

REPORT ON TUNISIA

**Published by the Centre for the Independence of Judges and Lawyers
of the International Commission of Jurists
Geneva, Switzerland**

March 2003

Table of Contents

I.	Executive Summary.....	3
II.	Introduction.....	5
III.	Attacks on Lawyers.....	5
	a. Prosecution of the Council of the Bar Association.....	8
IV.	Harassment of Human Right Defenders.....	10
	a. Tunisian League for Human Rights.....	10
V.	The Judiciary.....	12
	a. Structure of the courts.....	12
	(i) Ordinary courts.....	12
	(ii) Administrative courts.....	12
	(iii) Military Tribunals.....	13
	b. The Superior Council of the Judiciary.....	13
	c. Dismissal of Judge Mokhtar Yahyaoui.....	14
VI.	Center for the Independence of Justice in Tunis.....	16
VII.	CIJL/ICJ Fact- Finding Missions.....	17
	a. First fact-finding mission (16-22 June 2002).....	17
	b. Second fact-finding mission (26-22 31 October 2002).....	18
VIII.	Past CIJL/ICJ Involvement in Tunisia: 1994 Seminar.....	19
IX.	International Obligations.....	21
X.	Recommendations.....	21

I. Executive Summary

This is a report by the Center for the Independence of Judges and Lawyers ("CIJL") of the International Commission of Jurists ("ICJ") on the situation of judges, lawyers and human rights defenders in Tunisia, a situation that the CIJL/ICJ has been closely monitoring for nearly a decade.

In light of escalating attacks on members of the legal profession, the CIJL/ICJ undertook to organize a fact-finding mission to Tunisia in June 2002 to evaluate and report on the situation of judges and lawyers. However, it was not possible to do so as all efforts to establish a dialogue with the Tunisian Government proved futile and in fact culminated in the refoulment of the mission.

In October 2002, pursuant to an invitation by the Tunisian League for Human Rights, an organization with which the ICJ has been affiliated since 1979, and in view of continuing attacks on lawyers in the exercise of their professional duties, the CIJL/ICJ decided to organize another fact-finding mission. That mission, too, was refoiled upon arrival at the airport.

Nevertheless, the CIJL/ICJ was able to interview several Tunisian lawyers and human rights defenders outside of Tunisia. Human rights lawyers cannot carry out their professional duties as their every move is tracked by Government agents, files are created on them, their offices are raided and their telephone and fax lines are intercepted. Furthermore, they are often denied access to their clients or their clients' files which makes it impossible for them to prepare a proper defense. The harassment of human rights lawyers reached new heights in December 2002, when eight lawyers and an unfairly dismissed judge, Mokhtar Yahyaoui, were violently assaulted for having formed an organization to protect political prisoners.

Furthermore, the Council of the Bar Association as well as the President of the Bar Association are currently being prosecuted for having exercised the legitimate right to call their members to strike in protest against grossly unfair trial proceedings wherein detainees were physically attacked by police agents in court.

Other human rights defenders continue to be targeted and NGOs such as the Center for the Independence of the Judiciary in Tunis are not allowed to officially register. The elections held by the Tunisian League for Human Rights in October 2000, by which Mokhtar Trifi, a lawyer, was elected President, have long been a sore point for the authorities who continue to attack Mr. Trifi and create obstacles for the organization.

The case of the dismissed Judge Mokhtar Yahyaoui merits special attention as he was one of the rare members of the Tunisian bench to speak out against the lack of independence of the judiciary. The Tunisian Constitution guarantees judicial independence, yet the Superior Council of the Judiciary, the body

charged with nominating, transferring, disciplining, and promoting judges includes as its President and Vice President the President of Tunisia and his Minister of Justice as well as other members appointed by the Executive. Such control over the Superior Council of the Judiciary, in effect, nullifies the meaning and intent of the Constitution as well as recognized international standards on the independence of the judiciary.

The CIJL/ICJ is grateful to all those who assisted and gave of their time in trying circumstances, in particular, M. Abderaouf, Alya Sherif Chammari, Khemaïs Chammari, Bechir Essid, Frej Fenniche, Najib Hosni, Mohamed Jmour, Khemaïs Ksila, Omar Mestiri, Radhia Nasraoui, Sihem Ben Sedrin, and Mokhtar Trifi.

The CIJL/ICJ regrets that despite many written requests it was unable to establish a dialogue with Tunisian authorities.

II. Introduction

This is a report of CIJL/ICJ activities to promote and protect the independence of judges and lawyers in Tunisia. The report does not purport to be an exhaustive description of all accounts of harassment that judges, lawyers and human rights defenders have suffered throughout the past several years. It serves, rather, to highlight certain situations and give an overall appreciation of CIJL/ICJ endeavors to address some of the problems suffered by members of the legal profession and human rights defenders in Tunisia.

For nearly a decade, the CIJL/ICJ has been addressing interventions to the Tunisian government and issuing press releases on the harassment of lawyers and other human rights defenders whose situation has been deteriorating since the early 1990's when the CIJL/ICJ organized a seminar for judges in that country. In June and October 2002 respectively, the CIJL/ICJ planned to undertake two fact-finding missions to Tunisia with the aim of engaging in discussions on the role of the judiciary and lawyers with the Government, lawyers, judges, academics, NGOs and other members of civil society. The missions would have culminated in a report with concrete recommendations for all concerned parties. However, despite prolonged efforts to establish a dialogue with the Tunisian authorities, the CIJL/ICJ fact-finding delegations were both immediately turned back from Tunis-Carthage airport. The present report, therefore, relies upon information gathered from interviews with Tunisian lawyers and human rights defenders whom the CIJL/ICJ was able to meet outside of Tunisia over the past year. These include: M. Abderaouf; Alya Sherif Chammari; Khemeis Chammari; Bechir Essid; Frej Fenniche; Najib Hosni; Mohamed Jmour; Khemaïs Ksila; Omar Mestiri; Radhia Nasraoui; Sihem Ben Sedrin; and Mokhtar Trifi. The report also draws upon a variety of other sources such as the CIJL/ICJ's past accounts of the persecution of judges, lawyers and human rights defenders in Tunisia; CIJL/ICJ trial observations; the report of the UN Special Rapporteur on the independence of judges and lawyers; the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and other well-documented accounts by international and Tunisian NGOs.

III. Attacks on Lawyers

In 1994 the Human Rights Committee stated in its Concluding Observations at its fifty-second session that:

The Committee cannot conceal its disappointment with the deterioration in the protection of human rights in Tunisia in the period under review. It is concerned, in particular, with the growing gap between law and actual practice with regard to guarantees and safeguards for the protection of human rights...[the Committee] is concerned by the reports on harassment of lawyers who have represented clients accused of

having committed political offenses and of the wives and families of suspects.¹

Describing the situation of lawyers in Tunisia, *Attacks on Justice*, a CIJL/ICJ publication which documents the global state of the judiciary and legal profession, states that:

The Tunisian Bar has existed for over 100 years and is generally seen as having played a historically significant role in the struggle for independence. The first President of Tunisia, the late Habib Bougiba, was himself a lawyer who had used the Bar to intervene in the political process to defend human rights and pursue issues of public importance. The principle of intervention from the Bar remained in Tunisia after independence, when politicians, trade unionists or other groups under pressure or attack would turn to the Bar for protection. However in 1991 Tunisian authorities began targeting lawyers who defended Islamists and used the press as a means of attacking them. In recent years, the target has become human rights lawyers. Thus, Tunisian lawyers are frequently obstructed from carrying out their professional duties.²

Over the years, the CIJL/ICJ has issued numerous press releases and written more than a dozen interventions to the Tunisian Government on behalf of human rights lawyers such as Alya Sherif Chammari; Bechir Essid³; Najib Hosni; Anouar Kousri; Radhia Nasraoui; and Mokhtar Trifi,⁴ all of whom have been attacked in the discharge of their professional duties.⁵

Furthermore, as explained by Mr. Abid Hussain, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression:

Many political trials have reportedly taken place with no regard for the rights of defence and due legal process. The Special Rapporteur heard allegations that the judiciary is not entirely untouched by influence exerted by the executive branch. In addition, the task of lawyers specializing in the defence of human rights has been made increasingly difficult by the restrictions imposed on their activities in the defence of their clients, for

¹ CCPR/C/79/Add.43.

² ICJ, *Attacks on Justice*, 11th ed. (Geneva: ICJ, 2002) 517.

³ Bechir Essid is the *Bâtonnier de l'Ordre national des avocats tunisiens* (President of the Tunisian Bar Association). The Council of the *Ordre des avocats* is currently being prosecuted for having called a national strike of lawyers on 7 February 2002 to protest the lack of fair trial guarantees during the trial of Hamma Hammami, a political activist. See, p. 8-9 of this report.

⁴ Mokhtar Trifi is the President of the *Ligue tunisienne des droits de l'homme*, "LTDH", (Tunisian League for Human Rights) which was founded in 1977. It is one of the first human rights organizations of its kind to be established in the Arab world.

⁵ *Attacks on Justice*, supra note 2, 517-518.

example, the difficulty in obtaining copies of judicial documents and the practice of granting visiting permits to lawyers but refusing to recognize them on the day they visit prisons.... The Special Rapporteur considers that the harassment of lawyers and impeding their freedom to pursue their profession constitute violations of the principle of equity of the judicial system and of the right of the accused to a fair trial.⁶

Mr. Essid, the President of the *Ordre national des avocats tunisiens* (National Bar Association of Tunisian Lawyers) and Mr. Jmour, its Secretary-General, who were interviewed by the CIJL/ICJ,⁷ confirmed that the violation of the right to defense by persons detained for political reasons is particularly egregious in Tunisia. For example, the ability of lawyers to consult with clients is severely restricted as the Ministry of Justice limits or even refuses permits to visit detainees; lawyers are routinely denied access or only given limited access to their clients' files; and detainees are pressured to change lawyers and hire those recommended by the authorities. In addition, human rights lawyers rarely benefit from a corporate clientele, as those clients are also intimidated. To further discourage all clients and deprive human rights lawyers of their source of livelihood, policemen and other state agents are routinely posted at the entry of lawyers' offices. Furthermore, human rights lawyers are under constant surveillance, files are created on them, their passports are not renewed or are withheld, and their telephones and faxes are wire tapped or cut off. It is unfortunately not infrequent that lawyers' offices are ransacked and that they are physically assaulted when trying to exercise their professional activities.

Indeed, in mid-December 2002, the authorities stepped up their attacks on human rights lawyers who recently formed an organization to represent persons detained for political reasons. The CIJL/ICJ strongly condemned the wave of violent assaults on lawyers Saïda Akremi Bhiri, Nourredine Bhiri, Samir Ben Amor, Samir Dilou, Anwar Oled Ali, Youssef Rezjai, M. Ayadi and Mohamed Jmour.⁸ It is most alarming that the minor son of lawyers Saïda Akremi Bhiri and Nourredine Bhiri was also assaulted during the attacks on his parents.⁹

⁶ E/CN.4/2000/63/Add.4.

⁷ ICJ interview with Mr. Bechir Essid and Mr. Mohamed Jmour, Paris, 5 November 2002.

⁸ See, ICJ Press Release: *Tunisia: Wave of Violent Assaults on Lawyers Continues* (Geneva: ICJ, 18 December 2002), wherein the ICJ strongly condemned the recent violent spate of attacks against lawyers in clear violation of fundamental international human rights principles. As stated in the press release, "Some of the lawyers who were attacked are members of the newly created International Association for the Support of Political Prisoners which the Tunisian authorities consider to be illegal as it represents persons detained for political reasons."

⁹ Lawyers Committee for Human Rights Press Release: *Lawyers Committee for Human Rights Extends Solidarity to the Tunisian Legal and Human Rights Community* (New York: LCHR, 16 January 2003).

As indicated in a joint report written by the ICJ, Lawyers without Frontiers (Belgium) and the Observatory for Human Rights on the situation of human rights lawyers in Tunisia:

Attacks on the free exercise and independence of the legal profession are targeted to lawyers who are, or who are seen to be, engaged politically. This is manifested notably in the case of lawyers who defend members of the political opposition, those who are engaged in politically 'sensitive' causes, those who are active within independent organizations, or those who themselves are related to political opponents.¹⁰

The report goes to describe the numerous methods Tunisian authorities utilize to exert pressure on human rights lawyers such as economic strangulation, harassment by police, criminalization of the lawyers' professional activities and legal repression.¹¹

(a) Prosecution of the Conseil de l'ordre national des avocats (the Council of the Bar Association)

As in the past, the Tunisian Bar Association continues to play an essential role in defending human rights. This is demonstrated by the strong stand it took in protesting the unfair trial proceedings of Hamma Hammami, Abdeljabar Maddouri and Samir Tammallah at their 2 February 2002 trial. Prior to the commencement of that hearing, while the defendants, who are members of the banned *Parti communiste des ouvriers tunisiens* (Communist Party of Tunisia, hereinafter "PCOT"), were sitting in the courtroom, they were suddenly attacked and dragged away by plainclothes policemen in full view of lawyers and international observers, including a CIJL/ICJ trial observer.¹² As stated by Human Rights Watch, "(t)his measure prompted a protest walkout by the entire defense team. The defendants were later escorted in a disheveled state to a different courtroom, where they stated that the police had beaten them."¹³ Shocked at these assaults on the detainees, the Council of the National Bar Association and the aforementioned President of the Bar Association, Bechir

¹⁰Joint Report by Lawyers without Borders (Belgium), ICJ and the Observatory for the protection of human rights defenders, Tenth Congress of the Union of Arab Lawyers, March 2001, Beirut.

¹¹ *Ibid.*

¹² Mr. Alain Werner, a Swiss lawyer, observed the 30 March hearing on behalf of the CIJL/ICJ wherein the three defendants received sentences of imprisonment from 18 months to three years and three months. In his report, the CIJL/ICJ observer expressed strong misgivings about the fairness of the trial, *Rapport d'Alain Werner, mandaté par la Ligue Suisse des Droits de l'Homme, la Commission des droits de la défense de l'ordre des avocats de Genève et la Commission Internationale de juristes pour une mission d'observation judiciaire* (Geneva: ICJ, 30 March 2002).

¹³ Human Rights Watch Press Release: *Tunisia: Release Activists Sentenced on Political Charges* (New York: HRW, April 2 2002). See also, *Rapport de Christian Grobet, observateur judiciaire de la Ligue Suisse des Droits de l'Homme* (Geneva: LSDH, 9 March 2002). Mr. Hammami, who is the spokesperson for the PCOT and the husband of well-known human rights lawyer Radhia Nasraoui, came out of hiding on 2 February 2002 with the other two defendants to seek dismissal of a default judgment delivered against them at their *in absentia* trial in 1999. Appeals hearings took place on 9 March 2002 and 30 March 2002.

Essid, who was one of the defense lawyers, decided on 2 February 2002 in an extraordinary meeting to call a national lawyers' strike which would take place on 7 February.

According to Mr. Essid and Mr. Jmour, the strike was called to protest the lack of fundamental fair trial guarantees during the Hammami trial, attacks on the defendants by police in the courtroom, and the lack of respect for the rights of the defence. The strike was also intended to express outrage at the treatment of lawyers who themselves had been assaulted in the courtroom during the aforementioned trial. Female lawyers, in particular, had been targeted and rudely insulted.¹⁴

The Council's call for a strike, which consisted of not attending court hearings for one day, was respected by 3,595 lawyers and was not observed by 80.¹⁵

The evening before the strike, the Minister of Justice indicated that the strike was "political in nature" and that the Council's decision could be subject to an appeal in court. Indeed, that same evening several lawyers from the party in power, *Rassemblement constitutionnel démocratique* ("RCD"), filed a lawsuit against the Council in the Court of Appeal requesting the court to determine that the Council was not competent to order the members of the Bar to strike. According to Mr. Essid, the purpose of the lawsuit is to weaken the Council's role in protecting lawyers and prohibit lawyers from engaging in their constitutional right to strike.

The Tunisian authorities also intend to create a chilling precedent in that a court ruling which divests the Council of the power to declare strikes will deprive lawyers of one of their most important weapons in their struggle for justice. This is particularly troubling as, at the present time, the most active protectors of human rights in Tunisia are lawyers.

Given the significance of the trial against the Council, the ICJ, the Observatory for the Protection of Human Rights Defenders, and Lawyers Without Borders (Belgium) mandated Mr. Lyon-Caen, a prominent French magistrate of the *Cour de cassation*, the highest court in France, to observe the first trial of the Council which took place on 19 November 2002.¹⁶ That hearing was adjourned to 24 December 2002, which was again observed by the aforementioned trial observer. It is not an unusual tactic for Tunisian authorities to schedule trials which generate international interest during the holidays in the hope that this will dissuade foreign observers from traveling to Tunis. The 24 December hearing was adjourned as was the 25 February hearing which has now been rescheduled for 22 April.

¹⁴ An eyewitness informed CIJL/ICJ that the agents who attacked the prisoners addressed female lawyers as "whores".

¹⁵ *Supra* note 7.

¹⁶ Mr. Lyon-Caen had been present at the 2 February 2002 Hammami trial where he witnessed the assaults on the defendants and their lawyers. See, *Fédération Internationale des ligues des Droits de L'Homme* report, *Mission d'observation judiciaire, Tunisie: le procès Hammami, une caricature de Justice* (Paris: FIDH, January 2003).

IV. Harassment of Human Rights Defenders

The CIJL/ICJ has intervened in favor of other human rights defenders such as Khemaïs Chammari¹⁷ whose trial it observed; Khemaïs Ksila, a former vice president of *la Ligue Tunisienne des droits de l'homme* (Tunisian League for Human Rights, hereinafter "LTDH"); Mohammed Mouada, President of the opposition *Mouvement des démocrates socialistes*; and Dr Moncef Marzouki, former President of LTDH, founder of the *Conseil nationale pour les libertés en Tunisie* (National Council for Freedom in Tunisia), and founder of the Democratic Congress party. As described in *Attacks on Justice*:

[In 2000-2001] the Government continued to subject human rights defenders and activists to harassment and intimidation. Many defenders have been prosecuted or threatened with prosecution, subjected to ill treatment or had their telephone or fax lines cut.¹⁸

The UN Special Representative on human rights defenders and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression have urged the Tunisian Government to end the harassment and intimidation of human rights defenders, political opponents, trade unionist, lawyers and journalists.

(a) *La Ligue Tunisienne des droits de l'homme* (Tunisian League for Human Rights)

Pursuant to the Associations Act of 7 November 1959, which regulates the activities of NGOs, the Ministry of Interior can approve or refuse the registration of organizations.¹⁹ In practice, it is almost impossible to set up

¹⁷Khemaïs Chammari, a former opposition Member of Parliament (*Mouvement des démocrates socialistes*) was a vice president of LTDH and Fédération Internationale des droits de l'Homme ("FIDH") as well as a founding member of the Arab Institute for Human Rights. In July 1996, the ICJ sent Katerina Nägeli, a Swiss lawyer to observe his trial before the Criminal Chamber of the Court of Appeal of Tunis. Mr. Chammari was charged with "disclosure of national defence secrets to a foreign country or its agents, " a crime punishable by death pursuant to the Tunisian Penal Code. As stated in an ICJ press release, *Tunisia: Jurists Dismayed by Politically Motivated Chammari Sentence*, 20 July 1996, "(t)he alleged 'secrets' pertain to the trial case of the *Mouvement des démocrates socialistes* ("MDS") President, Mr. Mohammed Mouada, who was sentenced on 29 February 1996 to 11 years in prison on charges believed to have been fabricated." The ICJ trial observer concluded that the proceedings were based on "dubious and even faked evidence". See, ICJ Report by Dr. Caterina Nägeli, *Observation of proceedings against Mr. M. Khémis Chammari in Tunisia* (Geneva: ICJ, 16-19 July 1996).

¹⁸*Attacks on Justice*, supra note 2, 513.

¹⁹ *Report of Tunisian League for Human Rights* (Tunis: LTDH, 2001), p. 9 states, "(r)égie par la Loi du 7 novembre 1959 modifiée le 2 août 1988 et le 2 avril 1992, la loi sur les associations relève du droit d'association garantie par l'article 8 de la constitution et l'article 22 du pacte international. Celle ci ne concerne pas les partis, mais le ministère public utilise souvent la loi sur les associations pour inculper les membres des partis ou des formations politiques non autorisés.... La formation d'associations indépendante se heurte à différents blocages et tracasseries. En fait, l'administration se comporte comme si la création des associations est

new independent associations as such requests are often rejected. More ominously, the Associations Act is used to criminalize the activities of independent organizations.

The United Nations Human Rights Committee has declared that:

The Committee is concerned that the Associations Act may seriously undermine the enjoyment of the freedom of association under article 22, particularly with respect to the independence of human rights non-governmental organizations. In this connection, the Committee notes that the act has already had an adverse impact on the Tunisian League for Human Rights.²⁰

Thus, there is little respect for freedom of association for human rights organizations in Tunisia. Indeed, the case of the LTDH demonstrates the nature and level of attacks and interference in the work of NGOs. This reputable human rights organization, which has 41 local sections, has been affiliated with the ICJ since 1979.

Much to the consternation of a few members of the ruling RDC party, the LTDH elected to its board a majority of human rights activists, with Mokhtar Trifi, a human rights lawyer, being elected President at its fifth general assembly in October 2000. Four RDC members filed a lawsuit and won an interim injunction to annul the results of the elections and expel the newly elected steering committee of the LTDH. On 21 June 2001, the Appeal Court in Tunis affirmed the decision of the lower court which had ordered the results of the elections to be annulled and the elected board dissolved. Ironically, the authorities ordered that that same board organize elections for a new assembly.²¹ The LTDH continues to issue communications and attempts to conduct its daily business despite daily difficulties such as having its telephone and fax lines cut or monitored as experienced by CIJL/ICJ during numerous attempts to contact this organization. As stated by Mr. Trifi, the LTDH considers the Appeal Court's ruling invalidating that organization's democratic elections to be "a political decision in legal packaging".²²

The Government, in turn, continues to harass Mr. Trifi. The latest incident against this human rights lawyer took place on 6 February 2002, the evening before the lawyers' strike.²³ Mr. Trifi's law office was raided and the contents of his desk, along with 200 dinars, were emptied. When Mr. Trifi attempted to

soumise au régime de l'autorisations préalable. Toute activité associative, sans cette autorisation imposée par le ministre de l'intérieur est criminalisée. Malgré le suivi à la lettre de toutes les procédures de déclaration de constitution, les pouvoirs publics refusent de délivrer le récépissé aux intéressés."

²⁰ CCPR/C/79/Add.43.

²¹ For a full report on the LTDH elections, see, Human Rights Watch and The Observatory for the Protection of Human Rights Defenders, *A Lawsuit Against the Human Rights League, an Assault on all Rights Activists* (New York: HRW and OPHRD, April 2001).

²² Interview with Mr. Mokhtar Trifi, Paris, 6 November 2002.

²³ *Ibid.*

register a complaint with the police, he was asked to name the persons he suspected of the crime, whereupon Mr. Trifi indicated that it was the chief of the political police in Tunis, Mr. Belazrag, who had previously threatened him. At the mention of this name, the policeman allegedly refused to register a complaint whereby Mr Trifi, in turn, refused to sign the police report. Thereafter, three policemen charged by the public prosecutor with investigating the crime also reportedly refused to note Mr. Belazrag's name on the complaint. Thus, the incident was not investigated and the harassment of the LTDH and its president continues.

V. The Judiciary

Article 65 of the 1959 Constitution of Tunisia establishes the principle of the independence of the judiciary and provides that judges, in the exercise of their functions, are not subject to any authority other than the law.²⁴ Article 66 of the Constitution states that judges are named by Presidential decree upon the recommendation of the *Conseil supérieur de la magistrature* (Superior Council of the Judiciary), and Article 67 establishes that the aforementioned Superior Council is responsible for the nomination, promotion, transfer and discipline of judges.

(a) Structure of the Courts

The judicial system in Tunisia is composed of ordinary civil and criminal courts, an administrative court, and military courts.

(i) Ordinary Courts

Law no. 67-29 of 14 July 1967 establishes the structure of the ordinary courts, the statutes pertaining to the judiciary and the composition of the Superior Council of the Judiciary. Further to Article 1 of this Law, the civil and criminal court systems consist of lower district courts (*Justices cantonales*); courts of first instance (*Tribunaux de première instance*); the housing court (*Tribunal immobilier*); courts of appeal (*Cours d'appel*); and the Court of Cassation (*Cour de cassation*), which being the nation's highest appeals court, considers arguments on points of law as opposed to fact.²⁵

(ii) Administrative Courts

Pursuant to Article 69 of the Constitution, the administrative court system is headed by the Council of State (*Conseil d'état*) which examines legislation.²⁶ The Council of State is composed of the Administrative Tribunal (*le Tribunal administratif*) and the Court of Accounts (*la Cour des*

²⁴ Article 65, "L'autorité judiciaire est indépendante; les magistrats ne sont soumis dans l'exercice de leurs fonctions qu'à l'autorité de la loi."

²⁵ Article 1, amended by organic law no. 85-79 of 11 August 1985.

²⁶ Article 69 (amended by constitutional law no. 97-65 of 27 October 1997).

comptes), which has jurisdiction over the finances of government ministries and agencies.

(iii) Military Tribunals

Parallel to the civil system are the military tribunals within the Ministry of Defense. The Code of Military Justice provides that military tribunals within the Ministry of Defence are competent to try military personnel and civilians accused of national security crimes as provided by law.²⁷ At times of peace, a military tribunal consists of a civilian judge and four military *conseillers* who are active officers in the military.²⁸ The verdicts of these courts may be appealed before the Military Court of Cassation.²⁹

(b) The Superior Council of the Judiciary

As indicated above, Law no. 67-29 defines the composition of the Superior Council of the Judiciary. However, as this body is charged with nominating, transferring, disciplining, and promoting judges under the direct authority of the Executive, it is not independent.

Pursuant to Article 6 of Law no. 67-29 on judicial structure, the President of Tunisia heads the Superior Council of the Judiciary while the Minister of Justice serves as its Vice President.³⁰ The following members of the Superior Council of the Judiciary are selected by Presidential decree: the first president of the Court of Cassation; the public prosecutor of the Court of Cassation; the public prosecutor who is director of judicial services; the Inspector General of the Ministry of Justice; the first president of the Housing Court; the first president of the Court of Appeal of Tunis; and the public prosecutor of the Court of Appeal of Tunis.³¹ It is the President, or if he so designates, the Vice President who convene meetings of the Superior Council.³²

It is clear then that the Superior Council of the Judiciary, which decides on the judicial career of judges, is not independent but rather serves as an instrument of the Executive. As stated in *Attacks on Justice*:

This situation places undue pressure on the work and independence of judges who render decisions in politically sensitive cases...Judges fear the possibility of transfer or

²⁷ The Code of Military Justice established by Decree of 10 January 1957, Chapter I, Articles 5 and 8 modified by law no. 2000-56 of 13 June 2000.

²⁸ Chapter II, Article 10 of the Code of Military Justice.

²⁹ Chapter V, Article 29 of the Code of Military Justice.

³⁰ Title II, Article 6, amended by organic law no. 87.14 on 10 June 1987 and organic law no. 87-80 on 29 December 1987.

³¹ Title II, Article 7bis added by organic law no. 85-79 of 11 August 1985.

³² Title II, Article 7 added by organic law no. 85-79 of 11 August 1985.

discipline if they issue judgements conflicting with the interests of the executive.³³

Such undue influence on judges violates one of the most fundamental precepts of the *UN Basic Principles on the Independence of the Judiciary*, namely, that:

The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason.³⁴

Accordingly, the Government's prevalent and persistent interference with the functioning of the judiciary constitutes a serious threat to the constitutionally and internationally guaranteed principle of judicial independence.

(c) Dismissal of Judge Mokhtar Yahyaoui

On 14 July 2001, by order of the Minister of Justice, Judge Mokhtar Yahyaoui, the president of the 10th Civil Chamber of the Court of First Instance in Tunis, was suspended from his duties.³⁵ The cause of this suspension was an open letter that the Judge addressed on 6 July to the President of the Republic in the latter's capacity as President of the Superior Council of the Judiciary. In this letter, Judge Yahyaoui decried the lack of independence of the judiciary and Government disregard for the constitutional prerogatives of the judiciary. Judge Yahyaoui wrote that judges often had to "deliver verdicts which were dictated to them by political authorities... [leading] to judgements which do not reflect the law, but only the Executive's interpretation of the law."³⁶

The CIJL/ICJ addressed an intervention on 20 July 2001 on behalf of Judge Yahyaoui to the Tunisian Government, pointing out its concerns that Article 8 of the Tunisian Constitution on the freedom of opinion and expression and Article 65 on the independence of the judiciary, as well as the *International Covenant on Civil and Political Rights*, to which Tunisia is a State party, had been

³³ *Attacks on Justice*, supra note 2, 516.

³⁴ Principle 2 of the *UN Basic Principles on the Independence of the Judiciary*. The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted the *UN Basic Principles on the Independence of the Judiciary* by consensus. These were endorsed by the UN General Assembly (A/RES/40/32, 29 Nov. 1985) which later specifically "welcomed" the Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice." (A/RES/40/146, 13 Dec. 1985).

³⁵ Chapter VII of Law no. 67-29 of 14 July 1967 on judicial structure addresses the discipline of judges. Arts. 54 and 55 of this chapter provide that the Disciplinary Council is competent to discipline judges yet in urgent cases, it is the Secretary of State for Justice who does so.

³⁶ See joint report by Avocats Sans Frontières Belgique and l'Observatoire pour la protection des défenseurs des droits de l'homme, *Tunisie, l'affaire Yahyaoui, Le combat d'un homme pour l'indépendance de la justice* (Avocats Sans Frontières Belgique and l'Observatoire pour la protection des défenseurs des droits de l'homme, June 2002) 3.

violated. The Government's attention was also drawn to the violation of the *UN Basic Principles on the Independence of the Judiciary*.

Possibly due to mounting national and international outcry, on 1 August 2001 Judge Yahyaoui was allowed to resume his functions and his withheld salary was reinstated. However, the situation did not improve and at the beginning of November 2001, Judge Yahyaoui was removed from cases on which he was working. Shortly thereafter, he was asked to appear before the Disciplinary Council on 29 December on the grounds that he did not "fulfill his professional obligations" and that he had "denigrated the reputation of the judiciary." Given the short time that he was afforded to prepare his case, compounded by the fact that December 29 fell within the holiday period, Judge Yahyaoui's defense team asked the Disciplinary Council for an adjournment. This request was denied and the Judge's lawyers, to protest the lack of basic rights for the defense, withdrew from the case. On 29 December the Disciplinary Council announced the dismissal of Judge Yahyaoui. This decision was published by decree in the official gazette on 25 January 2002.

The CIJL/ICJ sent another intervention on 13 March 2002 to express its deep concern at the dismissal of Judge Yahyaoui and remind the authorities of Tunisia's national and international legal obligations. The CIJL/ICJ requested the authorities to reinstate Judge Yahyaoui and ensure that disciplinary proceedings against him conform with the *UN Basic Principles on the Independence of the Judiciary*.³⁷ To date, no response to either intervention has been forthcoming. Furthermore, dismissed Judge Yahyaoui informed the CIJL/ICJ on 24 December 2002 that after nearly one year, he has yet to receive a written decision from the Superior Council of the Judiciary explaining the reasons for his dismissal. Without such written notification setting forth the rationale for his dismissal, former Judge Yahyaoui cannot appeal the decision.

The UN Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, also sent urgent appeals to the Tunisian authorities on behalf of Judge Yahyaoui.³⁸ In its response to the Special Rapporteur the Government stated that the dismissed judge's open letter to the President was in retaliation for a judgement against him in a civil case. The Special Rapporteur remained unconvinced and noted "with concern the decision of the disciplinary council to dismiss Judge Yahyaoui and the reasons for that decision."³⁹ Despite several requests to conduct a mission in Tunisia pursuant to his mandate, the Special Rapporteur has yet to receive an invitation from the Tunisian Government.

Mr. Yahyaoui and members of his family face persistent harassment and intimidation at the hands of the authorities. Mr. Yahyaoui's 17-year old daughter, Amira, was assaulted outside of her school on 14 June 2002 by an

³⁷ Principles 17-20.

³⁸ E/CN.4/2002/72, *Report of the Special Rapporteur on the independence of judges and lawyers*, 11 February 2002.

³⁹ *Ibid.*

unknown person who beat her with a truncheon.⁴⁰ In addition, his nephew, Zouheir Yahyaoui, has been imprisoned for having operated a web site expressing critical views on the political situation in Tunisia.⁴¹ Mr. Yahyaoui himself has been prevented from leaving the country and travelling outside of Tunis.

On 11 December 2002, Mr. Yahyaoui was physically assaulted by plainclothes policemen as he was attempting to enter a colleague's office. These recent attacks on Mr. Yahyaoui and on several Tunisian human rights lawyers were allegedly intended to punish them for establishing the *Association internationale pour le soutien aux prisonniers politiques* (International Association for the Support of Political Prisoners), which is considered by Tunisian authorities to be an illegal organization.⁴²

VI. Centre de l'indépendance de la justice en Tunis (Center for the Independence of Justice in Tunis)

The Center for the Independence of Justice in Tunis was created in November 2001 by more than forty judges, lawyers, university professors, human rights defenders and other members of civil society to promote and protect the independence of the judiciary and lawyers as guaranteed by the Constitution and Tunisian laws. The Center is presided over by dismissed Judge Mokhtar Yahyaoui and has an executive committee whose members include Bechir Essid, the President of the Bar Association; Mokhtar Trifi, the President of the LTDH; Mohamed Charfi, the previous Minister of Education, lawyers Alya Chammari and Nejib Hosni; as well as Radhia Nasraoui and other renowned human rights defenders.

Despite numerous efforts by the founders of the Center to legally register their organization (through personal delivery of required documents and by registered mail), the authorities have refused, to date, to allow them to do so.

Regarding the difficulties Tunisian NGOs face when trying to register as organizations, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reported that:

... freedom of association, and also any other form of expression of divergent opinions, were subject to constraints designed to curtail if not suppress these freedoms. These constraints take various forms of pressure on organizations and, what is much more serious, on individuals themselves.

⁴⁰ Amnesty International Press Release: *Tunisia: The trial of Zouheir Yahyaoui, the right to freedom of expression on trial again* (London: Amnesty International, 19 June 2002).

⁴¹ *Ibid.*

⁴² ICJ Press Release: *Tunisia: ICJ condemns violent attacks on former Judge Mokhtar Yahyaoui* (Geneva: ICJ, 12 December 2002). Also see, *Tunisia: Wave of Violent Assaults*, *supra* note 8.

Firstly, the Special Rapporteur was informed that it is virtually impossible to set up new independent associations. The number of 7,000 NGOs mentioned by the authorities very largely represents associations close to the Government or set up by it...

In addition, the Special Rapporteur was informed that the everyday activity of the existing independent organizations is by no means facilitated by the Tunisian authorities....⁴³

According to Mr. Najib Hosni, a well-known human right lawyer on whose behalf the CIJL/ICJ has intervened several times⁴⁴, the Center for the Independence of Justice in Tunis is particularly threatening to the authorities as it promotes an independent judiciary - a radical change from the present *de jure* and *de facto* system whereby judges are controlled by the Executive as demonstrated above.

VII. CIJL/ICJ Fact-Finding Missions

(a) First fact-finding mission (16-22 June 2002)

In light of the attacks on the independence of the judiciary and mounting harassment of lawyers and human rights defenders in Tunisia, the CIJL/ICJ determined that it would be appropriate to conduct a fact-finding mission to that country. Furthermore, the CIJL/ICJ was strongly encouraged by Tunisian lawyers and other human rights defenders to undertake such a mission. The objective, as in all CIJL/ICJ fact-finding missions, was to undertake a full and fair evaluation of the state of the judiciary and lawyers based upon information gathered from interviews with Government authorities, judges, lawyers, academics, NGOs, human rights defenders and other members of civil society in order to ascertain whether national and international standards relating to the independence of the judiciary and lawyers are being respected. A report on the situation in Tunisia as it relates to the independence of the judiciary and the functioning of lawyers would have been issued after the conclusion of the mission. The report would have included concrete recommendations pursuant to the findings of the CIJL/ICJ mission and would have annexed any comments the Tunisian Government wished to add.

The experts who were selected for the first CIJL/ICJ fact-finding mission were: Louise Doswald-Beck, Secretary-General of the ICJ; Judge Alice Desjardins, Federal Appeals Court of Canada; and Mr. Michael Ellman, British Solicitor. Alain Werner, a Swiss lawyer, was chosen as Rapporteur. On 24 May, the CIJL/ICJ sent a letter to Mr. Hatem Ben Salem, the Tunisian Ambassador in Geneva, informing him of its intention to conduct a fact-finding mission and requesting interviews with relevant government officials. A similar letter was addressed to the Minister of Justice and the Minister in charge of human rights

⁴³ E/CN.4/2000/63/Add.4, *Report of the Special Rapporteur on freedom of opinion and expression: Civil and Political Rights Including the Question of Freedom of Expression*, 23 February 2000.

⁴⁴ *Attacks on Justice*, *supra* note 2, 518.

on 4 June. No written responses to any of these letters were given. In a meeting with Mr. Hatem Ben Salem on 7 June, however, the CIJL/ICJ was informed that that the fact-finding mission would not be welcome and that it would not be granted appointments with Government authorities. Various reasons for this denial were given including the following: the CIJL/ICJ had organized a seminar in Tunis in 1994 which had displeased the authorities; the CIJL/ICJ should not interfere in the internal affairs of countries; this organization had not followed proper procedures; it did not have an invitation; and one of the experts, Michael Ellman, was Jewish. However, as the Ambassador did not at any point inform the CIJL/ICJ that the mission would be denied entry into the country, preparations for the mission continued.

Nevertheless, on 15 June 2002, Judge Desjardins who was the first member of the delegation to arrive in Tunis, was immediately turned back from Tunis-Carthage airport. It became evident that the other members of the delegation would also receive the same treatment. Therefore, the ICJ decided to cancel the mission and attempted to secure appointments from Government authorities for a second mission.

On 16 June, the CIJL/ICJ issued a press release on the refoulement of Judge Desjardins, expressing its disappointment, and at the same time, its desire for future cooperation with Tunisian authorities. The CIJL/ICJ also sent a letter on 19 June to the Ministry of Justice to protest the refoulement of one of the delegation's most senior members and request future dialogue.

(b) Second fact-finding mission (26 -31 October 2002)

On 27 September and 14 October, the CIJL/ICJ addressed letters to the Minister of Foreign Affairs and the Minister of Justice informing them that it intended to organize another fact-finding mission to examine the situation of the judiciary and the functioning of lawyers. In this letter, the CIJL/ICJ requested appointments with relevant officials.⁴⁵ Furthermore, the CIJL/ICJ had received an official invitation from its affiliate, the LTDH, to conduct a mission to evaluate the situation of judges and lawyers. The CIJL/ICJ received numerous other invitations from Tunisian human rights lawyers to conduct such a mission.

The expert members of the second mission were Christian Grobet, a Swiss lawyer and Parliamentarian; Margaret Owen, a British barrister, Fellow at Cambridge University and retired magistrate; and Joachim Nergelius, Professor of Constitutional Law at Lund University and President of ICJ Swedish Section. Other members of the mission were Linda Besharaty-Movaed, ICJ Legal Advisor and Hassiba Hadj-Sahraoui, ICJ Jurist.

⁴⁵ By this time, Mr. Hatem Ben Salem was no longer the Tunisian Ambassador in Geneva as he had been appointed Coordinator for Human Rights at the Ministry of Justice in Tunis.

A few days prior to the delegation's departure, the ICJ received several telephone calls from the chargé of the Tunisian mission in Geneva who attempted to dissuade the mission from taking place. The ambiguous reasons given by the chargé were that the LTDH was not in a position to invite the CIJL/ICJ (presumably as it had not held elections pursuant to will of the Executive) and that the terms of the CIJL/ICJ mission were "in contradiction with the situation of the judiciary".

Despite several requests by the ICJ for an official written communication and explanation of the aforesaid reasons, none was forthcoming. Thus, it was decided that the mission should proceed.

Upon arrival at Tunis-Carthage airport on 26 October, all members of the delegation other than Ms. Owen who had missed her connecting flight, were immediately taken aside and requested to hand over their passports and tickets. The delegation was informed by security agents that it was not allowed entry into Tunisia and that it had to return on the same flight that had brought it there. The delegation made several requests for a written explanation yet was told that there would be no such thing. Ms. Owen, who arrived in Tunis later that same day, was also immediately turned back.

The CIJL/ICJ issued a press release strongly condemning the refolement of its second mission.⁴⁶ Louise Doswald-Beck, the Secretary-General stated that:

By closing its doors to international scrutiny, we can only conclude that the Tunisian Government has something to hide. The Government is foolish in thinking that by shunning the international legal community, it will not be held accountable to international human standards.⁴⁷

Thus, by not allowing the CIJL/ICJ missions to take place, the Tunisian Government demonstrated its bad faith and unwillingness to address serious concerns pertaining to the independence of judges and lawyers.

VIII. Past CIJL/ICJ Involvement in Tunisia: 1994 Seminar

The CIJL/ICJ's involvement in Tunisia began in 1994 when, in collaboration with the Ministry of Justice and the Arab Institute for Human Rights⁴⁸, it

⁴⁶ ICJ Press Release: *Tunisia Slams Door on Civil Society* (Geneva: ICJ, 28 October 2002).

⁴⁷ *Ibid.*

⁴⁸ The Arab Institute for Human Rights was created in 1989 through a joint initiative of the Union des Avocats Arabes, l'Organisation Arabe des Droits de l'Homme and the Ligue Tunisienne pour la Défense des Droits de l'Homme. It has consultative status with ECOSOC and the African Commission on Human and Peoples' Rights. It also has Observer Member status at the Permanent Committee of Human Rights at the League of Arab States. The mission of the Arab Institute is to "(p)romote the principles and culture of human rights, tolerance, peace and respect for human dignity, justice, equality and understanding between peoples in the Arab world based on the fundamental values of the Universal Declaration of Human Rights and through an approach based upon the indivisibility and complementarity of

organized a two-week seminar on *Judicial Independence and Functions in Tunisia*. On the last day of the seminar, the judges, who were junior in rank and who had been selected by the Minister of Justice to participate in said seminar, signed and unanimously adopted a report entitled *Summary of Activities of the Course* based upon their discussions during the seminar. Among the most important conclusions of the report were those calling for "a greater number of directly elected members of the [High Council] and for greater financial and legal independence of the High Council."⁴⁹ As indicated previously, the High Council is the constitutional body charged with nominating, dismissing, and promoting judges. The report also called for "the adoption of the principle that judges cannot be transferred without their consent"⁵⁰ and that "any transfer should take place according to objective standards that are applied equally."⁵¹ Recommendations regarding prosecutorial oversight of police records at the time of arrest, and the right of detainees to representation during custody were also drawn up.

Several days after the termination of the seminar, the CIJL/ICJ was notified by the Ministry of Interior that the participating judges had withdrawn their support for the declaration as it did not properly reflect their views. In fact, the judges were placed under duress to sign a counter-declaration substantially altering the views they had expressed in the earlier declaration. Mr. Frej Fenniche who was at that time the Executive Director of the Arab Institute for Human Rights and co-organizer of the seminar, stated that, "(o)n 10 Dec. 1994, at 3:00 a.m., representatives of the Ministry of Justice went to the homes of each of the participating judges and ordered them to sign a counter-declaration."⁵² This counter-declaration which contained only two short paragraphs was significantly at odds with the original declaration and included "two sentences praising the President of the Republic."⁵³ All but a few of the participating judges caved in to pressure to sign the counter-declaration. Mr. Fenniche informed us that the Ministry of Justice and the President of the Administrative Tribunal attempted to pressure him, too, to denounce the seminar and the declaration in question but Mr. Fenniche refused to comply with their request.⁵⁴

all human rights." The Institute achieves its objectives mainly through training and educational activities. <<http://www.aihr.org.tn/objectifs.htm>> visited on 24 December 2002.

⁴⁹ ICJ Press Release: *Judges Intimidated in Tunisia* (Geneva: ICJ, December 1994).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Interview with Mr. Fenniche, Geneva, 22 October 2002.

⁵³ *Judges Intimidated in Tunisia*, *supra* note 49.

⁵⁴ Pursuant to an Amnesty International report, "Mr. Frej Fenniche, then executive director of the Tunis-based Institut arabe des droits e l'homme (IADH), Arab Institute of Human Rights, was arrested in May 1996 at Tunis airport as he was about to board a plane to France where he was to represent the IADH at a human rights conference. He was held for four days in the Ministry of the Interior, where he was reportedly ill-treated, and the literature he was carrying for the meeting in France was confiscated." Amnesty International, *Tunisia Human Rights Defenders in the Line of Fire* (London: Amnesty International, 1 November 1998).

IX. International Obligations

Tunisia has ratified the following United Nations treaties: *Convention against Torture*, *Convention on the Rights of the Child*, *Convention on the Elimination of all Forms of Discrimination against Women*, *International Convention on the Elimination of all forms of Racial Discrimination*, *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. However, Tunisia is not party to the two optional protocols to the *Covenant on Civil and Political Rights*, the first relating to the right of individuals to bring complaints to the Human Rights Committee and the second aimed at the abolition of the death penalty. In addition, Tunisia has ratified the *African Charter on Human and Peoples Rights*.

Pursuant to Article 32 of the Constitution of Tunisia, ratified international treaties have legal precedence over domestic laws. By extension, treaties may be applied directly in domestic legislation by judges and those responsible for their application.

Relevant non-binding international obligations include: *UN Basic Principles on the Independence of the Judiciary*; *UN Basic Principles on the Role of Lawyers*; and *UN Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*.

X. Recommendations

The CIJL/ICJ urges the Government of Tunisia to respect the following recommendations pertaining to the judiciary, lawyers, and human rights defenders:

Judiciary

- Respect Article 65 of the Constitution calling for an independent judiciary.
- Conduct an impartial investigation into the dismissal of former Judge Yahyaoui and provide him with an opportunity to prepare a proper defense before a competent and independent body.
- Amend the law on the composition of the Superior Council of the Judiciary such that the majority of its membership is not designated by the Executive, but by qualified judges who are elected independently.

Lawyers and Human Rights Defenders

- Immediately cease assaulting lawyers and conduct impartial investigations into recent incidents where lawyers, and in some cases their children, have been physically attacked.

- Dismiss the lawsuit brought against the Council of the Bar Association and the President of the Bar Association for having exercised the legitimate right to call a strike. Cease future interference in the affairs of the Bar Association.
- End police surveillance and interception of telephones and faxes of lawyers and human rights defenders. Cease pillaging the offices of lawyers and human rights defenders. These actions clearly constitute harassment and intimidation.

National NGOs

- Allow the Center for the Independence of Judges in Tunis to register as an NGO. Such organizations promoting and protecting the independence of judges and lawyers exist legitimately throughout the world.
- Recognize as valid the democratic elections of the Tunisian Human Rights League and allow this and other human rights organizations to carry on their work without any interference or harassment.

International NGOs and UN special mechanisms

- Allow international NGOs and UN Special mechanisms into Tunisia to conduct missions pursuant to their respective mandates.

International Obligations

- Act in accordance with the following instruments: *International Covenant on Civil and Political Rights*, in particular, articles 9 and 14; *African Charter on Human and Peoples' Rights*, principally articles 7 and 26; amend the Code of Military Justice so that civilians are not tried by military courts; respect the *UN Basic Principles on the Independence of the Judiciary* and the *UN Basic Principles on the Role of Lawyers*; and respect the *UN Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*.