



**UNITED NATIONS HUMAN RIGHTS COMMITTEE**

**140<sup>th</sup> Session of the UN Human Rights Committee**

**4 March to 28 March 2024**

**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS  
TO THE UN HUMAN RIGHTS COMMITTEE IN VIEW OF THE  
COMMITTEE'S EXAMINATION OF INFORMATION SUBMITTED BY  
THE REPUBLIC OF TUNISIA ON THE IMPLEMENTATION OF THE  
COMMITTEE'S RECOMMENDATIONS UNDER ARTICLE 75 OF THE  
COMMITTEE'S RULES OF PROCEDURE**

Submitted on 12 December 2023

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## I. Introduction

1. On 3 and 4 March 2020, the Human Rights Committee (the Committee) examined the Republic of Tunisia's sixth periodic report under article 40 of the International Covenant on Civil and Political Rights (ICCPR). In advance of the Committee's review, the International Commission of Jurists (ICJ) made a submission pertaining to Tunisia's (a) Constitutional and legal framework; (b) implementation of transitional justice; and (c) legal framework on judicial independence and accountability.<sup>1</sup>
2. On 27 March 2020, the Committee adopted its Concluding observations on the sixth periodic report of Tunisia and requested the State party to provide follow-up information by 27 March 2022 on the implementation of its recommendations regarding the Constitutional Court, the state of emergency and counter-terrorism, and freedom of peaceful assembly and excessive use of force by the State's agents.<sup>2</sup> On 4 April 2022, the Committee received information from Tunisia on follow-up to the Committee's concluding observations on the above-mentioned concerns.<sup>3</sup> During the Committee's 140<sup>th</sup> session, from 4 to 28 March 2024, this information and Tunisia's implementation of the Committee's recommendations on the same issues will be reviewed.
3. In the context of the Committee's follow-up procedure, the ICJ wishes to bring to the Committee's attention its concerns pertaining to Tunisia's obligations under articles 2, 4, 14, 19 and 25 of the ICCPR as they relate to the Constitutional Court and the abuse of the counter-terrorism legislation to arbitrarily prosecute perceived political dissidents, including members of the judiciary.

## II. The Constitutional Court

4. In its 2020 Concluding observations, the Committee expressed concern at Tunisia's delays in formally establishing the Constitutional Court. Under the 2014 Constitution – that is, the constitutional text in force at the time of the Committee's review of Tunisia's sixth periodic report – the Court was mandated to ensure that the actions of public authorities were in line with the Constitution and was responsible for reviewing and ruling on the constitutionality of, *inter alia*, draft laws and presidential declarations relating to "exceptional circumstances".
4. ICJ apprised the Committee of the delays in the establishment of the Constitutional Court in its 2020 submission, which stemmed largely from the inability of the Assembly of Peoples' Representatives (APR) to reach a two-thirds majority for the nomination of its members to the Constitutional Court.<sup>4</sup>
5. In its submission of follow-up information to the Committee of April 2022, Tunisia noted its efforts to facilitate the establishment of the Constitutional Court through the amendment of Organic Law No. 50 of 2015. The ICJ notes, however, that in April 2021, despite parliamentary consensus on the amendment to the Organic Law, the President

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<sup>1</sup> ICJ, Submission of the International Commission of Jurists to the UN Human Rights Committee in view of the Committee's examination of Tunisia's sixth periodic report under article 40 of the International Covenant on Civil and Political Rights, 3 February 2020, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1371&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1371&Lang=en).

<sup>2</sup> United Nations Human Rights Committee, UN Doc. CCPR/C/TUN/CO/6, para. 54, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2FTUN%2FCO%2F6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2FTUN%2FCO%2F6&Lang=en).

<sup>3</sup> United Nations Human Rights Committee, Information received from Tunisia on follow-up to the concluding observations on its sixth periodic report, 4 April 2022, available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhshMktQJn68GxqXTdAYdq%2FuxzvdQ2iI3zTm0LvdWWhYzMHc2%2BraKp5DTxq5eIpIs9CB7X%2FGrKBRE0NbD0zqUxKANpIcO5fkph3JsiWbXRdII>.

<sup>4</sup> Constitution of Tunisia 2014, article 148(5).

of Tunisia refused to promulgate such amendment on the legally dubious basis that the deadline for establishing the Court had passed.<sup>5</sup>

5. The failure to establish a constitutional court has facilitated a significant deterioration of the rule of law in Tunisia. With respect to this, on 25 July 2021, invoking article 80 of the 2014 Constitution on exceptional measures, the President declared himself the head of the executive branch and suspended the Parliament.<sup>6</sup> Based on the "state of exception", he adopted the following Decrees:
  - a. No. 69 of 26 July 2021, terminating the duties of the Head and members of Government;
  - b. No. 80 of 29 July 2021, suspending the Parliament and lifting the immunity of its members for one month, starting from 25 July 2021;
  - c. No. 109 of 24 August 2021, extending the exceptional measures on the suspension of the Parliament and lifting the immunity of its members until further notice;
  - d. No. 117 of 22 September 2021 on exceptional measures, suspending most of the 2014 Constitution, arrogating to himself full executive and legislative powers, including to rule and legislate by decree, and removing the Provisional Instance, which had been created pursuant to the 2014 Constitution to verify the constitutionality of draft laws until the establishment of a Constitutional Court; and
  - e. Nos. 137 and 138 of 11 October 2021, pertaining to the appointment of the Head and members of Government, respectively.
6. In the absence of the Constitutional Court, the President's actions proceeded without due scrutiny and eschewed any accountability. The Provisional Instance was only entrusted with the review of draft laws before promulgation and did not fulfil the other functions of a Constitutional Court, including the review of "exceptional circumstances" further to a declaration of a "state of exception" by the President. In any event, Decree 2021-117 issued by the President in September 2021 dissolved the Provisional Instance.
7. Further, while article 80 of the 2014 Constitution empowered the President of the Republic to take "any measures necessitated by the exceptional circumstances", if ever taken, such measures should have been adopted within the framework of substantive and formal conditions according to which the Constitutional Court – which, in any event was never established – would play a significant role pursuant to the 2014 Constitution. In the absence of a Constitutional Court, the President failed to meet the formal condition of informing the President of the Constitutional Court before taking any measures purportedly in response to such exceptional circumstances. Moreover, and considering the President's decision to suspend the Parliament, neither the Speaker of the APR nor 30 of its members could have requested the Constitutional Court to review substantively whether the circumstances remained "exceptional" after 30 days of the President having declaring them so. As a result, the purported exceptional nature of the circumstances invoked to justify the President taking such measures, and consequently their constitutionality, has never been verified. Having arrogated all legislative and executive powers to himself, the President had all the prerogatives to decide whether the circumstances remained "exceptional" and, consequently, to justify the prolongation of the measures he had adopted.

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<sup>5</sup> Inkyfada, Without a Constitutional Court "we have no defence against authoritarianism", 29 July 2021, available at: <https://inkyfada.com/en/2021/07/29/constitutinal-court-delay-kais-saied-tunisia/>.

<sup>6</sup> ICJ, Tunisia: President's power grab is an assault on the rule of law, 26 July 2021: <https://www.ici.org/tunisia-presidents-power-grab-is-an-assault-on-the-rule-of-law/>.

8. On 13 December 2021, the President announced a further suspension of the APR until 17 December 2022 and a referendum on a new constitution on 25 July 2022. Drafted in secret via a process devoid of legal basis that violated Tunisians' rights to participate in constitution-making, the new constitution was adopted on 25 July 2022 following a democratically flawed referendum, for which no participation threshold was provided, and in which just over a quarter of the eligible electorate cast their vote.<sup>7</sup>
9. Article 125 of the new Constitution reduces the composition of the Constitutional Court to a nine-judge bench. The nine judges are to be named by a presidential order, where the first third (i.e., three judges) are the most senior judges of the Cassation Court, the second third are the most senior judges of the High Administrative Court and the last third are the most senior members of the Financial Court.
10. In addition, the new Constitution weakens the powers of the Constitutional Court. Article 127 provides a list of the Constitutional Court's competencies in reviewing the constitutionality of, *inter alia*, draft constitutional amendments; draft laws; treaties; and laws referred to it by domestic courts.
11. Contrary to article 80 of the 2014 Constitution, under article 96 of the new Constitution, the Constitutional Court has no power or role in relation to the President of the Republic's declaration of a "state of exception". In particular, the President is no longer required to inform the president of the Constitutional Court ahead of such a declaration, and members of the APR are no longer entitled to apply to the Constitutional Court with a view to verifying whether or not the circumstances necessitating such a declaration remain valid. Conversely, to safeguard the rule of law and the indivisibility of all human rights, all measures adopted to address an emergency, including those taken pursuant to a declared "state of emergency" must be subject to judicial oversight and review.<sup>8</sup> In addition, affected persons must have the right to challenge the legality of these measures, including their conformity with national or international law through fair and effective judicial proceedings.
12. In September 2022, the African Court of Human and Peoples' Rights rendered a ruling that ordered Tunisia to repeal the decrees adopted pursuant to article 80 of the Constitution, to return to constitutional democracy within two years and to ensure the establishment and operation of an independent Constitutional Court within the same period.<sup>9</sup>
13. As of December 2023, the Constitutional Court, even in its fundamentally weakened form under the new constitution, has yet to be established. Consequently, Tunisia falls far short of meeting its following obligations under the ICCPR:
  - a. Article 2(3). By failing to establish a Constitutional Court, and by severely limiting the independence and powers of the Constitutional Court under the new Constitution – should one ever be established – Tunisia has failed to provide recourse to resolve disputes about the constitutionality of the exceptional decrees promulgated by the President, including by removing the power of the legislature to challenge the constitutionality of such decrees; and
  - b. Article 4(1) and (3). By failing to specify the nature of the public emergency that necessitates the suspension of the Constitution, and the corollary interference

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<sup>7</sup> ICJ, Fundamentally flawed: Tunisia's 2022 constitution-making process, June 2022, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2022/07/Tunisia-draft-constitution-question-and-answer-briefing-2022-ENG.pdf>.

<sup>8</sup> ICJ, Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, 2011, p. xvi-xvii, available at: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>.

<sup>9</sup> African Court of Human and Peoples' Rights, Application 017/2021, *Brahim Ben Mohammed Ben Brahim Belguith v. Republic of Tunisia*, 22 September 2022, available at: <https://www.african-court.org/cpmt/details-case/0172021>.

with ICCPR rights, and by failing to notify the derogation to these rights, Tunisia has failed to meet its obligations to prove and ensure that the measures are "strictly required by the exigencies of the situation".

**Considering the above concerns, the Committee should recommend that Tunisia:**

- **Re-establish a democratic constitutional order;**
- **Enshrine guarantees for the independence of the Constitutional Court, including the independence of its members, as well as an independent appointment procedure for the selection of its members;**
- **Clearly and unambiguously recognize the primacy of the Constitution over all other aspects of domestic law, and ensure that domestic laws be adopted and implemented in full compliance with the Constitution;**
- **Ensure that the Constitution and domestic laws comply and be consistent with Tunisia's obligations under international law in spirit and letter;**
- **Fully embed the rule of law in the framework for the functioning of the State, including by ensuring the separation of powers, attribution of competences and adequate checks and balances between the legislature, the executive and the judiciary, as independent branches of the State and not as mere functions of the State;**
- **Clearly specify that presidential immunity cannot be used to shield the President of the Republic from accountability in case of serious violations of the Constitution, including interference in the legislature and/or the judiciary; and**
- **Ensure the Constitution's "state of exception" provisions comply with Tunisia's obligations under international law, including by incorporating all aspects of article 4 of the ICCPR, as well as the additional non-derogable rights mentioned by the UN Human Rights Committee in its General Comment 29.**

### III. The abuse of counter-terrorism legislation to arbitrarily prosecute perceived political dissidents, including members of the judiciary

14. In its 2020 Concluding observations, the Committee expressed concern regarding “the improper use of counter-terrorism legislation to criminalize conduct linked to the exercise of the right to freedom of expression and peaceful assembly.”<sup>10</sup> Since the declaration of a state of exception, the ICJ has documented a growing number of arbitrary prosecutions of members of the judiciary and perceived political dissidents under counter-terrorism legislation.

#### *Prosecution of members of the judiciary*

15. In the aftermath of the exceptional measures announced on 25 July 2021, the President announced steps to purportedly “cleanse” and “purify” the judiciary<sup>11</sup> and attacked the High Judicial Council (HJC) – a constitutional independent body composed of “magistrates”<sup>12</sup> with a mandate to oversee the organization of the judiciary – and its members,<sup>13</sup> limiting certain of their financial benefits.<sup>14</sup> On 12 February 2022, the President issued Decree-Law 2022-11, declaring the HJC’s dissolution and replacing it with a provisional body, the “Temporary HJC”, thereby significantly eroding the independence of the judiciary.
16. On 1 June 2022, the President issued Decree-Law 2022-35, granting himself the power to unilaterally and summarily dismiss magistrates and, on the same day, ordered the dismissal of 57 magistrates – namely, 34 judges and 23 prosecutors – based on vague accusations of “moral and financial corruption” and “obstruction of judicial proceedings”.<sup>15</sup> Pursuant to Decree-Law 2022-35, criminal proceedings are automatically instigated against dismissed magistrates.
17. More than half of the criminal cases against the dismissed magistrates examined by the ICJ, were based, among others, on “terrorism-related” charges, such as “establishing a terrorist enterprise” and “failure to report on terrorist crimes” under the “counter-terrorism” Law 2015-26 of 7 August 2015 (hereinafter the “counter-terrorism” Law).<sup>16</sup> These criminal investigations were instigated after their dismissal on the sole basis of police or ministerial reports about the refusal of the magistrates concerned to open investigations or issue search warrants in “terrorism-related” cases or, in one case, about alleged collusion with political parties in “terrorism” cases, without any supporting evidence. In another case, similar accusations were based on a letter of denunciation relying on social media posts critical of the President following his power grab on 25 July 2021. Another judge is being prosecuted and detained on similar charges in relation to

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<sup>10</sup> United Nations Human Rights Committee, UN Doc. CCPR/C/TUN/CO/6, supra note 2, para. 31(b).

<sup>11</sup> Meeting between President Kais Saied and the President of the HJC on 4 October 2021, available at: [https://www.youtube.com/watch?v=aASeWtHj25Q&ab\\_channel=WataniaReplay](https://www.youtube.com/watch?v=aASeWtHj25Q&ab_channel=WataniaReplay). See also: Meeting between President Kais Saied and members of the HJC on 6 December 2021, available at: <https://www.facebook.com/watch/?v=897148007667462>.

<sup>12</sup> 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.

<sup>13</sup> Tunisie: Kais Saïed fait le procès de la justice, 8 December 2021, available at: <https://www.jeuneafrique.com/1278365/politique/tunisie-kais-saied-fait-le-proces-de-la-justice/> (French only).

<sup>14</sup> Decree-Law No. 2022-4 of 19 January 2022, amending Organic Law No. 2016-34 of 28 April 2016 on the High Judicial Council. <https://legislation-securite.tn/law/105166>

<sup>15</sup> Order 2022-516 of 1 June 2022, based on Decree-Law 2022-35 of 1 June 2022 amending Decree-Law 2022-11.

<sup>16</sup> 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.

decisions he had made while investigating the killing of a political leader, in particular, with respect to issuing arrest warrants and hearing witnesses.<sup>17</sup>

18. The ICJ is deeply concerned that in these “terrorism” cases, the dismissed magistrates are subjected to criminal proceedings solely for the legitimate 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.
19. 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. 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.

*Prosecution of perceived political dissidents*

20. In addition to the arbitrary prosecution of magistrates, since February 2023, the Tunisian authorities have further abusively relied on counter-terrorism legislation to arrest and detain 17 political activists, businessmen, journalists and lawyers, on spurious charges of conspiracy against the State.<sup>18</sup> The investigations fall under, among other legal provisions, dozens of articles of the “counter-terrorism” Law, including article 32, which provides for up to 20 years’ imprisonment upon conviction for “forming a terrorist organisation or conspiracy”. Having reviewed one of these criminal cases, Amnesty International has deemed these accusations unfounded and the continued detention of the persons charged arbitrary.<sup>19</sup>
21. The ICJ is deeply concerned that Tunisia is abusing its counter-terrorism legislation to arbitrarily prosecute and detain perceived political opponents and lawyers, as part of its crackdown on political opposition, and against members of the judiciary, part and parcel of its ongoing erosion of judicial independence. In so doing, Tunisia has contravened the following obligations under the ICCPR:
  - a. Article 9(1). By arbitrarily detaining perceived political opponents, lawyers or judges under counter-terrorism provisions without reliable evidence, Tunisia is unlawfully interfering with their right to liberty.
  - b. Article 14(1). Through interference in the appointment, career, disciplining and dismissal of judges, prosecutors and HJC members, the President has undermined the independence and impartiality of tribunals presiding over criminal investigations and prosecutions, including with respect to counter-terrorism proceedings against perceived political opponents and members of the judiciary; and

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<sup>17</sup> For more details see ICJ, Attacks on Judges and Prosecutors in Tunisia: Arbitrary dismissals and prosecutions, 12 December 2023, available at: <https://www.icj.org/tunisia-authorities-must-end-attacks-on-judges-and-prosecutors/>.

<sup>18</sup> See Inkyfada, “Conspiracy Against State Security”: Empty Files to Eliminate Opposition, 24 March 2023, available at: <https://inkyfada.com/en/2023/03/24/conspiracy-state-security-opposition-tunisia>. In a statement issued on 14 February 2023, the UN High Commissioner for Human Rights expressed concern over “the deepening crackdown against perceived political opponents.” See OHCHR, Arrest of perceived political opponents and civil society in Tunisia, 14 February 2023, available at: <https://www.ohchr.org/en/press-briefing-notes/2023/02/arrest-perceived-political-opponents-and-civil-society-tunisia>.

<sup>19</sup> See, Amnesty International, Tunisia: Drop trumped-up charges against arbitrarily detained political dissidents, 10 October 2023: <https://www.amnesty.org/en/latest/news/2023/10/tunisia-drop-trumped-up-charges-against-arbitrarily-detained-political-dissidents/>.



- c. Article 19 (1) and (3). By arbitrarily investigating and prosecuting members of the judiciary, political opponents and lawyers under counter-terrorism provisions, Tunisia is unlawfully interfering with their right to express their opinions both in their professional and personal capacity.

**Considering the above concerns, the Committee should recommend that Tunisia:**

- **Revoke all presidential decrees that undermine the independence of the judiciary, including Decree-Laws 2022-11 and 35;**
- **Halt attacks on the judiciary as an institution and against individual judges, and ensure that judges be able to act independently and impartially in defence of the rule of law, the separation of powers and human rights;**
- **Stop abusing “counter-terrorism” legislation for the purpose of arbitrarily prosecuting and detaining dissidents or independent judges and, in particular, drop all charges against anyone being prosecuted for the legitimate exercise of their freedom of expression and provide reparation for the harm suffered as a result of such arbitrary prosecution and, as applicable, arbitrary detention.**