their challenges. Ignoring the First President of the Administrative Court's ruling, the prosecution instigated criminal proceedings against the 49 magistrates.

The defence lawyers of 13 magistrates investigated under the "counter-terrorism" Law, among other criminal offences, have submitted requests to the investigating judges investigating these cases to uphold the immunity of their clients based on the First President of the Administrative Court's decision. In response to these requests, investigating judges in at least 13 cases that were referred to them by the prosecution have submitted a request to the THJC to lift the immunity of the dismissed magistrates who are under investigation in relation to alleged "terrorism charges", including those mentioned above. The THJC was expected to hear or rule on the matter of immunity with respect to nine of these magistrates on 19 September 2023 but the decision was postponed *sine die* due to the absence of some THJC members. For other requests to lift the immunity of the concerned magistrates, the THJC has not set a date yet.

The arbitrary prosecution and detention of Bechir Akermi

Bechir Akermi served in key judicial positions, including as an investigating judge, and as the Public Prosecutor of the Tunis Tribunal of First Instance. As the Public Prosecutor, Bechir Akermi oversaw the investigation into the major attack against the Bardo Museum in Tunis on 18 March 2015, in which 21 tourists and one law enforcement officer were killed, and which was claimed by the so-called Islamic State.

As an investigating judge, Bechir Akermi was also in charge of the high-profile investigation into the killing of Chokri Belaid, a political leader, on 6 February 2013. Chokri Belaid's political party, the Unified Party of Patriotic Democrats, together with other political actors in Tunisia, have repeatedly accused Bechir Akermi of hindering the investigation into Chokri Belaid's killing. In March 2021, the Unified Party of Patriotic Democrats filed a criminal complaint against Bechir Akermi, accusing him of cover up and evidence tampering. According to Bechir Akermi's lawyers, this complaint was examined and dismissed by the Tunis Court of First Instance.

87. These magistrates did not want to be named.

The same complaint was sent to the now dissolved HJC. In July 2021, the HJC decided to suspend Bechir Akermi after an investigation by the GIS that was based on the accusations included in the complaint filed by the Unified Party of Patriotic Democrats in March 2021. Bechir Akermi successfully challenged his suspension before the Administrative Court, which overturned it on 2 June 2022, a day after the President's decision to dismiss Bechir Akermi and 56 other magistrates.

Bechir Akermi had already had his judicial immunity removed and was not among the 49 magistrates whose dismissal was suspended by the First President of the Administrative Court on 9 August 2022. Therefore, he was not immune from arrest.

On 12 February 2023, Bechir Akermi was arrested from his home by the "counter-terrorism" police brigade amidst a wave of arrests against a number of Tunisian businessmen, journalists and opposition leaders. At the time of his arrest, Bechir Akermi was not informed of the reasons for his arrest nor was he provided with an arrest warrant.

Following his arrest, his lawyers found out that he was being detained in connection with his investigation, as public prosecutor, of the 2015 attack against the Bardo Museum. On 17 February 2023, the deputy prosecutor of the "counter-terrorism" specialized judicial office informed Bechir Akermi's lawyers that he would be released from police custody without charge, but that he would be confined to a psychiatric hospital by court order based on a medical report, after he had reportedly had a nervous breakdown while in detention.

On 24 February 2023, Bechir Akermi was about to be discharged from the Arrazi psychiatric hospital when security forces surrounded the hospital, claiming that he was being investigated in another case and preventing Bechir Akermi's family from taking him home. A few hours later, Bechir Akermi was arrested by the "counter-terrorism" police brigade. The "counter-terrorism" specialized judicial office had opened another investigation against him based on a new complaint filed by the Unified Party of Patriotic Democrats on 6 February 2023. Based on this new complaint, Akermi was charged with: "establishing and participating in a terrorist enterprise", "criminal conspiracy", and "failure to immediately notify competent authorities of terrorism related acts that came to one's knowledge" under articles 1, 13 (new), 32, 37, 39 and 40 of the "counter-terrorism" Law. At the time of writing, Bechir Akermi remains in detention.

According to Bechir Akermi's lawyers, the February 2023 complaint is similar to the complaint filed by the same political party in 2021. The lawyers also underscored that Bechir Akermi was being investigated based on the "counter-terrorism" Law promulgated in 2015 for acts he is accused of having committed in 2013 while investigating Chokri Belaid's killing. According to his lawyers, Bechir Akermi's questioning revolved around decisions that he took as an investigating judge related to issuing warrants and hearing witnesses.

In the absence of evidence against Bechir Akermi, the ICJ is very concerned that he is facing a politically motivated prosecution because of decisions he took as an investigating judge or as a prosecutor. Bechir Akermi is being detained arbitrarily and should be released immediately.

Conclusion on arbitrary prosecutions of magistrates under the "counter-terrorism" legislation

The ICJ is deeply concerned that in these cases, the dismissed magistrates are subjected to criminal proceedings solely for the discharge of their duties in the course of their work consistent with the law and ethical standards or for the legitimate exercise of their right to freedom of expression.

The abusive resort to and enforcement of "counter-terrorism" legislation are also an indication of arbitrariness. Indeed, in the specific cases reviewed by the ICJ, neither the security reports nor the decisions to prosecute the concerned judges and prosecutors establish or provide any evidence of the "terrorist enterprises" these judges and prosecutors have been accused of establishing, nor about the purported "terrorist crimes" they have been accused of failing to report and under what circumstances.

Prosecutors and judges cannot be subject to criminal investigations for objecting to the

executive's and the security forces' attempts to interfere in their decisions, and for carrying out their work independently, impartially and in full compliance with the law and their ethical duties. They must not be criminally prosecuted on the bases of decisions that they have taken while performing their duties according to the law.

According to the UN Guidelines on the Role of Prosecutors, prosecutors have the responsibility to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights", and to "carry out their functions impartially and avoid all discrimination." To enable this, States have a duty to ensure that prosecutors "can carry out their professional functions impartially and objectively," and "are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability".⁸⁸

In light of the above, the ICJ considers that these prosecutions are arbitrary and abuse the "counter-terrorism" legislative framework for the purpose of violating the concerned judges' and prosecutors' rights and independence.

B. Prosecutions based on charges of "corruption" and "attacks on public authority"

A criminal investigation was opened against Bel Hassan Ben Amor, a prosecutor at the Court of Cassation, by prosecutors at the financial and economic judicial office (*Pôle judiciaire économique et financier*) under articles 4 and 37 of Law 2018-46 of 1 August 2018 on the declaration of assets and interests and the fight against illicit enrichment and conflicts of interest, and article 32 of the Penal Code on complicity. This investigation was opened on 18 August 2022 based on an unsigned and undated police report sent to the Ministry of Justice on 15 August 2022. The report refers to claims of Ben Amor's illicit enrichment and suspicious relations with businesspeople and politicians. On 19 August 2022, the prosecution asked the THJC to clarify the legal and professional status of Ben Amor in light of the decision of the First President of the Administrative Court suspending his dismissal. The THJC confirmed on 25 August 2022 that Law 67-29 on the organization of the judiciary and the statute of magistrates applied to Ben Amor, and that he, therefore, enjoyed immunity from prosecution unless the THJC authorized the lifting of his immunity. However, the investigation against Ben Amor has continued and is ongoing.

Youssef Bouzakher, a General Attorney at the Court of Cassation and President of the dissolved HJC, is also being investigated by the financial and economic judicial office in relation to a case that had been previously investigated and dismissed. When he was President of the HJC, a complaint had been filed against him by an anti-corruption group accusing him of profiting from benefits (i.e., the HJC's purchase of an official car and its use of the same as the HJC's President) to which he had no right. The complaint had been investigated by the prosecutor's office at the Tunis Tribunal of First Instance and dismissed since the car purchase was provided for by the HJC's budget, as approved by the Parliament and authorized by the Ministry of Finance. Despite the complaint's dismissal, a criminal investigation under articles 32, 82, 96 and 98 of the Penal Code was opened against Youssef Bouzakher on 9 September 2022 based on the same accusations. In this case, the investigation has also continued despite the fact that the request to have Bouzakher's immunity lifted is still being reviewed by the THJC.

The ICJ also documented the case of Ahmed Al-Abidi, a judge at the El-Fahs District Tribunal in the region of Zaghouane, who – based on a complaint submitted to the Ministry of Justice on 1 June 2022 by a former National Guard officer, accusing him and two other dismissed judges of "being biased against him" – has been under criminal investigation. Since 12 September 2022, Ahmed Al-Abidi, along with two other dismissed judges, has been investigated in relation to offences of "conspiracy with the purpose of attacking others" and "attributing illegal acts to a public official without evidence" under articles 128, 131 and 132 of the Penal code.

Ahmed Al-Abidi had already been investigated in 2021 by the GIS based on a complaint by this National Guard officer. The judge was accused by the officer of belonging to and financially contributing to a "suspicious" religious association. The GIS closed the investigation after it had

88. UN Guidelines on the Role of Prosecutors, paras 4, 12, 13.

concluded that the judge was wrongly accused due to his name being the same as the person against whom the National Guard officer had complained, and that the name associated with the “suspicious” religious association was that of another person. Afterward, Judge Al-Abidi filed a defamation complaint against the National Guard officer who wrongly accused him. In May 2022, the officer was dismissed based on various complaints, including Judge Al-Abidi’s.

Based on the same complaint of 1 June 2022, Ahmed Al-Abidi and another dismissed judge were both criminally investigated in a separate case under article 96 of the Penal Code in relation to “taking advantage of one’s official position for personal profit or gain.”

In light of the fact that the ongoing criminal proceedings against Bel Hassan Ben Amor, Youssef Bouzakher and Ahmed Al-Abidi all started in the aftermath of the decisions of the First President of the Administrative Court suspending the dismissal of the magistrates concerned, and given that they appear to be all based on unreliable complaints or reports, the ICJ is concerned about their ostensibly arbitrary nature.

Arbitrary prosecution and reprisals against Anas Hmedi, President of the AMT

The ICJ is concerned that politicized criminal and disciplinary proceedings have been used to target the President of the Association of Tunisian Magistrates (*Association des magistrats tunisiens*, AMT), Anas Hmedi, a judge at the Monastir Court of Appeal, in what appears to be acts of reprisals against his work and steps he has taken to challenge the ongoing attacks on the independence of the judiciary and the mass dismissal of magistrates.

Anas Hmedi has been subjected to a defamation campaign, harassment by the Ministry of Justice and arbitrary disciplinary and criminal proceedings in reprisal for his activism in defence of the independence of the judiciary.

After the summary dismissal of the 57 magistrates on 1 June 2022, the AMT, together with other judges associations, led a nationwide four-week strike to protest these arbitrary dismissals. The 2014 Constitution guaranteed the right of judges to strike.⁸⁹

Following the strike, Anas Hmedi was summoned four times between July and August 2022 by the GIS for questioning. On 17 August 2022, the THJC informed Anas Hmedi of a prosecutor’s request to lift his immunity with a view to opening criminal proceedings against him for work obstruction. The allegations against him related to the above-mentioned nationwide strike in June 2022. On 20 September 2022, the THJC decided to lift Anas Hmedi’s immunity, paving the way for his prosecution before the Monastir Tribunal of First Instance.

However, the THCJ did not inform Anas Hmedi of the decision to lift his immunity in writing, as required by law. Without an official written decision, Anas Hmedi was unable to immediately challenge the THCJ’s decision to lift his immunity before the Administrative Court, in clear violation of his right to an effective remedy.

In October 2022, the deputy prosecutor at the Monastir Tribunal of First Instance charged Anas Hmedi with “disrupting the freedom to work”, punishable with a maximum prison sentence of three years pursuant to article 136 of the Penal Code. The charges against him relate to his alleged “incitement” of other judges of the Monastir Tribunal to strike. In February 2023, the General Prosecutor of the Tunis Court of Appeal decided to move the case against Hmedi from the Monastir Tribunal to the El Kef Tribunal of First Instance. Anas Hmedi was summoned to appear by an investigating judge in the El Kef Tribunal of First Instance on 21 August 2023, a date that was postponed to 15 November 2023, and again until 12 January 2024 upon Hmedi’s defence request.

When Anas Hmedi’s lawyers obtained a copy of the case file from the Monastir Tribunal of First Instance in December 2022, they were able to obtain a copy of the THJC’s decision to lift his immunity. In December 2022, Anas Hmedi challenged the THJC’s decision before the Administrative Court, requesting its immediate suspension. Under Tunisian law, requests for

89. Article 36 of the 2014 Constitution guarantees the right to strike, except for internal security forces and customs officials.

suspension of administrative decisions are urgent and in practice adjudicated in less than two months. However, Anas Hmedi's request has been pending since December 2022, again in violation of his right to an effective remedy.

In parallel, a disciplinary procedure has been instigated against Anas Hmedi based on the same "acts" for which he was criminally charged. On 30 August 2022, the THJC decided to refer Anas Hmedi to the disciplinary council. However, Anas Hmedi was only summoned by the THJC in March 2023 to attend a disciplinary hearing on 16 May 2023. The summon followed an AMT statement denouncing "unprecedented pressures on the judiciary" and "the interference of the executive in the judiciary".⁹⁰ Following Anas Hmedi's lawyers request for postponement, the THJC had set 26 September 2023 as a new date for his hearing, but this was postponed *sine die* due to the absence of a number of THJC members following the annual rotation adopted on 29 August 2023.

Anas Hmedi's actions and the AMT's work are protected under international human rights law, notably articles 19, 21 and 22 of the ICCPR on the rights to freedom of expression, association, and peaceful assembly. The UN Basic Principles on the Independence of the Judiciary state that, "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence."⁹¹ While judges' and prosecutors' right to strike is not absolute under international standards,⁹² limitations thereto must be lawful, reasonable and justifiable. In particular, any limitation must be necessary and capable of being demonstrably justified in a free and democratic society. Abusive disciplinary and criminal proceedings in retaliation for the peaceful exercise of their human rights violate international standards guaranteeing judges' and prosecutors' exercise of their rights to freedom of expression, belief, association and peaceful assembly.

The UN Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association have expressed concern over the targeting of Anas Hmedi,⁹³ including in a communication addressed to the Tunisian government on 22 August 2022.⁹⁴

90. See AMT statement of 4 March 2023: <https://www.facebook.com/photo?fbid=519849130265129&set=pcb.519849193598456> (Arabic only).

91. UN Basic Principles on the Independence of the Judiciary, principle 9.

92. UNODC, Commentary to The Bangalore Principles of Judicial Conduct, September 2007, para. 176.

93. See joint statement of 14 September 2022: <https://www.ohchr.org/en/press-releases/2022/09/tunisia-judges-right-association-and-protest-must-be-respected-say-un>.

94. Joint Communication of 22 August 2022, Réf.:ALTUN6/2022: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27520>.

IV. Conclusions and recommendations

The ICJ's analysis of the cases of some of the dismissed magistrates and of the AMT's President establishes a pattern of arbitrary disciplinary and criminal processes to purge the judiciary of those who asserted their independence and challenged the dismantling of the institutional independence of the judiciary.

While the President has vowed to "cleanse" the judiciary from corruption, his government, together with the GIS, the THJC and the Public Prosecution Service, have failed to provide any credible, tangible evidence that the dismissed magistrates were involved in the commission of disciplinary, let alone, criminal offences. To the contrary, the judges' and prosecutors' dismissals and the subsequent criminal proceedings against them appear to be either acts of reprisals against decisions they took in the legitimate discharge of their professional duties or against statements they made legitimately exercising their freedom of expression, or as an ex post facto purported justification to impede the enforcement of the First President of the Administrative Court's orders to suspend the dismissal of 49 of the dismissed magistrates.

The subordination of the judiciary to the executive through presidential decrees, the absence of any constitutional guarantees of judicial independence in the 2022 Constitution, and the instrumentalization of the GIS and the Public Prosecution Service to crush dissent and free speech, including from within the judiciary, have sent a chilling message across Tunisia's courts, directly threatening the security of tenure of judges and prosecutors, and, with it, the ability of the judiciary to uphold and protect human rights, including, in particular, the right to a fair trial and the right to access justice and effective remedies for human rights violations.

In light of the above, the ICJ calls on the Tunisian authorities to:

- i) Revoke all presidential decrees that undermine the independence of the judiciary, including Decree-Laws 2022-11 and 35, and reinstate a democratic constitutional order in which:**
 - a. An independent, democratically constituted HJC, consisting of a majority of judges who are elected by their peers, is the only body in charge of managing the career of judges and prosecutors, including their appointment, promotion and discipline, based on objective criteria and transparent procedures;**
 - b. The Public Prosecution Service's independence is effectively guaranteed and prosecutors are able to perform their duties independently, impartially, fairly, consistently, and in defence of the rule of law, human rights and the public interest, and are not required to initiate or carry out investigations and prosecutions whenever impartial investigations show accusations to be unfounded; and**
 - c. An independent GIS is established, under the authority of an independent HJC, with a mandate to assess the work of judges and prosecutors based on objective, merit-based criteria, and through fair and transparent procedures that guarantee the rights of the concerned judges and prosecutors to challenge GIS reports and decisions and to have them reviewed before an independent body or court.**

To this end,

- i) End all of the President's powers in relation to the establishment of the HJC and the appointment of its members;**
- ii) End the President's powers to manage the career of judges, including their appointment and dismissal;**
- iii) End the Minister of Justice's authority over the GIS, and ensure the GIS be able to carry out its functions under the authority of an independent HJC;**
- iv) End the hierarchical authority of the Minister of Justice over the Public Prosecution Service, including the ability to control and direct prosecutors, and, to that end, revoke articles 21, 22 and 23 of the Code of the Criminal Procedure and article 15 of Law 67-29 on the organization of the judiciary and the statute of magistrates;**
- v) Where the power to issue written instructions extends to the executive, define in law the nature and scope of such power, including a prohibition on the ability to**

issue instructions not to prosecute or to require prosecution in a specific case, as well as recognition that the issuance of written instructions does not preclude the ability of the prosecutor to submit to the court any legal arguments of their choice; and

- vi) Require that any power to issue written instructions be limited to general criminal policy issues and be exercised transparently, in accordance with international and national law, and that written instructions be published.**

In addition, the Tunisian authorities must:

- vii) Immediately release Bechir Akermi, and discontinue all arbitrary criminal proceedings against him solely related to his work as an investigating judge and as a public prosecutor;**
- viii) Immediately reinstate all judges and prosecutors arbitrarily dismissed by the President and ensure that judges and prosecutors may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties;**
- ix) Ensure that all disciplinary, suspension or removal proceedings be determined in accordance with established standards of judicial conduct, before an independent HJC, and through fair procedures that guarantee the rights of the concerned judges and prosecutors to due process;**
- x) Ensure that judges and prosecutors be entitled to freedom of expression, opinion, association and peaceful assembly; that the legitimate and peaceful exercise by judges and prosecutors of these rights cannot give rise to disciplinary or criminal proceedings against them, and, to this end, end all ongoing arbitrary disciplinary and criminal proceedings based on the sole and legitimate exercise of these rights;**
- xi) End all forms of reprisals, harassment and intimidation against the AMT, including arbitrary disciplinary and criminal proceedings against its leader Anas Hmedi;**
- xii) Terminate all ongoing arbitrary criminal proceedings against judges and prosecutors based on charges related to the lawful discharge of their professional duties; and**
- xiii) Ensure effective remedies, including adequate reparation, restitution, rehabilitation and financial compensation, as well as guarantees of non-repetition, to all judges and prosecutors who have been arbitrarily dismissed and continue to be subjected to arbitrary criminal proceedings.**

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