

## Penal code, article 121(3)

The distribution, putting up for sale, public display, possession with the intent to distribute, sell or display for propaganda purposes, of tracts...that can harm public order or good morals, is prohibited.

Any infraction...can bring about, in addition to immediate confiscation, a prison term of six months to five years and a fine of 120 to 1200 dinars.

الفصل 121(3) من القانون الجنائي... يجزر توزيع المنشور... التي من شأنها تعكير صفو النظام العام أو النيل من الأخلاق الحميدة وكذلك بيعها وعرضها على العموم... كما نية ترويجها أو بيعها أو عرضها لغرض دعائي... وكل مخالفة يمكن أن يترتب عنه زيادة عن الحد الأقصى من عقاب المسجون من 6 أشهر إلى 5 أعوام وبخطية من 120 ديناراً إلى 1.200 ديناراً.



**Mohamed Abbou**, imprisoned by the Ben Ali government in 2005 pursuant to article 121(3)



**Samir Feriani**, detained by the interim government in 2011 pursuant to article 121(3)

TUNISIA

# Tunisia's Repressive Laws

The Reform Agenda

HUMAN  
RIGHTS  
WATCH



# **Tunisia's Repressive Laws**

## The Reform Agenda

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# Tunisia’s Repressive Laws

## The Reform Agenda

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# Introduction

Now that Tunisia's interim governing institutions have adopted laws to oversee the election of a constituent assembly, scheduled for October 23, 2011, they have begun the task of reforming the many laws that are incompatible with a democratic and pluralistic society that respects its citizens' basic human rights.

Although the interim government suspended Tunisia's 1959 constitution, pending adoption of a new constitution to be drafted by the constituent assembly, the country's existing legal codes and decrees remain in effect—even if the interim government has not been enforcing its more repressive provisions with the same zeal as did the government of President Zine el-Abidine Ben Ali before his ouster on January 14, 2011.

During his 23 years in power, Ben Ali and his government used these laws to stifle civil society, diminish judicial independence, limit political participation, and shield the president from accountability for any legal trespass, no matter how grave. In particular, the laws punished citizens for expressing views critical of the government and for addressing other subjects deemed improper for public debate, with provisions that criminalized insulting or defaming public officials, harming state interests or public morals, or encouraging others to violate the law. The laws also limited the ability of Tunisians to express and access dissenting viewpoints, form independent associations or political parties, compete meaningfully for political office, and assemble in order to protest against the government and its policies.

In case after case, human rights activists, lawyers, writers, journalists, and political opposition members endured imprisonment and other sanctions on the grounds they had violated these stifling laws, giving a veneer of legality to Ben Ali government's efforts to maintain authoritarian control.

These provisions—which are spread across various laws, including the Press Code and Penal Code and laws on associations, assemblies, and political parties, and the counter-terrorism law—must be reformed or revoked to ensure the future of civil liberties in Tunisia. Tunisians should not have to rely on the good will of authorities not to enforce these onerous laws, and must know that the law fully protects all their rights, with no lurking clauses that may be used against them should the political winds shift. The laws must also be written in such a way so as to minimize the possibility of judges applying them in a

manner prejudicial to the enjoyment of human rights. At the same time judges must apply all laws in a way consistent with Tunisia's human rights obligations.

The High Commission for Protecting the Revolution, Political Reform and Democratic Transition has been debating draft laws to replace the laws on political parties, on associations, and on the press, all discussed below in this report and containing substantial advances in terms of human rights over existing laws, although there remains room for further improvement.

The High Commission is an ad hoc body formed during the transitional period that has served as a kind of consultative assembly, debating and approving legislation during a period when Tunisia's parliament has been dissolved and the constitution suspended. The acting president has signed into law some of the approved legislation.

The Decree law on associations and the decree law on political parties were both promulgated by the interim President on the September 24.

The High Commission voted to approve the draft press law on September 23 which now awaits promulgation before it takes effect.

This report presents 10 priority areas for reforming domestic legislation that compromises the rights of Tunisians. It focuses on laws that are incompatible with enjoyment of the rights affirmed in the international treaties that Tunisia has ratified, including the International Covenant on Civil and Political Rights (ICCPR), which Tunisia ratified in 1969, and the African Charter on Human and Peoples' Rights, to which it acceded in 1983.<sup>1</sup>

This report does not include all of the harsh laws that comprise Tunisia's repressive legal arsenal; nor does it cover all provisions that need to be harmonized with international human rights law.

Moreover, while the focus of this report is repressive laws, they were only one of the means by which President Ben Ali curtailed rights and punished nonviolent dissent and criticism. This report does not address two other pillars of repression under Ben Ali: the government's non-enforcement of good laws and a justice system that issued politically-driven verdicts after unfair trials.

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<sup>1</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

For example, even though in 1999 Tunisia adopted article 101*bis* of the Penal Code defining and criminalizing acts of torture by public servants, security forces continued to torture persons with impunity during interrogations.<sup>2</sup> Even though arresting officers are obliged to inform the family when placing a suspect in *garde à vue* detention, they routinely ignored this legal requirement, effectively turning this form of arrest into a form of abduction.

Another part of Tunisia's repressive arsenal has been a justice system that lacks independence and has convicted persons after unfair trials, even though—on paper—the courts were independent (article 65 of the constitution), and the Code of Penal Procedure grants defendants the rights they need to mount an adequate defense.

In addition, even though Tunisia's Constitution—which was suspended in March 2011—affirmed many basic rights, its broad wording provided qualifications and exceptions to these rights. For example, article 8 states: "Freedom of opinion, expression, press, publication, assembly and association are guaranteed and exercised according to the conditions set forth by the law." Article 10 states: "Every citizen has the right to move about freely within Tunisian territory and to leave it, and to determine his place of residence within the limits determined by the law."

Revising the country's constitution will provide the chance to revise and omit language that qualifies basic rights. However, doing so is not enough to overcome the laws and regulations that restrict free speech and association.

Although enforcement of the repressive laws has slackened since President Ben Ali left the country on January 14, only suppressing or revising them can create legal guarantees for a vigorous, pluralistic political life in which Tunisians can freely debate, assemble, and associate with one another, peacefully advance their views, assemble and organize political parties, seek representation, and find a voice in government and its affairs.

Tunisia's current government, although transitional, remains bound by the country's international treaty obligations, which require it to ensure that the domestic laws comply with international standards, and to amend or abolish laws that do not; as do all state officials, including the judiciary.

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<sup>2</sup> Penal Code, online in French at <http://www.jurisitetunisie.com/tunisie/codes/cp/cp1005.htm> (accessed August 19, 2011).

## Recommendations to Tunisian Authorities

Make the protection of human rights a cardinal principle of the Constitution by including in the text:

1. an affirmation that all treaties ratified by Tunisia, customary international law, and the general rules of international law have the force of law; and that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples' Rights have a force that is higher than domestic law.
2. an affirmation of the principle of equality among all persons and a prohibition of discrimination on all of the grounds provided in ICCPR article 26, which lists prohibited grounds for discrimination to include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; specify that "other status" shall include pregnancy, marital status, ethnic origin, sexual orientation, age, disability, conscience, belief, culture, and language.

Make the following 10 areas among the priorities when reforming legislation to better protect the rights of Tunisians:

### 1. Protect Freedom of Expression

- a. Eliminate criminal penalties in the Penal Code and Press Code for speech that:
  - i. "Defames," "insults," or "offends" other persons or state institutions or religions;
  - ii. Is deemed likely to harm "the public order" or "Tunisia's reputation";
  - iii. Is deemed to incite hatred or religious extremism.
- b. Narrow the unlimited discretion the minister of interior enjoys in banning the importation of foreign publications, and the minister's discretion to ban any publication, imported or not, that harms "the public order" or "good morals." Require that any such ban be based on the minister proving clear harm and gaining court approval, or else be subject to court appeal.

## **2. Protect Privacy and Freedom of Expression Online**

Revise the Internet Decree (ministry of communications decree of March 22, 1997 “Approving Specifications for Setting Up and Operating Value-Added Internet Telecommunications Services”), one of the main laws governing the internet’s use. Establish the basic aim of this law or one that replaces it to be protecting freedom of expression; do not hold service providers responsible for all content posted online, nor require them to disclose to authorities information about internet users except in narrowly defined circumstances, such as when a court orders the provision of such information because it is deemed likely to assist the investigation of a serious and recognizable crime.

## **3. Protect Freedom of Association**

- a. Revise the Law on Associations (Law no. 59-154 of November 7, 1959, as subsequently revised) to ensure that:
  - Criteria that authorities can use to refuse recognition of new associations or ban existing ones are narrow and legitimate;
  - Refusals are subject to appeal.
- b. Revise laws to eliminate fines and prison terms for conducting peaceful, non-criminal activities on behalf of unregistered (or “unauthorized”) associations, including membership in them, holding meetings, or collecting funds.
- c. Abolish laws that interfere with the autonomy of certain types of independent associations by requiring them to admit any person as a member who pledges to subscribe to their principles and decisions.

## **4. Protect the Freedom to Form Political Parties**

Abolish the overly broad provision in the Political Parties law that prohibits any party that “fundamentally bases its principles, activities, and programs on a religion, language, race, sex, or region.”

## **5. Protect Freedom of Assembly**

Revise the main law on public assemblies (Law no. 69-4 of January 24, 1969, as subsequently revised) to limit the discretion that authorities have to prohibit public gatherings. This discretion should not exceed strict and narrowly defined criteria that the

International Covenant on Civil and Political Rights (ICCPR) recognizes. Moreover, the law should require that authorities provide clear and specific reasons for prohibiting or restricting a gathering, and allow event organizers to mount a timely and effective appeal.

## **6. Protect Freedom of Movement**

Eliminate the provision of the Law on Passports (Law no. 75-40 of May 14, 1975, as amended by Law no. 98-77 of November 2, 1998) that allows authorities to deny passports to persons for “reasons of public order and security or if there is a danger of harming Tunisia’s good reputation.”

## **7. Protect the Right of Citizens to Run for Public Office and Choose Candidates**

Ensure that any legal requirement for becoming a presidential candidate is not in practice discriminatory or unduly onerous. The requirement under the existing law (Law no. 69-25 of April 8, 1969) that presidential candidates must obtain exclusive endorsements from 30 parliamentary deputies or presidents of municipal councils was unduly onerous during the Ben Ali and Habib Bourguiba presidencies because it was almost impossible for opposition candidates to meet it when the ruling party dominated the national legislature and elected municipal councils.

## **8. Enhance Judicial Independence**

Revise the Law on the Magistrature to eliminate the control that the executive branch and its appointees effectively exercise over the High Council of the Magistrature, and especially over decisions on promoting and reassigning judges.

## **9. Prevent Abuses under the Guise of Fighting Terrorism**

Eliminate the 2003 Law on Terrorism, or revise it by:

1. Narrowing its overly broad definition of a “terrorist” offense, so that a prerequisite condition be that the offense involves the intention of taking hostages or of using deadly or otherwise serious physical violence against a population, for the purpose of provoking a state of terror, intimidating a population, or compelling a government or international organization to do or abstain from doing any act;
2. Narrowing its broad definitions of “incitement to terrorism” and “membership in a terrorist organization”;

3. Eliminating the many provisions that compromise the right of defendants charged with terrorist offenses to mount an adequate defense, such as:
4. Articles that permit, broadly rather than exceptionally, witnesses to testify without being physically present before the defendants, or their identities being disclosed to the defendants; and
5. Articles concerning confidentiality that do not recognize the special status of lawyers vis-à-vis their clients and do not exempt them from criminal penalties imposed on persons who know of terrorist acts as defined by the law and who fail to report them to authorities.

## **10. Exclude International Crimes from any Presidential Immunity Provisions**

In order to prevent impunity for officials responsible for grave human rights abuses, legislators should revise the provision in the last constitution that granted the president immunity for life “for all acts executed as part of the office.” If there is to be an immunity clause, it is best placed in domestic law rather than in the constitution. Wherever it is placed, any immunity clause that protects the president or other public officials should explicitly exclude international crimes, including torture and crimes against humanity.

# REPRESSIVE LAWS: TEN AREAS TO REFORM

## 1. Decriminalize Peaceful Expression

In contrast to the narrow limits on speech restrictions that international law permits, Tunisia's penal and press codes contain broadly-worded articles that provide prison terms of up to five years and fines for various types of peaceful speech, notably speech deemed defamatory toward individuals but also toward state institutions and speech deemed liable to disturb the public order or harm Tunisia's image.<sup>3</sup>

The High Commission for Protecting the Revolution, Political Reform and the Democratic Transition approved on September 23 a draft press code that had not been promulgated as this report went to press.

The draft code contains a number of improvements over the current press code, including eliminating prison terms for nearly all speech offenses. Meanwhile, the penal code, which provides prison terms for certain speech offenses, has yet to be amended. The draft press code maintains prison terms for certain types of incitement: inciting others to commit robbery or violent crimes (article 50) and "calling for hatred between the races, religions, or members of the population by inciting to discrimination, using hostile means or violence, or publishing ideas based on racial discrimination, religious extremism, or on regional or tribal chauvinism" (article 51). Offenders would face imprisonment of one to three years and a fine.

The draft code preserves defamation as a criminal offense, although it eliminates prison terms for defamation while preserving fines, as a punishment, of up to 10,000 dinars (US \$7,000). The draft code eliminates the offense of defaming state institutions, religions and religious groups. It does away with the stiffer penalties that article 52 of the existing code imposes for defamation when the person being defamed is a public official or a diplomat or official of a foreign government. It completely eliminates the crime of "offending" the president of the republic (article 48), which is currently punishable by one to five years in prison and a fine of 1,000 to 2,000 dinars (\$700 to \$1,400).

The draft press code, as approved on September 23, does not eliminate the offense of distributing "false information," a concept that the Ben Ali government used to prosecute numerous dissidents and human rights activists. But the code does remove the minister of

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<sup>3</sup> Press Code, Law 1975-32 published in the Official Journal no. 29 of April 28, 1975, online in French at <http://www.jurisetatunisie.com/tunisie/codes/cpresse/menu.html> (accessed August 19, 2011).

interior's unlimited discretion to ban the importation of foreign publications, found in article 25 of the current law.

The International Covenant on Civil and Political Rights (ICCPR) guarantees freedom of expression in article 19, which states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a. For respect of the rights or reputations of others;
  - b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20 requires that states prohibit “propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

The UN Human Rights Committee, the treaty body that is an authoritative interpreter of state duties under the ICCPR and that issues general comments periodically to summarize the interpretation of particular articles, wrote:

21....[W]hen a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself....

22. Paragraph 3 [of Article 19] lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3....  
25 .... A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient

guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not....

30....It is not compatible with paragraph 3, for instance, to invoke [national security] to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information....

34. Restrictions must not be overly broad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected....The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.<sup>4</sup>

## Defamation Laws

Tunisia should amend its defamation laws to conform with international norms on freedom of expression in four broad ways:

1. Depenalizing defamation, making it a civil rather than a criminal matter;
2. Recognizing that public figures, while entitled to protection from defamation, should be required to tolerate a greater degree of criticism than private citizens;
3. Eliminating state institutions as the potential object of defamation actions; and
4. Eliminating religions and religious groups as potential objects of defamation actions.

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<sup>4</sup> UN Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, July 21, 2011, advanced unedited version, CCPR/C/GC/34, <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed August 31, 2011), paras. 21-34. See also the Camden Principles on Freedom of Expression and Equality, which sets forth a set of principles to guide the limitations that governments may legitimately place on expression, in light of their obligation also to guarantee equality. The Camden Principles were prepared by the nongovernmental association Article 19 and represent, in Article 19’s words, “a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognized by the community of nations.” <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (accessed August 31, 2011).

The Tunisian Penal Code defines defamation in article 245 as “any allegation or public imputation of a fact that harms the honor or the esteem of a person or official body.” In article 247, the code provides a penalty of six months in prison and a fine of 240 dinars (US\$168) for defaming an individual or state institution (*corps constitué*).

The Press Code defines defamation similarly in article 50 and stipulates a punishment of 16 days to six months imprisonment and/or a fine of between 120 and 1,200 dinars (\$84 and \$840) for defaming a person. Article 52 imposes a penalty of up to one year in prison and a fine of 1,200 dinars (\$840) when the person defamed is a government member, a parliamentary deputy, a public servant, an agent of the public authorities, or a citizen when acting on a public mission or when being defamed in connection with his or her official function or capacity.

### *Depenalize Defamation*

In a 2002 joint declaration, three international mandates on freedom of expression stated, “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”<sup>5</sup>

Redress for defamation should consist of damages, such as reasonable monetary compensation, rather than deprivation of liberty.

The UN Human Rights Committee wrote:

47. Defamation laws must be crafted with care to ensure that they... do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognised as a defence.... States parties should consider the decriminalisation of defamation and, in any case, the application of the

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<sup>5</sup> Joint declaration of December 10, 2002 by the UN special rapporteur on freedom of opinion and expression, the Office for Security and Co-operation in Europe representative on freedom of the media, and the Organization of American States special rapporteur on freedom of expression, <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=87&IID=1> (accessed August 31, 2011).

criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.<sup>6</sup>

### **Civil Defamation Laws Can Still Be Improperly Restrictive of Free Expression**

Countries that have civil defamation statutes must still take care that these do not improperly restrict freedom of expression. In 2000 the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression outlined a list of minimum requirements that civil defamation laws must satisfy in order to comply with article 19 of the ICCPR. They include:

- Sanctions for defamation should not be so onerous as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive, and impart information... and damage awards should be strictly proportionate to the actual harm caused.
- Government bodies and public authorities should not be able to bring defamation suits.
- Defamation laws should reflect the importance of open debate about matters of public interest, and the principle that public figures must tolerate a greater degree of criticism than private citizens.
- Where publications relate to matters of public interest, it is excessive to require truth in order to avoid liability for defamation; instead, it should be sufficient if the author has made reasonable efforts to ascertain the truth.
- Where opinions are concerned, they should only qualify as defamatory if they are unreasonable, and defendants should never be required to prove the truth of opinions or value statements.
- The burden of proof of all elements should be on the person claiming to have been defamed rather than on the defendant.
- A range of remedies should be available in addition to damage awards, including apology and/or correction.<sup>7</sup>

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<sup>6</sup> UN Human Rights Committee, General Comment No. 34, para. 47.

### *A Higher Threshold for the Defamation of Public Officials*

It is a norm of international law that while officials should be entitled to the protection of laws on defamation, they should be required to tolerate a greater degree of criticism than ordinary citizens. This distinction serves the public interest by making it harder to bring a case against persons for speaking critically of public officials and political figures, thereby encouraging debate about issues of governance and common concern.

The UN Human Rights Committee observed:

[I]n circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, *lese majeste*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration....<sup>8</sup>

In 1986, the European Court of Human Rights ruled:

The limits of acceptable criticism are... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) [of the European Convention on Human Rights] enables the reputation of others—that is to say, of all individuals—to be protected, and this protection

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<sup>7</sup> United Nations Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36, UN Doc. E/CN.4/2000/63, January 18, 2000, para. 52.

<sup>8</sup> United Nations Human Rights Committee, General Comment No. 34, para. 38.

extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.<sup>9</sup>

In a later case, the court held that this principle applies not just to politicians but to public officials: “Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.”<sup>10</sup>

Tunisian law not only fails to set a higher threshold of proof for public officials than for private individuals wishing to prove defamation, it imposes penalties that are harsher when the person defamed is a public official as opposed to a private individual, as shown by comparing the defamation provisions of articles 48, 52, and 53, a disparity that can only have a chilling effect on political speech.

### *Eliminate the Concept of Defamation of State Institutions*

Another international norm intended to protect robust freedom of expression—as relates to issues of governance and public interest—is that state bodies and institutions should not be able to file defamation suits, or have such suits filed on their behalf.

In his April 20, 2010 report, the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, stated:

[C]riminal defamation laws may not be used to protect abstract or subjective notions or concepts, such as the State, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines. This is consistent with the view, sustained by the Special Rapporteur, that international human rights law protects individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism.<sup>11</sup>

Human rights experts have noted the danger that giving public bodies the right to sue their critics for defamation poses for freedom of expression. The UN Human Rights

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<sup>9</sup> Lingens v. Austria, 8 July 1986, Application No. 9815/82, para. 42, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695400&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (accessed August 8, 2011).

<sup>10</sup> Thoma v. Luxembourg, 29 March 2001, Application No. 38432/97, para. 47, [http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le\\_europeo/thoma%20vs%20luxembourg%202001.htm](http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/thoma%20vs%20luxembourg%202001.htm) (accessed August 8, 2011).

<sup>11</sup> United Nations Commission on Human Rights, Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/14/23, April 10, 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf> (accessed August 17, 2011), paras. 84 and 85.

Committee, the treaty body that is the authoritative interpreter of state duties under the ICCPR, stated in its observations on the periodic report of Mexico on its compliance with the ICCPR that it “deplores the existence of the offence of ‘defamation of the state,’” and called for its abolition.<sup>12</sup>

The Johannesburg Principles on National Security, Freedom of Expression, and Access to Information, a set of principles that many experts agree upon and is widely used, states in Principle 7(b):

No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.<sup>13</sup>

Tunisian law provides prison terms for defaming various state institutions (*corps constitués*). This offense is found in both the Press Code (article 51) and the Penal Code (articles 245 and 247). The former lists the state entities that are covered—the courts, army, air force, navy, state institutions, and the public administration—the defamation of which entails a penalty of one to three years in prison and a fine of 120 to 1200 dinars (\$84 to \$840).

Until 2001 Tunisia had a law criminalizing defamation of “the public order,” which was used to convict dissidents (see example below).

### *Eliminate the Concept of Defamation of Religions*

The Press Code also penalizes defamation against religions or members of a race or religion in articles 48 and 53. Article 48 provides a prison term of between three months and two years, and a fine for libeling a religion “whose practice is permitted,” although what it means to “libel” a religion remains unclear. This provision not only infringes upon freedom of expression, it discriminates among religions by penalizing defamation of only those religions whose practice is permitted in Tunisia. (The Ben Ali government permitted Christian and Jewish worship in churches and synagogues; it considered the Bahai faith as heretical, although it allowed adherents to worship in private.) Article 53 criminalizes “defamation” when it is directed at a “group of persons who belong, by virtue of their

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<sup>12</sup> UN International Covenant on Civil and Political Rights, Concluding Observations of the Human Rights Committee: Mexico, UN Document CCPR/C/79/Add. 109, 27 July 1999, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.109.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.109.En?Opendocument) (accessed August 17, 2011), para.14.

<sup>13</sup> The Johannesburg Principles, <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> (accessed June 23, 2011).

origin, to a specific race or a religion” and when the purpose of said “defamation” is “to incite hatred.” The penalty is a maximum of one year in prison and a fine of 120 to 1,200 dinars (\$84 to \$840).

The only permitted limitations on freedom of expression in the ICCPR are found in articles 19 and 20, as discussed above. Neither refers to defamation of religion as a permitted limit on free speech.

The UN Human Rights Committee, in its general comment on Article 19 of the ICCPR, wrote:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>14</sup>

As noted above, the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression stated that criminal defamation laws should not be used to protect abstract or subjective notions or concepts such as religions. The special rapporteur wrote that, in his point of view, “it is conceptually incorrect to present the issue of ‘defamation of religions’ in an abstract manner as a conflict between the right to freedom of religion and belief, and the right to freedom of opinion and expression.”<sup>15</sup> He invoked the joint declaration issued by the four international mechanisms for promoting freedom of expression in 2008: “The concept of ‘defamation of religions’ does not accord with international standards regarding defamation, which refer to the protection of the reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.”<sup>16</sup>

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<sup>14</sup> United Nations Human Rights Committee, General Comment No. 34, para 48.

<sup>15</sup> Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, paras. 84 and 85.

<sup>16</sup> International Mechanisms for Promoting Freedom of Expression, “Joint declaration on defamation of religions, and anti-terrorism and anti-extremism legislation,” December 9, 2008, <http://www.article19.org/data/files/pdfs/other/joint-declaration-on-defamation-of-religions-and-anti-terrorism-and-anti-ext.pdf> (accessed September 3, 2011). The four mechanisms are the UN special rapporteur on freedom of opinion and expression, the Office for Security and Co-operation in Europe Representative on freedom of the media, the Organization of American States special rapporteur on freedom of expression and the African Commission on Human and Peoples’ Rights special rapporteur on freedom of expression and access to information.

The UN special rapporteur on freedom of religion or belief and the special rapporteur on contemporary forms of racism, xenophobia and related intolerance presented the following joint declaration at a seminar held by the Office of the High Commissioner on Human Rights in October 2008:

Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one's religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.<sup>17</sup>

#### **Examples of Criminal Defamation Prosecutions during the Ben Ali Presidency**

In January 1991 the Tunis Military Court sentenced human rights lawyer Mohamed Nouri to six months in prison for “defaming the judiciary” due to an article he published in *al-Fajr*, an organ of an-Nahdha—Tunisia’s largest opposition movement—in October 1990. The article was entitled “When will military courts, which function as special courts, be abolished?” The same court also sentenced Hamadi Jebali, *al-Fajr*’s editor-in-chief, to one year in prison for publishing the article, which argued that military courts were unconstitutional and that the judges in those tribunals lacked independence and professional qualifications.

In 1999 a Tunisian court tried 18 members of the Tunisian Communist Workers Party (PCOT) for defaming both the judiciary and “the public order,” under articles 50 and 51 of the Press Code. The investigating judge and the prosecutor relied on articles in the October 1996 edition of *al-Badil*, the banned PCOT newspaper, to support the defamation charges. These articles criticized the “submission of the national economy to imperialist states and institutions,” state policies based on “the oppression of the people,” and “unjust trials” in the country that involved the “fabrication of a drug case against a professor.” The defense claimed these criticisms were directed at policies and could not be seen as attacks on the individuals behind them, or on the institutions in question. The court convicted all defendants and sentenced them to prison terms of up to nine

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<sup>17</sup> Asma Jahangir, special rapporteur on freedom of religion and belief, and Doudou Diene, special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, “Conference Room Paper #4,” presented at the expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR): Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, Office of the High Commissioner for Human Rights (October 2-3, 2008).

years and three months for this and other charges, such as maintaining an association “that incites hatred.”<sup>1</sup> In 2001, two years after the trial, parliament modified article 51 to eliminate the offense of defaming “the public order.”

On June 26, 2001, authorities arrested Sihem Bensedrine, spokesperson of the National Council for Liberties in Tunisia, an unrecognized human rights organization, due to an interview she had given one week earlier to the London-based *Al-Moustaqilla* television station in which she accused a sitting judge by name of making remarks dismissive of the presumption of innocence for persons accused of committing offenses. Charged with defaming both the judge and the Tunisian judiciary, Bensedrine was held in pre-trial detention until her provisional release on August 11, 2001. The court never brought the case to trial.

## Speech Offenses Other Than Defamation in Tunisian Law

In addition to defamation, both the Press Code and Penal Code penalize other types of speech offenses deemed disrespectful toward others. Such laws violate the right to freedom of expression in that they are not grounded in any of the permissible restrictions on freedom that the ICCPR permits in its article 19(3). The ICCPR permits restrictions necessary “for respect of the rights or reputations of others.” Defamation laws, when properly composed, may meet this test. But laws that penalise “insult” or “giving offense” without linking this to the honor and dignity of the offended party may fail that test.

Provisions of Tunisian law that fail the test include articles 48, 54, 59, and 60 of the Press Code. Article 54 provides prison terms for “insults,” defined as “any offensive expression or term of contempt or invective that is not grounded in a precise fact.” The object of the insult can be either a person or a state institution, and when it is not preceded by a “provocation,” it is punishable by 16 days to three months in prison and a fine 120 to 1,200 dinars (\$84 to \$840).

Article 48 of the Press Code provides that “giving offense” (*l’offense au*) to the president of the republic is punishable by one to five years in prison and a fine of 1,000 to 2,000 dinars (\$700 to \$1,400). Thus, “giving offense” to the president incurs penalties heavier than penalties for defaming other parties.

Article 59 and 60 of the Press Code provide prison terms for giving offense to, respectively, officials of foreign governments and diplomats. Article 59 provides prison terms of three

months to one year, and/or a fine; article 60 provides prison terms of 16 days to one year and/or a fine.

Article 44 of the Press Code penalizes various categories of speech deemed to incite or provoke certain sentiments or behavior. While it is permissible under international norms to penalize speech that constitutes direct incitement to imminent acts of violence, the vaguely-worded provisions of this article permit the imprisonment of persons for speech that should be protected insofar as it does not contain direct and imminent incitement to violence. To meet that standard, the evidence must indicate that the speech could reasonably be expected to result in immediate violence.

Article 44 imposes two months to three years in prison and a fine of 1,000 to 2,000 dinars (\$700 to \$1,400) on a person who “directly incites hatred among races, religions, or populations; propagates views that support racial segregation or religious extremism; instigates the commission of infractions mentioned in article 48 [insulting the president of the Republic or a legally recognized religion]; or incites the population to disobey the laws of the country.”

Thus, a person whose words are deemed to have inspired another to insult the president, or who is credited with stoking “extreme” religious views—regardless of whether this leads to anyone inflicting harm on others or damaging property—can go to prison.

In the above-mentioned 1999 trial of members of the banned Tunisian Communist Workers Party, 13 of the defendants were convicted under article 44 of the Press Code on a charge of incitement to disobey the country’s laws. The court convicted them even though the prosecution failed to specify which laws the defendants were inciting the public to violate.<sup>18</sup>

### *Spreading “False” Information*

The government has punished many human rights activists under article 49 of the Press Code for “knowingly” distributing “false” news “that can disturb the public order.” The offense is punishable by two months to three years in prison and/or a fine of 100 to 2,000 dinars (\$70 to \$1,400).

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<sup>18</sup> Op cit., Human Rights Watch, “The Administration of Justice in Tunisia.”

In February 1998, a Tunis court of first instance sentenced Khemaïs Ksila, at the time a vice president of the Tunisian League for Human Rights, to three years in prison for defamation and knowingly disseminating “false information” that could disturb public order. The conviction stemmed from a communiqué he had issued on September 29, 1997, condemning the deterioration of human rights in Tunisia, and his own dismissal by authorities from the job he had held for more than 15 years at the national railroad authority. Ksila served two years in prison before his release.

Two years later, on December 30, 2000, a Tunis court convicted Moncef Marzouki, then spokesperson of the National Council for Liberties in Tunisia, of spreading “false information” after he gave a speech at a conference in Morocco in October that year in which he criticized Tunisian authorities for violating human rights, not allowing an independent judiciary, and mismanaging a government charity. The court gave him a four-month sentence. Marzouki refused to appeal the conviction but remained free as the prosecutor appealed the sentence’s “leniency.” Marzouki never served the sentence but fled to France because of constant harassment by authorities, which included their dismissing him from his post as professor of neurology and preventive medicine in July 2000.

It was not the first time that Marzouki had faced such charges. On March 24, 1994, authorities jailed him for spreading “false information” and “defaming” the judiciary after a Spanish daily quoted him questioning the judiciary’s independence. Marzouki maintained he had been misquoted by the newspaper, which later acknowledged a transcription error. Marzouki nevertheless spent four months in pre-trial detention—most likely to punish him for attempting a symbolic run in that year’s presidential election against Ben Ali, the incumbent. Marzouki had tried to run in order to demonstrate Tunisia’s lack of democracy (see below). He was never brought to trial on these charges.

In another case, two human rights activists, Mohamed Nouri and Mokhtar Yahiaoui, appeared before a Tunis investigating judge on August 8, 2003, on charges of disseminating “false information” with the aim of inspiring belief that a criminal act had been perpetrated by state agents.” The offending information came in a communiqué, dated April 28, 2003, that they co-signed on behalf of the International Association in Solidarity with Political Prisoners (AISPP), an unrecognized association. Nouri headed the organization at the time, and Yahiaoui was a member of its executive committee.

The government accused Yahiaoui and Nouri of having repeated unverified, false information about the death of a prisoner named Maher Osmani, a death that authorities maintain did not take place. Yahiaoui and Nouri were never tried, but the pending charge formed the basis for placing them under “judicial control,” a legal status that prevented them from traveling abroad for a period of time.

### ***Banning Foreign Publications***

The Press Code in article 25 empowers the interior minister to ban any foreign publication, be it a periodical or a book, “upon consulting with the secretary of state for information within the office of the prime minister.” The law gives unlimited discretion to the minister. It provides no criteria in terms of content, imagery, or origin that must be met before the minister may ban a publication from entering the country. Nor does it require that the interior ministry justify the ban.

In one of many examples, the government reportedly banned distribution of the October 29, 2009 issue of *The Economist* magazine for an article on Tunisia’s national elections titled: “One-man show: Another meaningless election.” It also banned *Le Monde Diplomatique*’s October 2001 issue, which contained an article about Tunisia entitled, “Can Fear Change Sides?”

### **Penalizing Speech Liable “To Cause Harm to Public Order or Public Morals”**

The Penal Code’s article 121<sup>ter</sup> makes it an offense to “distribute, offer for sale, publicly display, or possess, with the intent to distribute, sell, display for the purpose of propaganda, tracts, bulletins, and fliers, whether of foreign origin or not, that are liable to cause harm to the public order or public morals. Any infraction of this law can bring about the immediate seizure of the offending material and imprisonment for six months to five years, and a fine of 120 to 1,200 dinars (\$84 to \$840).

Penal Code article 121<sup>ter</sup> defines the offense as speech that might harm the public order, without the additional requirement found in article 49 of the Press Code that the offending speech contain information that is false, much less known to be false by the perpetrator. Also, under article 121<sup>ter</sup>, the government need not prove that harm occurred; only that it might occur.

On April 25, 2005, a Tunis court convicted lawyer Mohamed Abbou under article 121*ter* of harming public order, and also of defaming the judiciary, because of an article he published online on August 2004, comparing conditions in Tunisian prisons to those in the US-run Abu Ghraib detention facility in Iraq. (In Tunisia, prisons are administered by the justice ministry).

The court sentenced Abbou to 18 months on these charges. A different court convicted him the same day of trumped-up assault charges.<sup>19</sup> Abbou spent more than two years in prison before being released in a presidential pardon on July 24, 2007.

### ***Law Penalizing Contacts with Foreign Entities that Could Harm Tunisia's "Vital Interests"***

In July 2010 parliament passed an amendment to the Penal Code, article 61*bis*, which imposes prison terms on “any person who, directly or indirectly, has contacts with agents of a foreign country, institution or organization in order to encourage them to affect the vital interests of Tunisia and its economic security.”

Parliament adopted this law at a time when Tunisia's effort to negotiate “advanced status” with the European Union was complicated by European hesitations over the government's human rights record. Tunisian activists were meeting during this period with EU decision-makers and describing the rights situation, urging them either to withhold “advanced status” from Tunisia or to condition it on Tunisia meeting human rights benchmarks.

The government crafted article 61*bis* so as to intimidate and punish those whose evocation of human rights abuses might complicate approval of “advanced status.” Then-Justice and Human Rights Minister Lazhar Bououni made this clear during a parliamentary debate in which he said that “affecting the vital interests of Tunisia” also included:

[i]nciting foreign parties not to extend credit to Tunisia, not to invest in the country, to boycott tourism, or to sabotage the efforts of Tunisia to obtain advanced partner status with the European Union.<sup>20</sup>

Although the Ben Ali government did not prosecute anyone under article 61*bis* in the six months between its adoption and the president's ouster, the law clearly violates the right

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<sup>19</sup> “Tunisia: Lawyer Convicted for Online Dissent,” Human Rights Watch news release, April 28, 2005, <http://www.hrw.org/en/news/2005/04/28/tunisia-lawyer-imprisoned-online-dissent>.

<sup>20</sup> See articles of Agence Tunis Afrique Presse, June 15, 2010 and La Presse de Tunisie, June 16, 2010.

of expression and of association, penalizing peaceful communication and associational activities on the basis of content.

The Penal Code in articles 125 through 128 provides for prison terms and fines for persons who insult public servants while they are performing their duties, as well as for persons who, without being able to offer proof, accuse public officials of breaking the law while on the job.

The post-Ben Ali interim government used Penal Code articles 128 and 121*ter*, cited above, to lock up a policeman who sought to denounce senior security officials. Security forces on May 29, 2011, detained officer Samir Feriani, who wrote a letter accusing high-level security officials of being responsible for killing protesters during anti-Ben Ali protests and for destroying sensitive archives. The military court investigated him on the basis of article 121*ter* and article 128—accusing public servants of crimes.<sup>21</sup> Feriani remained in custody as of August 31, 2011.

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<sup>21</sup> “Tunisia: Free Would-Be Whistle-Blower Policeman,” Human Rights Watch news release, June 9, 2011, <http://www.hrw.org/en/news/2011/06/09/tunisia-free-would-be-whistle-blower-policeman>.

## 2. Online Freedom: Revise Internet Decree to Protect Expression and Privacy

President Ben Ali's government actively monitored, interfered with, and censored online expression, blocking political and human rights websites it disliked and prosecuting persons for their online postings. The government was widely believed to be behind the commonplace sabotaging of the e-mail accounts of human rights activists, which caused e-mail communications to disappear or be replaced by spam-like messages.<sup>22</sup>

The Ben Ali government decreed an internet law in 1997 that provides a repressive framework for internet governance, requiring that internet service providers (ISPs) turn over data about their subscribers as a matter of course—not only under particular circumstances or when directed to do so by a court.

It is not known to what extent ISPs complied with this law by giving data to the government about their subscribers, and to what extent internet users' privacy was compromised, although such information may one day become known. What is clear is that many Tunisians frequently found their e-mail accounts sabotaged and believed that their privacy was being violated.<sup>23</sup>

The main internet law is ministry of communications decree of March 22, 1997 “Approving Specifications for Setting Up and Operating Valued-Added Internet Telecommunications Services” (hereinafter the Internet Decree). It was issued eight days after a decree—Decree no. 97-501 of March 14, 1997 relating to value-added telecommunications services (hereinafter the telecommunications decree)—was passed regulating telecommunications more generally.

The existing legal framework for internet governance in Tunisia impedes online expression, free flow of information, and the right to privacy of communication. Moreover, online expression is not exempt from the repressive provisions of the Press Code and Penal Code, which the Ben Ali government used to imprison a number of Tunisians—including Zuhair Yahiaoui, Mohamed Abbou, and Ali Ramzi Bettibi—for critical articles they posted online.<sup>24</sup> The right to freedom of expression under article 19 of the ICCPR extends to online expression. The UN Human Rights Committee has written:

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<sup>22</sup> See Freedom House, “Freedom on the Net 2011: A Global Assessment of Internet and Digital Media,” [www.freedomhouse.org/images/File/FotN/FOTN2011.pdf](http://www.freedomhouse.org/images/File/FotN/FOTN2011.pdf), and Human Rights Watch, *False Freedom: Online censorship in the Middle East and North Africa*, Vol. 17, No. 10(E) November 2005, <http://www.hrw.org/en/reports/2005/11/14/false-freedom-o>.  
<sup>23</sup> *Ibid.*

<sup>24</sup> On the cases of Yahiaoui and Abbou see “False Freedoms”; on Bettibi, see Human Rights Watch letter to President Zine el-Abidine Ben Ali, March 15, 2006, <http://www.hrw.org/en/news/2006/03/15/letter-president-zine-el-abidine-ben-ali-ali-ramzi-bettibi>.

Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [of article 19]. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.<sup>25</sup>

## The Right to Privacy and the Internet

The ICCPR affirms a right to privacy in article 17:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Any state interference that is capricious, unjust, or disproportionate would constitute interference that is "arbitrary," as would interference for a purpose inimical to the protection of human rights more generally, such as inhibiting peaceful dissent. This principle extends to electronic communications, including email and newsgroup postings, as well as electronic forms of personal data retained about individuals. States may not randomly or freely intercept or monitor email or internet usage.<sup>26</sup>

In a general comment on the right to privacy, the UN Human Rights Committee—the treaty body that is an authoritative interpreter of state duties under the ICCPR—said:

As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.... Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise

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<sup>25</sup> United Nations Human Rights Committee, General Comment No. 34, para. 43.

<sup>26</sup> See Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, (Kehl, Strasbourg, Arlington: N.P. Engel) 1993, pp. 291-294.

circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis....Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited.<sup>27</sup>

Frank La Rue, the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression, has noted:

Although “correspondence” primarily has been interpreted as written letters, this term today covers all forms of communication, including via the Internet. The right to private correspondence thus gives rise to a comprehensive obligation on the part of the State to ensure that e-mails and other forms of online communication are actually delivered to the desired recipient without interference or inspection by State organs or by third parties.<sup>28</sup>

The right to privacy encompasses both the individual's right to a zone of autonomy within a "private sphere" such as the home, but also personal choices within the public sphere. This is important, as much of the controversy over how much respect to accord individual choices in internet usage becomes caught up in whether the internet is characterized as a public space (e.g., a virtual town square or "information highway"), or as a zone of private communication or research (e.g., a telephone booth or a virtual library).

Where the expectation of privacy also serves to facilitate freedom of expression and information, heightened scrutiny of government intrusion is appropriate. Such an expectation can be found in various contexts, such as attempts to protect the anonymity of a person who communicates online, or the interest in keeping one's communications and browsing private even when using an internet café.

Tunisia's constitution refers to privacy rights in article 9:

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<sup>27</sup> United Nations Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), 08/04/88, paras. 7-8.

<sup>28</sup> Commission on Human Rights, Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, May 16, 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement> (accessed August 17, 2011), para. 57.

The inviolability of the home, the confidentiality of correspondence, and the protection of personal data shall be guaranteed, save in exceptional cases prescribed by law.<sup>29</sup>

### *Anonymity and Encryption*

The right to privacy and the right to free expression both entail a corollary right to communicate anonymously. The importance of allowing persons to speak anonymously has long been recognized as worth protecting in order to encourage communication that might otherwise invite reprisal or stigmatization, such as political pamphleteering, providing anonymous tips to journalists, "blowing the whistle" on workplace improprieties, and even participating in AIDS outreach or support efforts.

Since anonymity may also be sought by persons engaged in criminal activity, one cannot speak in terms of an absolute right. But neither may the freedom to communicate anonymously be subject to such restrictions as would eliminate the right *a priori*.

Some of Tunisia's internet regulations interfere arbitrarily with privacy.

Article 9, paragraph 3 of the Internet Decree states that each internet service provider (ISP) must designate a director who "assumes responsibility... for the content of pages and Web pages and sites that the ISP is requested to host on its servers." This requirement encourages prior censorship by ISPs fearing that they will be held presumptively liable for the content that users post. In the view of Human Rights Watch, no ISP provider should be held liable for content posted on sites that it hosts unless the ISP has received notice of a court of law's judgment that the offending content is unlawful and fails to remove it.<sup>30</sup>

Article 8, paragraph 5 of the Internet Decree also requires that each ISP submit, on a monthly basis, a list of its internet subscribers to the "public operator," the Tunisian Internet Agency.

This requirement is incompatible with the right of individuals to communicate anonymously and privately. This right, however, does not preclude circumstances where law enforcement authorities, upon obtaining a proper warrant, may obtain such information about specific individuals.

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<sup>29</sup> Constitution of the Tunisian Republic, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188885#LinkTarget\\_357](http://www.wipo.int/wipolex/en/text.jsp?file_id=188885#LinkTarget_357) (accessed August 19, 2011).

<sup>30</sup> For a discussion of intermediary [e.g., ISP] liability regimes, including "notice and take-down," see La Rue, A/HRC/17/27, paras. 38-48.

Article 9, paragraph 7, requires that if an ISP closes down or stops providing services, it must “without delay” turn over to the “public operator” a complete set of its archives (“*l’ensemble des supports d’archivage*”) as well as the means to read it. This requirement violates the right to communicate anonymously and privately, and places an undue burden on ISPs, since unlike other businesses they alone are required to maintain their archives in order to be able to turn them over to a state institution.

The Internet Decree also requires that the “director” of the ISP maintain “constant oversight” of content on the ISP’s servers, to insure that no information remains on the system that is contrary to “public order and good morals” (“*l’ordre publique*” and “*bonnes moeurs*”) the same phrases found in Article 121<sup>ter</sup> of the Penal Code, which provides for banning publications, inter alia.

This article violates rights in two basic ways:

1. It bans the posting of information according to criteria—“public order and good morals”—that are manifestly vague. Laws that aim to limit speech or writings based on content must be defined far more narrowly, as discussed above.
2. It fails to define the “constant oversight” that the director is obliged to maintain, leaving it open to authorities to interpret it abusively, and so exert pressure on ISPs to censor content preemptively.

The Internet Decree also bars encryption without prior approval from the authorities (article 11). People or service providers who wish to encrypt data must submit an application to the ministry of communications and provide the keys needed to decrypt the data. The ministry rules on the application after consulting the Commission on Telecommunications. By preventing individuals from taking steps to ensure the privacy of their communications, the law constitutes arbitrary interference with their right to privacy and privacy in communications.

Tunisia should revise its legislation to permit private communications, including the encryption of communication, as a protection of the right to exchange information anonymously. This does not preclude circumstances in which the government may seek a court order to decrypt communications when it shows cause to believe that accessing those communications may serve a legitimate purpose, such as preventing crime or upholding the right to a fair trial.

### **3. Revise the Law on Associations to Guarantee Freedom of Association**

Tunisia's suspended constitution affirmed the right to freedom of association, but that right was undermined in practice by provisions of the Law on Associations, the Penal Code, and the Law on Public Meetings, Processions, Marches, Demonstrations and Gatherings.

The Law on Associations impedes the right to form and operate independent associations, despite the fact that the law requires founders of a new association merely to notify authorities rather than obtain their authorization.<sup>31</sup> The Ben Ali government frequently denied legal recognition to independent human rights, political, and labor associations. Those that attempted to operate without legal recognition were generally unable to carry out the normal business of an association, including opening a bank account, organizing meetings, and renting an office. Moreover, their members were at risk of prosecution.

The draft law on associations, which the High Commission for Protecting the Revolution, Political Reform and the Democratic Transition adopted in August 2011 but has yet to be signed into law, contains a number of important advances over the current law on associations. It eliminates all of the law's penal dispositions. Gone is the offense of belonging to, or serving an unrecognized or dissolved association, a provision that led to the imprisonment of thousands of Tunisians—especially members of the banned Nahdha party—during the presidency of Ben Ali.

The draft law, like its predecessor, requires founders of a new association simply to notify authorities rather than to seek prior approval. It eases the procedures and makes it harder for authorities to subvert the notification regime by withholding the required receipt from the association's founders.

Furthermore, the minister of interior can no longer forbid an association upon its creation; rather, the association exists legally from the moment it deposits its papers, and any move by the government to outlaw it must now pass through the courts.

The basis for denying legal status to or dissolving an association has been narrowed. The existing law forbids associations whose cause or objective is deemed "to be contrary to laws and morals or lead to disruption of public order, or undermine Tunisia's territorial

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<sup>31</sup> Law on Associations, Law no. 59-154 of November 7, 1959, as subsequently revised.

integrity or republican form of government.” The draft law provides a more restrictive definition of what types of associations may be forbidden: those “in whose basic organization, statements, programs or activities there is a call to violence, hatred, or a call to discrimination on the basis of religion, intolerance, gender or region.”

The draft association law also eliminates the requirement, added to the law in 1992, that certain types of associations must admit as members any person who professes to subscribe to the association’s principles and decisions, a requirement that deprived those associations of the freedom to choose their members.

The ICCPR states in article 22:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others....

Within three months after an association deposits its founding papers, the interior minister may refuse the association’s legalization, according to the Law on Association’s article 5. The law obliges the minister to notify the founders of the refusal and to justify it, and gives the founders the option of appealing a refusal before an administrative court. But article 2 gives the minister a broad basis on which to oppose recognition of an association: it states that no association may be formed whose cause or objective is deemed “to be contrary to laws and morals or lead to disruption of public order, or undermine Tunisia’s territorial integrity or republican form of government.” These criteria make it difficult for the founders of an association that has been refused recognition to prove in court that the minister exceeded his or her powers.

The International Association in Solidarity with Political Prisoners (AISPP) first attempted to file its founding papers in November 2002. The authorities refused to accept them, in violation of their obligation under the law. On March 29, 2004 authorities finally accepted to take the documents that the AISPP had to file as a new association. Then on June 15, 2004, just before the three-month period expired, the minister of interior notified the AISPP of his refusal to legalize the group, without specifying the reasons. When the AISPP appealed the refusal to an administrative court, the interior minister responded with the argument that “the association’s aim is to defend political prisoners and their right to a fair trial ... whereas [it] cannot fail to be aware that such political prisoners who are desirous of being defended do not exist in our country.”<sup>32</sup>The administrative court rejected the AISPP’s appeal on June 22, 2010.

In 1999 the interior ministry refused to grant legal recognition to another human rights association, the National Council for Liberties in Tunisia (CNLT), explaining only that it did not conform to the Law on Associations. The CNLT appealed in 1999. By the time President Ben Ali fled Tunisia nearly 12 years later, the administrative court had yet to schedule the CNLT’s appeal.

During those years, the CNLT was compelled to function as an “unrecognized” organization, with all the attendant restrictions, harassment, and dangers. Tunisian courts convicted some of its members of belonging to an unrecognized association (e.g., Moncef Marzouki, see below). In one of many such incidents, a large number of police on December 11, 2004, prevented CNLT members from reaching the group’s Tunis headquarters, where they had hoped to convene its general assembly. A government official confirmed the police action, explaining that the CNLT “is not a legal organization.”<sup>33</sup>

The law also gives the interior minister broad discretion when seeking to dissolve an existing association, although in contrast to when refusing a newly created association, the minister must petition a court to order the dissolution. This would provide an important safeguard—if the judiciary were independent and the legal criteria for dissolution were narrow. But in Tunisia’s case, the grounds for dissolution, as enumerated in the law’s article 24, are broad; they include when the association’s “real

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<sup>32</sup> Argument filed by the Ministry of Interior on February 9, 2006, in the matter of administrative affair 1/13381, before the Tunis administrative court. Copy on file with Human Rights Watch.

<sup>33</sup> “Police Use Force to Block Rights Meeting,” Human Rights Watch news release, December 13, 2004. <http://www.hrw.org/en/news/2004/12/13/tunisia-police-use-force-block-rights-meeting>.

goals, activity or actions are revealed to be contrary to the public order, good morals, or if the association has an activity whose objective is political in nature.”

Membership in an “unrecognized” association and participating in “unauthorized” meetings, were the two legal provisions the Ben Ali government used more than any other to imprison opponents. Article 30 of the Law on Associations imposes prison terms of one to five years and/or a fine on persons who participate in maintaining or reviving an association that is not legally recognized or that has been dissolved. Although the law refers to “maintaining” an association, the courts in their jurisprudence have referred to the offense simply as “membership.” Between 1990 and 2010, the government convicted and sentenced to prison thousands of persons for membership, most of them for belonging to the unrecognized Islamist an-Nahdha movement, including women who collected or donated money to help families whose bread-winners had been imprisoned for an-Nahdha activities. The courts convicted a smaller number of Tunisians for membership in the banned Tunisian Communist Workers Party (PCOT). Both an-Nahdha and the PCOT gained legal recognition in 2011, shortly after Ben Ali fled the country.

Tunisian courts convicted an-Nahdha member Daniel Zarrouk, who was already in prison for other political offenses, four separate times between 1992 and 1995 for membership in the organization, adding a total of nine more years to his prison term.<sup>34</sup> Zarrouk was one of many Nahdha members sentenced to multiple prison terms on charges of “membership.”

Authorities also reimprisoned an-Nahdha leader Sadok Chorou in December 2008 for giving a media interview, following his release from nearly two decades in prison, in which he said that the organization’s demand to participate openly in politics was not open to negotiation. The interview earned him a one-year sentence in a trial on December 13, 2008, for membership in an unrecognized association.<sup>35</sup>

Even membership in a human rights organization could lead to conviction under article 30. On December 30, 2000 a Tunis court convicted Moncef Marzouki, former spokesman of the unrecognized National Council on Liberties in Tunisia (CNLT), on charges of membership in an unauthorized association and spreading “false information” likely to disturb the public order. The court sentenced

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<sup>34</sup> Human Rights Watch letter to Tunisian President Ben Ali on Daniel Zarrouk, April 24, 2007, [www.hrw.org/en/news/2007/04/24/human-rights-watch-letter-tunisian-president-ben-ali-daniel-zarrouk](http://www.hrw.org/en/news/2007/04/24/human-rights-watch-letter-tunisian-president-ben-ali-daniel-zarrouk).

<sup>35</sup> “Tunisia: Revolving Door Shows Intolerance for Dissent,” Human Rights Watch news release, March 12, 2009, [www.hrw.org/en/news/2009/03/12/tunisia-revolving-door-shows-intolerance-dissent](http://www.hrw.org/en/news/2009/03/12/tunisia-revolving-door-shows-intolerance-dissent).

Marzouki to eight months in prison on the membership charge. He refused to appeal, but remained provisionally free while the prosecutor appealed the leniency of the sentence.<sup>36</sup> He eventually left the country for France because of the intensive harassment. The appeals trial never took place.

In 1992 Tunisia's parliament amended the Law on Associations to deprive certain associations of the right to refuse applicants for membership, an initiative that seemed tailor-made to undermine the independence of the Tunisian Human Rights League. The new law stated that associations categorized as being "of a general character" could no longer refuse to admit "any person who is committed to its principles and decisions unless the said person does not enjoy full civic and political rights, or if the said person engages in activities or practices incompatible with the objectives of the association." The amendments also provided, in article 2, that:

[i]ndividuals assuming functions or responsibilities in the central governing bodies of political parties may not become directors of associations of a general character. These provisions apply to the steering committee of the aforementioned associations as well as to sections, branches, related organizations or secondary groups.

The government presented the amendments to articles 1 and 2 as intended to democratize civil society. But they constitute interference in the right of the members of an independent association to decide whom to admit and not to admit as members, a right that should be subject only to applicable laws against discrimination on internationally-prohibited grounds, such as gender or race (which prohibit unjustified differential treatment).

Persons refused membership by an independent association should be free to create their own association, but, unless discriminated against, they should not have the right to force existing associations to admit them. Consequently, the 1992 amendment should be revoked.

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<sup>36</sup> Human Rights Watch, "Tunisia: A Lawsuit against the Human Rights League, An Assault on All Human Rights Activists," Vol. 13, No. 3(E), April 2001, <http://www.hrw.org/en/reports/2001/04/01/tunisia-lawsuit-against-human-rights-league-assault-all-rights-activists>, p. 18.

When proposed by the government in 1992 the amendment to article 2 was widely perceived as designed to compromise the autonomy of the Tunisian Human Rights League, stripping it of its right to screen potential members and to freely choose its steering committee, which at the time included senior members of various political parties.

The league responded to the law's adoption by dissolving itself rather than comply, fearing that it would be unable to fend off a flood of applications from persons belonging to the ruling party or close to the security services. The league formally resumed its activities only after electing a more compliant leadership in 1994 that agreed to change its statutes in order to comply with the 1992 law.

## 4. Revise the Law on Public Assemblies to Guarantee the Right of Assembly

Article 21 of the International Covenant on Civil and Political Rights (ICCPR) states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

International law allows only narrow restrictions on the right to peaceful assembly, and subjects those restrictions to a rigorous analytical test, as defined by the ICCPR in article 21. Terms such as “national security” and “public safety” refer to situations involving an immediate and violent threat to the nation or to its territorial integrity or political independence. Therefore, nationwide limitations on assembly that are imposed on the basis of merely isolated or localized threats cannot be justified, and are impermissible.<sup>37</sup>

Tunisia’s suspended constitution affirmed the right of assembly, while Tunisia’s laws restrict that right in many ways.

On the positive side, Tunisia’s main law governing assemblies stipulates that organizers of “public meetings” need only inform authorities, rather than seek permission, before holding an event.<sup>38</sup> However, articles 7 and 12 of the law give authorities the discretion to forbid any public meeting or demonstration “likely to disturb public security and order.”

Such broad criteria invite abusive and arbitrary interpretations by the authorities, and thus run counter to the ICCPR’s guarantees of freedom of assembly.

In practice, the Ben Ali government enforced a *de facto* ban on demonstrations organized by independent forces and opposition political parties, dispatching large numbers of police to physically prevent them, without necessarily providing a legal basis and regardless of whether organizers had informed authorities beforehand in accordance with the law. On December 30, 2008, for example, police in Tunis prevented two marches to

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<sup>37</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights*, pp. 394-396.

<sup>38</sup> Law no. 69-4 of January 24, 1969 on Public Meetings, Processions, Marches, Demonstrations and Gatherings, as subsequently revised, article 2.

protest Israel's attack on the Gaza Strip, one called by the Tunis Bar Association and the other by the opposition Progressive Democratic Party (PDP). After stopping these gatherings, the government organized its own pro-Gaza march on January 1, 2009.

While the law requires that authorities notify the organizers of a negative decision and provides them an avenue of appeal to the secretary of state of the interior (*Sécretaire d'état de l'intérieur*), it does not require that authorities explain their motives in prohibiting a gathering.

Furthermore, nowhere does the law define the difference between a "public meeting" that requires advance notification, and other types of meetings that do not. It also imposes prison terms and a fine on persons who attend meetings or gatherings that have either been forbidden or have not been the subject of a notification process according to the law.

The Law on Associations in article 29 penalizes "facilitating" the meeting of members of an "association that is recognized as lacking legal existence or that has been dissolved." Nowhere does that law define what "a meeting" is, or how many persons must be in attendance.

The government used this law, as noted above in the section on freedom of association, to convict and imprison hundreds of an-Nahdha members for attending meetings of an unrecognized association.

At the time President Ben Ali left the country in January 2011, only two an-Nahdha members remained in prison, Ali Abdallah Saleh Harrabi and Ali Farhat, both from the southern city of Douz. They had been convicted in late 2010 and given six-month sentences for attending meetings of an unrecognized association and attempting to revive a banned association, and in Harrabi's case, making a house available for those meetings.<sup>39</sup> The two men were freed in February 2011 in the general amnesty decreed by the transitional government.

The government also frequently prosecuted members of the banned Tunisian Communist Workers Party for attending unauthorized meetings, such as in the trial held in 1999, cited above, at which 13 members received prison terms under this law, along with other charges.<sup>40</sup> As many an-Nahdha activists told Human Rights Watch over the years, any gathering of persons suspected of links to the dissolved party—even a small, social gathering—put them at risk of prosecution under this provision.

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<sup>39</sup> Human Rights Watch interview with Ali Abdallah Saleh Harrabi, Mornaguia prison, February 1, 2011.

<sup>40</sup> Human Rights Watch, "The Administration of Justice in Tunisia."

## 5. Revise the Law on Travel Documents to Guarantee Freedom of Movement

For politically motivated reasons, the Ben Ali government denied passports to thousands of Tunisians and arbitrarily sent back countless Tunisians at the airport as they sought to travel abroad, even though they held valid passports and entry visas to their country of destination. In most cases, the refusal was arbitrary in that it was accompanied by no justification.

The suspended constitution recognizes the right to travel in article 10: “[E]ach citizen has the right to move in or outside the country and choose the place of residency according to the law.” The right to travel, including the right to leave any country, including one’s own, is enshrined in article 12 of the ICCPR.

The main law regulating the issuance of travel documents, Law no. 75-40 of May 14, 1975, permits the ministry of interior to deny passports in certain situations. This law was amended by Law 98-77 of November 2, 1998, to give judges sole authority in nearly all situations regarding whether to revoke a valid passport or prohibit a citizen who has one from leaving the country.

Article 13 of Law no. 75-40 states that every Tunisian citizen has the right to receive, renew, or extend his or her passport except under certain conditions, including, “on request of the prosecution if the subject is under legal proceedings, is wanted for a felony or misdemeanor, or has been sentenced to prison following conviction,” or, pursuant to article 13(d), for “reasons of public order and security or if there is a danger of harming Tunisia’s good reputation.”

The provisions of article 13(d) grant authorities excessive discretion to deny persons a passport, which is tantamount to denying their freedom of movement. The criteria open the door to refusing passports or foreign travel on the basis of a person’s political views or activities, as happened repeatedly during the Ben Ali presidency.

Since 1995, the Ministry of Interior repeatedly and arbitrarily refused to issue passports to former political prisoner Moncef Ben Salem and his daughter Mariem, from the city of Sfax. After receiving no response to their applications, Ben Salem filed a complaint with the administrative court on April 18, 2006. On October 12, 2006, the Ministry of Interior responded to the court, stating the application was “still under study.” On November 27, 2006, lawyer Abdelwaheb Maâtar filed a response on behalf of Ben Salem arguing the delay was unsatisfactory.

A second reply from the Ministry of Interior came on December 28, 2007, stating it had denied Moncef Ben Salem a passport in accordance with article 13 of Law no. 75-40 of 1975, the provision that allows denial of a passport for reasons that include “public order and security or if there is a danger of harming Tunisia’s good reputation.” The ministry provided no further justification for this decision and no response at all on Mariem Ben Salem’s application. On October 25, 2007, attorney Maâtâr argued that the administration had overstepped its powers by failing to issue passports to the complainants without furnishing an explanation. The case was postponed until November 22, 2007, when the court referred it for further investigation. Maâtâr asked the court at least to respond with regard to the passport application of Ben Salem’s daughter Mariem, but in vain. Finally, on June 11, 2009, the court ruled that the authorities had wrongly denied Moncef Ben Salem his passport.<sup>41</sup>

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<sup>41</sup> Human Rights Watch, “A Larger Prison: Repression of Former Political Prisoners in Tunisia,” March 24, 2010, <http://www.hrw.org/en/reports/2010/03/24/larger-prison-o>.

<sup>42</sup> Ibid.

## **6. Revise the Law on Political Parties to Narrow Content-Based Restrictions on Legal Parties**

The political parties law (Organic Law no. 88-32 of May 3, 1988 regulating political parties) was adopted just months after Ben Ali seized power in a de facto coup. The law states in article 3 that no party may “fundamentally base its principles, activities, and programs on a religion, language, race, sex, or region.” In effect, this law gives authorities grounds to stop citizens forming a party that draws its main inspiration from, for example, Islam, the advancement of women’s interests, or particular regional interests.

This limitation on the themes and interests on which a political party may be based is too sweeping, especially given a government’s duties to uphold equality and minority rights (article 27 of the ICCPR). These require respect for the right to associate freely, including the right to create and participate in political parties on the basis of language or religion, and the right of minorities to participate in decision-making. Any law on political parties should be drawn so as to allow the state to prohibit parties only on the grounds that they advocate violence or the overthrow of democracy.

The Tunisian law’s prohibition of parties organized around certain themes infringes on the right of people to associate freely and elect their representatives, including on the basis of religion, gender, race, or minority grouping. Under this provision, the government could bar a party that, for example, espouses pan-Arabist ideology, on the grounds it is based on race.

The draft law on political parties, approved on August 4, 2011 by the High Commission for Protecting the Revolution, Political Reform and the Democratic Transition but not yet signed into law, considerably narrows the grounds on which authorities may forbid a party on the basis of its content. Its article 4 states that no party “may rely, in its basic organization or in its activities, on a call to hatred, intolerance, or discrimination on the basis of religion, factions, gender, region, or tribal affiliation.” In article 5, the draft law explicitly grants parties the right to appeal to the courts in the event that the public authorities restrict them or circumscribe their activities.

## 7. Drop Politically Motivated Hurdles to Running for President

The current electoral law (Law no. 69-25 of April 8, 1969) in article 66 requires that a presidential candidate gather the signatures of 30 members of the chamber of deputies or presidents of municipal councils, each of whom may endorse only one candidate.

This hurdle to getting on the ballot was unacceptably high during the presidency of Ben Ali, because nearly all deputies and presidents of municipal councils belonged to the ruling party or to parties loyal to Ben Ali, and were unwilling to endorse opposition candidates.

Whatever the elected positions created under the next constitution, eligibility requirements should not be so stringent so as to favor one party or tendency, and to deny citizens the right to run for office and vote for candidates of their choice.

In 1994 Moncef Marzouki, the former president of the Tunisian Human Rights League, ran a symbolic campaign for president to show that electoral laws were designed to exclude genuine opposition candidates. Unable to obtain the required 30 signatures, Marzouki openly urged President Ben Ali to allow 30 ruling-party members to endorse his candidacy. Marzouki did not get the required endorsements and on March 24, 1994, four days after the president was re-elected, unopposed, with 99.92 percent of the vote, Marzouki was jailed on politically motivated charges of defamation. He was provisionally released four months later.

## 8. Amend the Law on the Magistrature to Enhance Judicial Independence

One of the main laws governing the profession of judges—Law no. 67-29 of July 14, 1967 on the Organization of the Judiciary, the High Council of the Magistrature and the Status of the Magistrature, as amended in 2005—violates the notion of the separation of powers by having the president of the republic preside over the High Council of the Magistrature (HCM), the body that decides the promotion of judges and their assignment to particular posts and courts. Also sitting on that council are several officials whom the president appoints, including the minister of justice. Judges elected by their peers also sit on the council, but constitute a minority.

This law undermines the independence of judges in various ways, including granting the executive branch effective control over decisions regarding the promotion of judges and their assignments to posts and jurisdictions. The executive should not exercise a dominant role over the career path of judges.

In December 2004 the Association of Tunisian Magistrates (*Association des Magistrats Tunisiens*, ATM) elected an independent slate of member judges to head the association, ending a long period of control by judges viewed as more compliant to the executive branch. The new ATM board opposed a government-sponsored bill to modify the Law on the Magistrature, arguing it did not end executive domination of the HCM or protect judges from abusive reassignments, and thus did little to advance judicial independence.

On July 30, 2005, against the ATM's objections, Tunisia's chamber of deputies approved the new law on the magistrature.<sup>43</sup> Shortly afterwards, the HCM reassigned several of the independent-minded judges in the elected ATM leadership to posts far from the capital. This included the new secretary-general, Kalthoum Kennou, whom the council reassigned from Tunis to Kairouan, 160 kilometers to the south, without providing justification or obtaining her agreement. (In 2009, the HCM reassigned Kennou again, this time to the remote

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<sup>43</sup> Association des magistrats tunisiens, "Rapport sur les revendications des magistrats tunisiens et les menaces au droit d'association" ("Report on the demands of Tunisian judges and on threats to the right of association"), September 16, 2005, <http://nawaat.org/portail/2005/09/22/amtravail-sur-les-revendications-des-magistrats-tunisiens-et-les-menaces-au-droit-d%E2%80%99association/> (accessed July 29, 2011).

city of Tozeur, 436 kilometers south of the capital). The council also transferred Wassila Kaâbi, a member of the ATM executive board, to Gabès (420 kilometers from Tunis). The transfer of ATM officeholders out of Tunis forced many of them to resign their posts in the association because of its rules on geographic representation. Kennou appealed her 2005 transfer, but it was not until Ben Ali fled the country that the administrative court ruled in her favor and she was able to again occupy a judgeship in the capital.

## 9. Revise the Terrorism Law to Tighten “Terrorism” Definition and Restore Defendants’ Rights

Tunisia has prosecuted well over 1,000 individuals under its counter-terrorism law since it took effect in December 2003.<sup>44</sup> Based on an informal sampling of cases and information provided by defense lawyers, it seems the basis for the charges in most cases was accusations of planning to join violent militant groups abroad or inciting others to join, rather than accusations of having planned or committed specific acts of violence.

The evidence in court files usually consisted of statements attributed to defendants or other persons purportedly proving that the defendants had discussed joining or supporting jihadist groups abroad. The defendants usually contested these statements as false confessions extracted using torture, or, if accurate, describing permissible speech or other actions they had engaged in that did not reach the level of a terrorist offense. This did not prevent the courts from admitting nearly all such statements into evidence, where they constituted the main basis for convicting the defendants. Some case files contain additional evidence in the form of pro-jihadist audiovisual materials allegedly found during a search of the defendant’s home or of his computer.

The fact that courts convicted the defendants as terrorists based on such questionable evidence shows how the judiciary exploited the vagueness of the definitions of terrorism, incitement to terrorism, and membership in a terrorist organization in Tunisian law.<sup>45</sup>

### Overly Broad Definitions of Terrorism and of Incitement to Terrorism

The 2003 law contains a broad definition of terrorism that is susceptible to being used to punish nonviolent acts of speech, association, and assembly. Article 4 defines the terrorist act as:

...[a]ny infraction, whatever the motive, in relation with an individual or collective enterprise liable to terrorize a person or a group of persons, to

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<sup>44</sup> The UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism provides a figure, given to him by the government, of 1,123 persons prosecuted through 2009. United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his mission to Tunisia (22-26 January 2010), December 28, 2010, A/HRC/16/51/Add.2, <http://www.unhcr.org/refworld/docid/4d53c5092.html> (accessed June 23, 2011), p. 7.

<sup>45</sup> See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his mission to Tunisia.

sow terror amidst a population, with the design of influencing the policies of the state, to force it to do what it does not intend to do or to refrain from doing what it intends to do; to disturb the public order, peace or international security, to bring harm to persons or property, to damage buildings housing diplomatic missions, consulates, or international organizations, to cause serious harm to the environment, in a way that would endanger the lives or the health of residents, or to bring harm to vital resources, infrastructure, or means of transport or of communication, information systems or public services.<sup>46</sup>

The International Covenant on Civil and Political Rights states in article 15 that all elements of a crime must be precisely encapsulated in law. This definition of terrorism does not meet that standard because it fails to explain what it means by “terrorizing a person or group of people,” “influencing state policies,” “disturbing the public order,” “bringing harm to persons or property” or “jeopardizing vital . . . infrastructure.” Under that definition, a demonstration by truck drivers that blocks a major highway overpass could be classified as a terrorist act.

Nor does the Tunisian law’s definition of terrorism require the intention of resorting to deadly or otherwise serious physical violent means against a population, or the intention of taking of hostages, which the UN special rapporteur on counterterrorism has designated to be the central elements of a terrorist act.<sup>47</sup>

The law also provides too broad a definition of incitement to commit terrorist acts. Article 11 includes as acts of terrorism “incit[ing] or consult[ing] with others in order to commit a terrorist act, or resolv[ing] to commit one, when that resolve is accompanied by a preparatory act with a view toward its execution.” Article 12 imposes prison terms of five to 12 years and a fine on anyone who:

...[c]alls for the commission of terrorist infractions, or to join an organization or to enter into an agreement related to terrorist infractions, or uses a name, a term, or a symbol or any other sign in order to justify a terrorist organization, or one of its members or its activities.

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<sup>46</sup> Law no. 2003-75 of December 10, 2003, relative to supporting international efforts to fight terrorism and to eradicate money-laundering, <http://www.jurisitetunisie.com/tunisie/codes/terror/terror1015.htm> (accessed August 18, 2011).

<sup>47</sup> United Nations Commission on Human Rights, Promotion and Protection of Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, December 28, 2005, E/CN.4/2006/98, <http://www.unhcr.org/refworld/docid/441181f10.html> (accessed August 19, 2011), section III.

These articles could be used to penalize individuals or groups for legitimate freedom of expression. For example, persons risk imprisonment if they employ a term or symbol that is deemed supportive of terrorism, regardless of whether doing so results in any concrete act.

The UN Human Rights Committee, in its general comment on the ICCPR's article 19, wrote:

States parties should ensure that counter-terrorism measures are compatible with paragraph 3 [of article 19]. Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to an unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities.<sup>48</sup>

Article 13 of Tunisia's counter-terrorism law allows prison terms of five to 12 years for:

...[b]elonging to an organization or entity, whatever its form and the number of its members, which has, even if coincidentally or incidentally, used terrorism as a means of action in the realization of its objectives.

This criminalization of mere “membership” has been the basis for imprisoning hundreds of persons, mostly young men, who were never charged with having a connection to the commission or preparation of violent acts.

Another concern is the phrase “coincidentally or incidentally,” particularly when coupled with the overly broad definition of terrorism; there is no requirement that the accused was aware of the terrorist nature of the organization or intended to adhere to an organization involved in terrorism.

Articles 14-18 criminalize, among other acts, the housing or hiding of terrorists, helping terrorists escape, providing terrorists with meeting places, and training or lending expertise to terrorists. The provisions do not require proving criminal intent on the part of the person housing or otherwise helping the terrorist.

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<sup>48</sup> United Nations Human Rights Committee, General Comment No. 34, para. 46.

### **The Case of Abidi Labidi**

Many of those imprisoned under the anti-terrorist law have profiles like that of Abidi Labidi from Tajerouine, in western Tunisia.

A court convicted Labidi, apparently because of conversations he was accused of having about joining violent militant groups in Iraq and elsewhere—conversations the defendant denies having had. Labidi told Human Rights Watch during an interview in Mornaguia Prison on February 1, 2011, that the police started questioning him in 2007, when he was a student at the University of Jendouba and regularly prayed in a mosque with friends. The police visited his apartment, confiscated the computer of a roommate along with religious compact discs.

In May 2010, the police arrested Labidi and took him for interrogation at the Ministry of Interior in Tunis. They asked him if he had talked about jihad, or about Iraq or Algeria. When he denied doing so, they started beating him with their hands and clubs, Labidi told Human Rights Watch. They then brought in one of his friends, Hedi Hajari, handcuffed, who stated that Labidi had indeed discussed Iraq and Algeria. The police typed a statement and told Labidi to sign it, covering the pages except the space for the signature, according to Labidi. He signed. The court sentenced him to three years in prison for belonging to a terrorist organization, recruiting persons for a terrorist enterprise, attending meetings of an “unrecognized” association, and incitement to commit terrorist acts. Labidi was freed from prison in February 2011, when the transitional government decreed an amnesty for political prisoners.

## **Articles that Undermine Defendants’ Right to Mount a Fair Defense**

The counter-terrorism law restricts various rights that defendants ordinarily enjoy under the Code of Penal Procedure, thereby undermining their right to a fair trial.

Article 22 imposes one to five years in prison and a fine on “anyone, even those bound by professional secrecy, who did not immediately inform the relevant authorities of the facts, information, or intelligence relative to terrorist infractions about which they had knowledge.” Only family members are exempt.

This provision of the counter-terrorism law applies to professionals normally bound by confidentiality, such as defense lawyers, medical workers, or clergy. This risks jeopardizing the internationally guaranteed right to health, as well as the right to lawyer-

client confidentiality that is a key component of the internationally guaranteed right to a fair trial.<sup>49</sup> This provision should either be eliminated or revised to recognize exemptions for lawyers, clergy, and medical workers.

The counter-terrorism law contains provisions allowing for witnesses to testify outside the presence of the accused and to withhold their identity. While such provisions are permissible in narrowly defined circumstances, the broadly written provisions in this law violate the fundamental right of defendants to “equality of arms,” which entails the possibility of examining their accusers, and challenging their testimony—which may weigh heavily in the court’s verdict— and their motives in testifying.

Article 41 allows the court to hear witnesses without the defendant being present. It states the witness must give consent before a defendant can sit in and hear his or her testimony. Article 49, paragraph 2, allows judges to take testimony from witnesses via visual or audio communication without requiring that they physically appear in court, and while maintaining the anonymity of the witnesses. Article 51 further allows the court to withhold the identity of witnesses, victims, and persons who informed the authorities.

Article 47 of the law violates the presumption of innocence by providing that if the court imposes a prison term for a terrorist offense, its execution is automatic, regardless of whether the defendant appeals. It takes discretion away from the judge to consider motions to release the defendant provisionally pending the final verdict.

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<sup>49</sup> The right to a fair trial is guaranteed under the ICCPR, art. 14. While the right to attorney-client privilege is not absolute, there is broad judicial recognition of the privileges and duties of such confidentiality. In *Smith v. Jones*, for example, the Supreme Court of Canada in 1999 articulated that disclosure of privileged information is permitted in instances in which there is an imminent risk of serious bodily harm or death to an identifiable person or group, but it held that the disclosure should be limited as much as possible. See *Smith v. Jones*, [1999] 1 S.C.R. 455, <http://csc.lexum.org/fr/1999/1999rcs1-455/1999rcs1-455.html> (accessed September 5, 2011). Although the ICCPR does not contain a specific provision safeguarding the right to health, several rights incorporated in the covenant are directly or indirectly linked to a person’s enjoyment of his or her right to health, including the right to life (article 6) and the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7).

## **10. Exclude International Crimes from any Presidential Immunity Provisions**

A constitutional amendment adopted in 2008 changed article 41 to provide the president of the republic with “judicial immunity in the exercise of his duties,” including after the presidential term, “for all acts executed as part of the office.”

While immunity laws are commonplace for elected officials while they hold office, they should be worded so as to exclude lifetime immunity from prosecution for grave human rights abuses. Thus, Tunisia’s immunity for acts “executed as part of the office” should either be eliminated or narrowed to prevent impunity for implication in the commission of grave abuses.

The means of achieving this is two-fold:

Ensuring that any immunity provision, whether in the constitution or in domestic law, states that such immunity would not apply to international crimes, including those covered by the Rome Statute of the International Criminal Court (ICC), which Tunisia ratified in June 2011. These encompass acts of torture and enforced disappearance, and crimes against humanity, among others.

1. Including a general provision in the constitution that all treaties ratified by Tunisia, customary international law, and the general rules of international law will apply directly and be superior to domestic law. Such a provision would serve as a tool against abusing immunity provisions if they were part of domestic law. Immunity provisions should therefore be in the law, rather than set out in the Constitution itself.

Tunisia’s now-suspended constitution provided a narrower definition of what types of international law take precedence over domestic law, stating, in article 32, that only “Treaties ratified by the President of the Republic and approved by the Chamber of Deputies have a higher authority than that of laws.”

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# Tunisia's Repressive Laws

## The Reform Agenda

Following the ouster of President Zine el-Abidine Ben Ali in January 2011, Tunisia's interim government has begun the task of reforming the many laws that restricted the rights of its citizens. During his 23-year rule, Ben Ali used these laws to criminalize critical speech, outlaw independent associations and opposition parties, prevent dissidents from traveling, demote independent judges, and imprison as terrorists young men innocent of plotting or committing any violent act.

Most of these stifling laws, which gave a veneer of legality to Ben Ali's authoritarian rule, remain in effect. The interim government has dramatically eased enforcement but has not dispensed with them altogether: for example, it invoked an infamous provision on spreading information "that could disturb the public order" to jail a would-be whistle-blower policeman. The case shows the urgency of replacing repressive laws with laws that neither the executive nor the judiciary can use to prevent Tunisians from peacefully exercising their rights.

*Tunisia's Repressive Laws: The Reform Agenda* surveys 10 areas of repressive legislation, providing case studies of how the Ben Ali regime used laws to imprison Tunisians and otherwise violate their rights. The report presents recommendations for how to revise those laws to harmonize them with the international human rights treaties that Tunisia has ratified. These include laws on the press and defamation, the internet, associations, public assemblies, political parties, passports, presidential elections, presidential immunity, combating terrorism, and promoting judges