

Denial of Justice

Tunisia's "Conspiracy" Case 36/6835

An analysis of pre-trial proceedings



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March 2025

I. Overview

This briefing documents the International Commission of Jurists' concerns arising from the Tunisian authorities' ongoing prosecution of eight opposition figures in Case 36/6835, one of the notorious cases concerning an alleged "conspiracy against the internal and external security of the State."¹

Since President Kaïs Saïed's power-grab of 25 July 2021,² the prosecuting authorities have instigated these and other arbitrary prosecutions to crackdown on political dissent and pluralism in the country.

While Case 36/6835 involves 40 accused individuals, this briefing concentrates on the following eight accused, who constitute the initial contingent of people arrested in the Case:

- i. Khayam Turki, the head of the political think-tank, Jousour;
- ii. Abdelhamid Jelassi, a former leader of the Ennahdha Party;
- iii. Issam Chebbi, the leader of the Republican Party;
- iv. Jaouhar Ben Mbarek, an academic and leader of the National Salvation Front Party;
- v. Ghazi Chaouachi, a former leader of the Courant Démocrate Party and lawyer for Khayem Turki in the same "conspiracy case";³
- vi. Ridha Belhaj, former senior member of the Nidaa Tounes Party, leading figure in the National Salvation Front Party and lawyer for Khayem Turki in the same "conspiracy case";
- vii. Chaima Issa, a political activist, academic and also a member of the National Salvation Front Party;⁴ and
- viii. Lazher Akremi, a lawyer, political activist and former government minister.⁵

Along with 32 other opposition figures, the Tunisian authorities have subjected the accused to prolonged and arbitrary criminal prosecutions based on spurious charges, including of "planning an attack intended to change the nature of the State", an offence punishable with the death penalty upon conviction.⁶

In light of Tunisia's legal obligations under international human rights law, this briefing outlines a number of grave violations of the right to a fair trial of the eight accused in the context of the criminal proceedings against them before the Tunis Court of First Instance, the Tunis Court of Appeal and the Court of Cassation.

The briefing has been informed by a detailed analysis of available case files and information provided by the accused's lawyers and the "Defence Committee", a group of eminent lawyers defending the accused in the "conspiracy cases".⁷ The briefing concludes by outlining a number

1. ICJ, Tunisia, End wave of arbitrary arrests targeting critics and opposition members, 15 February 2023, available at: <https://www.icj.org/end-wave-of-arbitrary-arrests-targeting-critics-and-opposition-members/>. See also, ICJ, Tunisia, The authorities must release opposition figures and end politically motivated prosecutions, 7 May 2024, available at: <https://www.icj.org/tunisia-the-authorities-must-release-opposition-figures-and-end-politically-motivated-prosecutions/>.

2. On 25 July 2021, the President dismissed the government, declared himself the head of the executive branch and the Public Prosecutor's Office, suspended the country's legislature (the Assembly of the People's Representatives, ARP), and stripped the ARP's members of their parliamentary immunities. See: ICJ, Tunisia, President's power grab is an assault on the rule of law, 26 July 2021, available at: <https://www.icj.org/tunisia-presidents-power-grab-is-an-assault-on-the-rule-of-law/>.

3. In addition to Case 36/6835, the Tunisian authorities have also arbitrarily prosecuted Chaouachi in separate criminal proceedings. See, ICJ, Tunisia, Authorities must stop using criminal law to target lawyers, 5 January 2023, available at: <https://www.icj.org/tunisia-authorities-must-stop-using-criminal-law-to-target-lawyers/>.

4. In addition to Case 36/6835, the Tunisian authorities have also arbitrarily prosecuted Issa in separate criminal proceedings. See, Amnesty International, Tunisia: Quash military court conviction against prominent activist Chaima Issa, 13 December 2023, available at: <https://www.amnesty.org/en/latest/news/2023/12/tunisia-quash-military-court-conviction-against-prominent-activist-chaima-issa/>.

5. In addition to Case 36/6835, the Tunisian authorities have also arbitrarily prosecuted Akremi in separate criminal proceedings. See, ICJ, Tunisia, Authorities must stop using criminal law to target lawyers, 5 January 2023, supra note 3.

6. Tunisian Penal Code, art. 72, available in French at: <https://legislation-securite.tn/latest-laws/decret-du-9-juillet-1913-portant-promulgation-du-code-penal/>.

7. The Committee for the Defence of Political Leaders Detained in the Conspiracy Case, hereinafter "The Defence Committee" was set-up to defend and represent the political opponents prosecuted in Case 36/6835. It

of recommendations addressed to the Tunisian authorities with a view to ensuring:

- i. Effective remedies for fair trial violations in Case 36/6835; and
- ii. Legal and judicial reforms needed to prevent violations of the right to a fair trial in Tunisia.

The need for Tunisia to immediately return to the constitutional, democratic order is of particular urgency, given the detrimental impact that the executive's erosion of judicial independence has had on the accused's fair trial rights.⁸ In particular, Tunisia must:

- i. amend its constitutional and legal frameworks, which currently grant the executive powers to control or influence judicial appointments;⁹
- ii. halt the Ministry of Justice's practice of arbitrary judicial rotations;¹⁰ and
- iii. re-establish a fully independent High Judicial Council with sole responsibility for the selection, discipline, dismissal, rotation and training of judges and prosecutors, with its members selected independently of the executive, and whose separation from the legislative and executive branches of the State is codified in the Constitution.

The "Conspiracy" Case 36/6835

According to the Defence Committee, the prosecuting authorities are currently investigating and prosecuting at least four separate "conspiracy cases" in the country. Through these cases, the Tunisian authorities have subjected President Saïed's perceived political opponents to arbitrary criminal prosecutions on charges of "conspiracy against the internal and external security of the State", under the Penal Code and "Counter-Terrorism" Law, solely for their legitimate exercise of their rights to freedom of expression and peaceful assembly, or for carrying out their legitimate work or fulfilling their professional duties. Case 36/6835, on which this briefing focuses, epitomizes the egregious practice and arbitrary nature of all these "conspiracy cases".

The arrests

On 10 February 2023, President Saïed met the Minister of Justice, Leila Jaffel, and urged her to speed up what he referred to as "the accountability process," declaring it to be "unacceptable that those against whom there is evidence of guilt...escape accountability."¹¹ On the same day, the Counter-Terrorism and Organized Crime Police Unit submitted a letter to the Minister of Justice featuring the names of several individuals allegedly involved in a "conspiracy against the internal and external security of the State". The Minister then forwarded this letter to the Public Prosecutor's Office at the Tunis Court of First Instance with a request to "undertake and authorize the necessary investigations". On the same day, the public prosecutor instructed the Counter-Terrorism and Organized Crime Police Unit to investigate the allegations.¹²

Between 11 and 25 February 2023, the Counter-Terrorism Brigade carried out a wave of arrests targeting political opponents and government critics,¹³ including the accused:

- i. Khayem Turki, who was arrested from his home late on 11 February and has been detained

comprises 8 prominent lawyers who coordinate among dozens of other lawyers representing political opponents in this case.

8. ICJ, Fundamentally flawed: Tunisia's 'constitution-making' process, 29 June 2022, available at: <https://www.icj.org/fundamentally-flawed-tunisia-constitution-making-process/>.

9. 2022 Tunisian Constitution, available in French at: https://www.jurisitetunisie.com/tunisie/codes/Constitution_2022/menu-5.html.

10. The Association of Tunisian Magistrates (AMT), Statement on the extremely dangerous situation that the Tunisian judiciary has reached, 16 April 2024, available in Arabic at: https://www.facebook.com/story.php?story_fbid=732478925668814&id=100067201385778&mibextid=WC7FNe&rdid=6zEJZP1A4LtMX0Xx.

11. The Presidency of Tunisia, Meeting between President Kaïs Saïed and the Minister of Justice, 10 February 2023, available at: <https://www.facebook.com/Presidence.tn/posts/pfbid02c9dFqHgoBSEJaiE5ThD8JLK19njdJ3oS Rrm2Vg dTWHd jTUjRvYHcP ea 9b25v j4PL>.

12. Information received from the Defence Committee. See also, Inkyfada, Conspiracy Against State-Security: Empty Files to Eliminate Opposition, 24 March 2023, available at: <https://inkyfada.com/en/2023/03/24/conspiracy-state-security-opposition-tunisia/>.

13. ICJ, Tunisia: End wave of arbitrary arrests targeting critics and opposition members, 15 February 2023, supra note 1.

- since the early hours of 12 February 2023;
- ii. Abdelhamid Jelassi, who was arrested from his home late on 11 February, and has been in detention since the early hours of 12 February 2023;
- iii. Lazhar Akremi, who was arrested from his home on 13 February 2023, and held in detention until his release on bail on 13 July 2023. The day following his arrest, the Counter-Terrorism Brigade officially notified Akremi's family of his detention for allegedly "joining a terrorist enterprise and plotting against the external security of the State";
- iv. Issam Chebbi, who was arrested from his home at dawn on 23 February 2023, and who has been detained since;
- v. Chaima Issa, who was arrested from her home at dawn on 23 February 2023, and who was held in detention until her release on bail on 13 July 2023;
- vi. Jaouher Ben Mbarek, who was arrested from his home on 23 February 2023, and who has been detained since. During what his lawyers described as a "violent arrest", the authorities also arrested and detained Mbarek's father, releasing him later the same day;
- vii. Ridha Belhaj, who was arrested from his home during the night between 24 and 25 February 2023, and who has been detained since; and
- viii. Ghazi Chaouachi, who was arrested from his home during the night between 24 and 25 February 2023 and who has been detained since.

According to information provided by the Defence Committee, the police officers carrying out the arrests failed to provide any of the eight accused with the reasons for their arrests at the time, contrary to international human rights law and standards, including under article 9(2) of the International Covenant on Civil and Political Rights (ICCPR),¹⁴ by which Tunisia is bound,¹⁵ and contrary to article 13bis of the Criminal Procedure Code.¹⁶ Following the searches of the eight accused's homes carried out at the time of their arrest, the Counter-Terrorism Brigade confiscated their mobile telephones along with their and their family members' personal electronic devices, including mobile phones, memory cards, SIM cards and laptops.

Following their arrests, the public prosecutor at the Tunis Court of First Instance extended the detention of the following accused in police custody on the following occasions:

- i. Khayem Turki: on 17 February for five days and 22 February for five days;
- ii. Abdelhamid Jelassi: on 17 February for five days and 22 February for five days; and
- iii. Lazhar Akremi: on 17 February for five days and 22 February for five days.

Despite article 41 of the "Counter-Terrorism" Law requiring the public prosecutor to provide written reasons for extending detention in police custody,¹⁷ no such reasons were provided for any of these extensions.

With respect to Chebbi, Issa, Mbarek, Belhaj and Chaouachi, who were all arrested and initially detained in police custody between 23 and 25 February, no applications for extensions of detention in police custody were made before they were brought before an investigating judge.

Interrogations and "Evidence"

According to the Defence Committee, during the accused's detention in police custody, the Counter-Terrorism Brigade questioned each of them regarding their political activities. In particular, the officers interrogated Jelassi about his meetings with foreign researchers and his public criticism of President Saïed's July 2021 power grab. The Counter-Terrorism Brigade also interrogated Turki regarding his alleged meetings with diplomats from the United States embassy in Tunis. Additionally, they interrogated the eight accused regarding anonymous testimonies

14. "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him": ICCPR (1966), art. 9(2), available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

15. Tunisia ratified the ICCPR in 1969.

16. Tunisian Criminal Procedure Code, available in French at: <https://legislation-securite.tn/latest-laws/loi-n-68-23-du-24-juillet-1968-portant-refonte-du-code-de-procedure-penale/>.

17. Organic Law No. 2015-26 of 7 August 2015 on combating terrorism and preventing money laundering, hereinafter "Counter-Terrorism" Law, available in French at: <https://legislation-securite.tn/latest-laws/loi-organique-n-2015-26-du-7-aout-2015-relative-a-la-lutte-contre-le-terrorisme-et-a-la-repression-du-blanchiment-dargent/>.

that the Counter-Terrorism Judicial Pole,¹⁸ at the Tunis Court of Appeal, had obtained between 16 and 21 February 2023:

On 16 February 2023, an anonymous witness reportedly alleged that Khayem Turki had close ties to businessman Kamel Ltaief,¹⁹ who is among the forty accused in this case and has been detained since February 2023,²⁰ and that they both had links with "Zionist and Freemasonic" entities seeking to undermine the Tunisian economy; and

On 18 February 2023, a second anonymous witness apparently alleged that a friend had informed him of reports circulating within the Tunisian community in Europe that Kamel Ltaief had conspired with Tunisian political figures in Tunisia and abroad, including Ennahdha movement representatives, to overthrow President Saïed.²¹

Under article 57 of the Criminal Procedure Code, people purportedly suspected of involvement in terrorism, but who are yet to be charged, are denied access to a lawyer for the first 48 hours of detention.²² As a result, deprived of access to legal advice, all of the accused in Case 36/6835 refused to answer the Counter Terrorism Brigade's questions.

On 24 February 2023, the Public Prosecutor's Office of the Counter-Terrorism Judicial Pole opened an investigation against the accused and nine others in relation to allegations of "conspiracy against the internal security of the State" and attempting to "plan an attack intended to change the nature of the State", under articles 68 and 72 of the Penal Code, respectively.

Between 24 and 25 February 2023, the investigating judge at the Counter-Terrorism Judicial Pole interrogated each of the eight accused regarding their connections to each other, their meetings, their social media communications and their interactions with foreign diplomats in Tunisia, particularly from the British, Italian and Belgian embassies.²³ During these interrogations, the investigating judge presented "evidence" of "offences" under the Penal Code and "Counter-Terrorism" Law to the accused and their lawyers, including screenshots of WhatsApp messages referring to conversations that they had had with diplomats and "foreigners", as well as with one another, particularly regarding their efforts to mobilize a peaceful opposition to President Saïed's "coup". According to their lawyers, the accused's case files at this time contained excerpts from the accused's electronic communications on social media platforms, including WhatsApp, Telegram and Messenger, where they had exchanged opinions on the political situation in Tunisia.

On 2 March 2023, the Defence Committee filed a motion with the investigating judge at the Counter-Terrorism Judicial Pole, requesting the disclosure of the identity of the anonymous witnesses to enable them to examine them and to assist their clients in preparing their defence. However, both the investigating judge and the Indictment Chamber, upon appeal, denied the request, without providing reasons.

On 1 April 2023, ostensibly in response to Facebook posts denigrating the involvement of diplomatic missions in Case 36/6835, the spokeswoman and deputy public prosecutor at the Counter-Terrorism Judicial Pole, on behalf of the Public Prosecutor's Office, issued a letter to diplomatic delegations in Tunisia to reassure and exonerate them.²⁴

18. The Counter-Terrorism Judicial Pole, established within the jurisdiction of the Tunis Court of Appeal, handles terrorist offenses as defined by Organic Law No. 2015-26 of 7 August 2015 on combating terrorism and money laundering, art. 40. Ibid.

19. Kamel Ltaief is one of the first accused to be detained in this case, and has been detained with the original 8 defendants since 11 February 2023. He is not represented by the Defence Committee as he has appointed independent legal counsel. This briefing focuses on the defendants represented by the Defence Committee. .

20. Le Monde, En Tunisie, un influent homme d'affaires et deux activistes politiques arrêtés, 12 February 2023, available at: https://www.lemonde.fr/afrique/article/2023/02/12/en-tunisie-un-influent-homme-d-affaires-et-deux-activistes-politiques-arretes_6161520_3212.html.

21. Inkyfada, Conspiracy Against State-Security: Empty Files to Eliminate Opposition, 24 March 2023, supra note 12.

22. Criminal Procedure Code, art. 57, para. 7, supra note 16.

23. Inkyfada, Conspiracy Against State-Security: Empty Files to Eliminate Opposition, 24 March 2023, supra note 12.

24. Business News, Case of conspiracy against the state: a letter addressed to foreign diplomatic missions, 1 April 2023, available in French at: <https://www.businessnews.com.tn/affaire-de-complot-contre-letat--une-lettre-adressee-aux-missions-diplomatiques-etrangeres,520,128088,3>.

On 16 August 2023, Khayem Turki appeared before the investigating judge at the Counter-Terrorism Judicial Pole. The judge questioned Turki about the findings of technical examinations conducted on his confiscated electronic devices. These examinations included an analysis of WhatsApp and Signal messages exchanged with diplomats and other accused in the case. The judge then ordered that Turki remain in pre-trial detention.

On 29 September 2023 the Defence Committee applied to the investigating judge of the Counter-Terrorism Judicial Pole to request that the diplomats with whom the accused had allegedly conspired be summoned and questioned. The investigating judge did not respond to this application.

According to the Defence Committee, aside from the prosecution and the investigating judge's interrogation of the accused during their initial detention in police custody and during their first appearances before the investigating judge on 24 and 25 February 2023, and Turki's second appearance on 16 August 2023, the investigating judge carried out no further inquiries aimed at identifying any exculpatory or incriminatory evidence against the accused in the run up to them being charged and referred for trial. Additionally, according to the Defence Committee, the investigating judge at the Counter-Terrorism Judicial Pole failed to hear the two anonymous witnesses directly and refused to disclose their identities to the accused's lawyers, despite relying on their "evidence" for the purpose of the prosecution, thus undermining the ability of the defence to challenge the credibility of the anonymous witnesses' assertions.

Charge, pre-trial detention and referral for trial

On 25 and 26 February 2023, the investigating judge at the Counter-Terrorism Judicial Pole brought the following charges against the accused under the "Counter-Terrorism" Law:

- i. Forming a terrorist organization intended to commit terrorist crimes (article 32);
- ii. Intent combined with preparatory acts to commit violence against individuals (articles 5 and 13);
- iii. Training individuals to commit terrorist crimes (article 33);
- iv. Providing information that could assist terrorist activities, including by failing to report such information to the authorities (articles 34 and 37);
- v. Endangering food and environmental safety (article 14);
- vi. Providing, by any means, weapons, explosives and ammunition (article 35);
- vii. Concealing or facilitating the concealment of sources of funding for terrorist activities (article 36); and
- viii. Money laundering (articles 92 and 94).

The investigating judge also charged the accused with the following "offences" under the Penal Code:

- i. Forming a criminal organization to commit attacks against persons or properties (articles 131 and 132);
- ii. Conspiracy against the external security of the State through establishing connections with agents of a foreign State with the aim of harming Tunisia's diplomatic relations (articles 32, 61bis and 69);
- iii. Conspiracy against internal State security (article 68);
- iv. Expressing opinions with the intent to conspire to commit an attack against the State's internal security (article 70);
- v. Planning an attack intended to change the nature of the State (article 72); and
- vi. Committing an offence against the President of the Republic (article 67).

Further to charging each accused, the investigating judge remanded them into pre-trial detention under article 85 of the Criminal Procedure Code, which permits pre-trial detention in relation to felonies under the "Counter-Terrorism" Law and the Penal Code, for up to 14 months pending referral for trial.²⁵

25. Tunisian Criminal Procedure Code, art 85, supra note 16. <https://legislation-securite.tn/latest-laws/loi-n-68-23-du-24-juillet-1968-portant-refonte-du-code-de-procedure-penale/>

According to the Defence Committee, the investigating judge's decision to remand the accused into pre-trial detention lacks the required level of individualization and specificity. Rather than providing tailored reasons for each accused, the judge appears to have relied on the generic and vague grounds outlined in article 85 of the Criminal Procedure Code, such as the need to preserve the interests of a thorough investigation and the severity of the charges.

Between March 2023 and March 2024, the Defence Committee made the following applications for the accused's release on bail and challenges against decisions to extend their pre-trial detention, before the investigating judge at the Counter-Terrorism Judicial Pole, the Tunis Court of Appeal's Indictment Chamber and the cassation court

- i. **On 16 March 2023**, the Defence Committee lodged an application with the investigating judge at the Counter-Terrorism Judicial Pole for all eight accused to be released on bail on the basis that the investigation had yielded no credible evidence that they had committed offences under the Penal Code or the "Counter-Terrorism" Law. On 21 March 2023, the investigating judge implicitly rejected the Defence Committee's bail application after the four-day deadline passed without issuing a decision,²⁶ further to which the Defence Committee appealed the investigating judge's implicit refusal of the application for release on bail to the Tunis Court of Appeal's Indictment Chamber.²⁷ On 30 March 2023, the Tunis Court of Appeal's Indictment Chamber dismissed the Defence Committee's appeal of the investigating judge's decision to deny the accused release on bail. The Chamber failed to provide sufficient reasons for this decision, particularly regarding the necessity, proportionality, and individualized nature of the need to keep the accused in pre-trial detention; and
- ii. **On 19 June 2023**, the Defence Committee made a further application to the investigating judge of the Counter-Terrorism Judicial Pole, on the same grounds, for the release of the eight accused on bail. On 23 June 2023, the investigating judge ordered the release of Issa and Akremi on bail but refused to direct the release of the remaining six accused, without providing reasons. The public prosecutor appealed to the Tunis Court of Appeal's Indictment Chamber against the decision to release Issa and Akremi on bail. On 13 July 2023, the Indictment Chamber of the Tunis Court of Appeal upheld the investigating judge's decision to release the two on bail. On 18 July 2023, without providing any reason, the Indictment Chamber imposed two bail conditions on Issa and Akremi: a travel ban and a ban on public appearances.
- iii. **On 22 August 2023**, the investigating judge at the Counter-Terrorism Judicial Pole extended the pre-trial detention of Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj for four months without providing tailored and individualized reasons for his decision. On the same day, the Defence Committee appealed the decision to extend their pre-trial detention to the Indictment Chamber of the Tunis Court of Appeal on the basis that the investigation had yielded no credible evidence that the detainees had committed offences under the Penal Code or "Counter-Terrorism" Law. On 21 September 2023, the Indictment Chamber of the Tunis Court of Appeal dismissed the Defence Committee's appeal against the extension of the six accused's pre-trial detention, without providing any additional reasons, simply endorsing the vague and generic grounds for pre-trial detention provided by the investigating judge.
- iv. **On 21 December 2023**, the investigating judge at the Counter-Terrorism Judicial Pole further extended the pre-trial detention of Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj for an additional four-month period without providing specific and individualized reasons. On the same day, the Defence Committee appealed the decision to the Indictment Chamber of the Tunis Court of Appeal on the same grounds as previously. On 11 January 2024, the Indictment Chamber upheld the investigating judge's decision and refused to release the six accused, echoing the investigating judge's vague and generic grounds.
- v. **On 17 March 2024**, the Defence Committee made an application to the investigating judge for the release on bail of Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj on the same grounds as before. The investigating judge implicitly rejected the Defence Committee's application after the four-day deadline passed without the judge issuing a decision, further to which the Committee appealed the investigating judge's implicit refusal of the application

26. Ibid, art. 86.

27. In Tunisia, each Court of Appeal has at least one Indictment Chamber with jurisdiction to examine appeals against decisions taken by the investigating judge.

for release on bail of the six accused to the Tunis Court of Appeal's Indictment Chamber. On 4 April 2024, the Indictment Chamber refused to release them reiterating the same vague and generic justifications.

- vi. **On 5 April 2024**, the Defence Committee appealed to the Court of Cassation to challenge the dismissal by the Tunis Court of Appeal's Indictment Chamber of the appeal against the investigating judge's refusal to release Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj on bail. On the same day, further to the Defence Committee's appeal to the Court of Cassation, the Defence Committee informed the investigating judge at the Tunis Court of First Instance that the "conspiracy" case had been transferred to the Court of Cassation and requested that the judicial investigation be halted pending a decision. Simultaneously, the Defence Committee notified the public prosecutor at the Tunis Court of Appeal regarding the Cassation appeal and requested that they forward Case 36/6835 to the Court of Cassation. However, on 5 April 2024, instead of sending the case file to the Court of Cassation, the public prosecutor at the Tunis Court of Appeal returned the case to the investigating judge at the Counter-Terrorism Judicial Pole.

Subsequently, on 15 April 2024, having not interrogated the accused since their initial interrogations in February 2023, with the exception of Turki's second interrogation in August 2023, the investigating judge at the Counter-Terrorism Judicial Pole concluded the investigation against the eight initial accused and the 32 other accused in Case 36/6835. On that occasion, the investigating judge confirmed all charges against the 40 accused, referred the case for trial before the Criminal Chamber of the Tunis Court of First Instance, ordered the continuation of the six accused's pre-trial detention and transferred the Case to the Indictment Chamber at the Tunis Court of Appeal. The investigating judge provided no reasons as to why the six accused's continued pre-trial detention was necessary and proportionate.

On 18 and 19 April 2024, the 14-month pre-trial custody time limits for Turki, Jelassi, Mbarek, Chaouachi, Belhaj and Chebbi expired.²⁸ However, despite this – and in violation of Tunisian law itself²⁹ – all six accused remained in detention until the decision of the Indictment Chamber of the Tunis Court of Appeal on 2 May 2024 confirming the investigating judge's decision of 15 April 2024 and referring Case 36/6835 for trial.³⁰

On 8 May 2024, the Defence Committee lodged an appeal with the Court of Cassation against the Indictment Chamber's decision to refer all accused for trial, on the basis that the investigation had yielded no credible evidence that they had committed offences under the Penal Code or the "Counter-Terrorism" Law.

On 24 December 2024, the Court of Cassation rejected all appeals lodged in Case 36/6835, including the appeal challenging the Indictment Chamber's dismissal of the appeal against the investigating judge's refusal to release Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj on bail, and the appeal against the Indictment Chamber's decision to refer all the accused for trial. Consequently, the Criminal Chamber specializing in terrorism cases at the Tunis Court of First Instance will try the case. However, at the time of writing, the Criminal Chamber of the Tunis Court of First instance had not set a date for trial.

With respect to the Tunisian authorities' arrest, detention, investigation and prosecution of the eight accused, the ICJ is concerned that:

1. The arrest and ensuing detention of the eight accused in Case 36/6835 were solely based on their legitimate exercise of the rights to freedom of opinion, freedom of expression and to take part in the conduct of public affairs, and as such were arbitrary and in violation of their right to liberty;
2. The President's erosion of judicial independence has given rise to a situation where the accused cannot be guaranteed the right to be tried before an independent and impartial tribunal in violation of their right to a fair trial; and

28. Criminal Procedure Code, art. 85, *supra* note 16.

29. The unlawful status of the detention was confirmed by over 50 legal experts. See, Sana Ben Achour, Facebook post, 24 April 2024, available at: https://www.facebook.com/1203564976/posts/10228636740762466/?mibextid=WC7FNe&rdid=0KqcZ6M9RhvBBML_j.

30. ICJ, Tunisia: The authorities must release opposition figures and end politically motivated prosecutions, 7 May 2024, *supra* note 1.

3. The pre-trial proceedings against the eight accused have failed to meet internationally recognized fair trial standards, particularly with regard to the presumption of innocence, the right to adequate time and facilities to prepare a defence and the right to examine witnesses.³¹

The criminal prosecution of members of the Defence Committee

On 3 May 2023, after notifying the Tunis Bar Association,³² the investigating judge at the Counter-Terrorism Judicial Pole expanded the list of accused in Case 36/6835 to include human rights lawyer Ayachi Hammami, who is a member of Case 36/6835's Defence Committee,³³ human rights lawyer Bochra Belhaj Hamida and two opposition political figures, Nejib Chebbi and Nouredine Bhriri. In addition to Ayachi Hammami, the prosecuting authorities initiated investigations of the following human rights lawyers and members of the Defence Committee for the eight accused: Dalila Msaddek, Islem Hamza and Abdelaziz Essid under Decree-Law 54 for alleged "fake news" dissemination stemming from statements they had made in their professional capacity.³⁴

The ICJ considers that the Tunisian authorities' use of criminal proceedings to harass and obstruct the work of the Defence Committee constitutes a direct assault on the independence of the legal profession and a violation of principle 18 of the United Nations Basic Principles on the Role of Lawyers, which states that lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions, as well as a violation of the right to a defence of the eight accused in Case 36/6835.³⁵

31. See below the section entitled: "The right to adequate time and facilities to prepare a defence and the right to examine and call witnesses".

32. In the event of criminal proceedings against a lawyer, the president of the competent regional section of the Bar Association must be notified immediately in accordance with Decree-Law No 2011-79 of 20 August 2011 on the organization of the legal profession, art. 46, available in French at: <https://legislation-securite.tn/latest-laws/decret-loi-n-2011-79-du-20-aout-2011-portant-organisation-de-la-profession-davocat/>.

33. Amnesty International, Tunisia: Authorities add human rights lawyers to trumped-up conspiracy case, 9 May 2023, available at: <https://www.amnesty.org/en/latest/news/2023/05/tunisia-authorities-add-human-rights-lawyers-to-trumped-up-conspiracy-case/>.

34. ICJ, Tunisia: End judicial harassment of lawyers, 5 October 2023, available at: <https://www.icj.org/tunisia-end-judicial-harassment-of-lawyers/>.

35. UN Basic Principles on the Role of Lawyers, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>. See also, principle 17.

II. Violations of the eight accused's human rights in Case 36/6835

The ICJ considers that the arrest, prolonged pre-trial detention and ongoing prosecution of the eight accused in Case 36/6835 violate their right to liberty and to a fair trial, including the right to be tried by an independent, impartial and competent tribunal, the presumption of innocence and the rights to adequate time and facilities to prepare a defence and to examine witnesses,³⁶ which Tunisia is bound to guarantee in accordance with its international human rights law obligations.

The right to liberty

Over the course of the Tunisian authorities' 14-month investigation of Case 36/6835, all eight accused were initially held in police custody, from the time of their arrest, and then remanded in detention pending trial. Issa and Akremi spent under four months in detention before being released on bail pending trial, while Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj, who currently remain in custody at Mornaguia Prison pending trial, have already spent over 24 months in detention. The Tunisian authorities' detention of the accused amounts to a violation of Tunisia's legal obligation to guarantee their right to liberty, including the right not to be subjected to arbitrary arrest or detention under article 9 of the ICCPR. This conclusion is supported by the United Nations Working Group on Arbitrary Detention's (WGAD) opinion, issued on 8 October 2024, in which the WGAD found the detention of the eight accused in Case 36/6835 to be arbitrary.³⁷

First, in the aftermath of President Saïed's entrenchment of the authoritarian measures taken after 25 July 2021 and the ensuing promulgation of the 2022 Constitution,³⁸ the Tunisian authorities arrested, detained and initiated the prosecution of the accused amid a sustained crackdown on all real and perceived political opponents of the President, including politicians, judges, lawyers and journalists. The scant "evidence"³⁹ on which the authorities have purportedly "relied" on to prosecute the accused appears to rest on their alleged relationships with each other and with foreign diplomats. With respect to this, as opposition figures, the accused would ordinarily be expected to entertain such relationships with one another and with foreign diplomats for the purpose of their legitimate political work and in the legitimate exercise of their rights to freedom of expression, of peaceful assembly, to freedom of association with others, as well as to take part in the conduct of public affairs, as guaranteed by articles 19, 21, 22 and 25 of the ICCPR. Additionally, the supposed "evidence" against the accused also rests, in part, on opinions that they had expressed in public and private messages in response to the President's power grab on 25 July 2021, in the legitimate exercise of their rights to freedom of opinion and expression under article 19 of the ICCPR. The UN Human Rights Committee has authoritatively held that any arrest or detention carried out as punishment for the legitimate exercise of ICCPR rights, including the rights to freedom of expression, freedom of opinion, peaceful assembly, freedom of association and to take part in public affairs, is arbitrary.⁴⁰

36. See below the section entitled: "The right to adequate time and facilities to prepare a defence and the right to examine and call witnesses".

37. WGAD, Opinion No.35/2024, UN doc. A/HRC/WGAD/100/35, 8 October 2024, available in French at: <https://www.ohchr.org/sites/default/files/documents/issues/detention-wg/opinions/session100/a-hrc-wgad-2024-35-tunisia-advance-edited-v.pdf>. The WGAD concluded that the deprivation of liberty of Turki, Issa, Jelassi, Chebbi, Chaouachi, Belhaj, Mbarek and Akremi violated articles 3, 9, 10, 11, 19, 20 and 21 of the Universal Declaration of Human Rights, and 9, 14, 19, 21, 22 and 25 of the ICCPR. The Working Group called, *inter alia*, for the immediate and unconditional release of the eight accused and for Tunisia to guarantee their rights to an effective remedy.

38. ICJ, Fundamentally flawed: Tunisia's 'constitution-making' process, 29 June 2022, *supra* note 8; ICJ, Tunisia: a rigged referendum delivers Constitution threatening democracy and human rights, 27 July 2022, available at: <https://www.icj.org/tunisia-a-rigged-referendum-delivers-constitution-threatening-democracy-and-human-rights/>. ICJ, Attacks on Judges and Prosecutors in Tunisia: Arbitrary dismissals and prosecutions 18 December 2023, available at: <https://www.icj.org/wp-content/uploads/2023/12/ICJ-attacks-on-judges-in-tunis-ENG.pdf>.

39. Inkyfada, Conspiracy Against State-Security: Empty Files to Eliminate Opposition, 24 March 2023, *supra* note 12.

40. UN Human Rights Committee, General Comment No.35 on Article 9, Liberty and security of person, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 17, available at: <https://www.ohchr.org/en/calls-for-input/general-comment-no-35-article-9-liberty-and-security-person>.

Secondly, under article 9(3) of the ICCPR, “it shall not be the general rule that persons awaiting trial shall be detained in custody”. The Human Rights Committee has elaborated on this obligation, stating that “detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.”⁴¹ As mentioned above, the Defence Committee lodged a number of bail applications on behalf of the accused and appealed to the Tunis Court of Appeal’s Indictment Chamber and the Cassation Court against judicial decisions denying bail. On each of these occasions, both the investigating judge and the Indictment Chamber failed to provide specific and individualized reasons as to why each of the accused’s continued detention was necessary and proportionate in the circumstances, nor did the Cassation Court require the lower courts to provide such reasons. Furthermore, as mentioned above, the investigating judge took two decisions to extend the pre-trial detention of Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj, and the Indictment Chamber of the Tunis Court of Appeal dismissed the appeal against both of these pre-trial detention extensions. On both occasions, neither the investigating judge nor the Indictment Chamber of the Tunis Court of Appeal provided any reasons for their respective decisions as to why such pre-trial detention extensions were necessary and proportionate in the circumstances.⁴² Conversely, a 14-month long investigation against the accused yielded no credible evidence of the accused’s commission of the serious offences with which they were charged under the “Counter-Terrorism” Law and Penal Code. With respect to Akremi and Issa, while four months after their initial arrest the Tunis Court of First Instance ordered their release on bail pending trial,⁴³ the failure of the public prosecutor and investigating judge to provide reasons as to why Akremi’s initial detention in extended police custody⁴⁴ was necessary and proportionate and the failure to provide reasons as to why the subsequent remand in detention of both Akremi and Issa pending trial was necessary and proportionate, in the face of an apparent absence of any credible evidence to meet these requirements, also constitute a violation of Tunisia’s obligations under article 9(3) of the ICCPR. Consequently, all accused’s detentions to date violated Tunisia’s international human rights law obligations to guarantee their right to liberty and freedom from arbitrary detention.

Thirdly, under article 9(3) of the ICCPR, “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.” The Human Rights Committee has authoritatively held that this requires detainees to be brought before a judge or judicial officer within 48 hours, and that “any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances”.⁴⁵ The Human Rights Committee has also stated that “a public prosecutor cannot be considered as an officer exercising judicial power”, due to their lack of independence, impartiality and objectivity with regard to an investigation.⁴⁶ In Case 36/6835, the public prosecutor not only extended the detention of Turki, Jelassi and Akremi in police custody, under articles 39 and 41 of the “Counter-Terrorism” Law, but did so without providing any reasons for such extension.⁴⁷ Consequently, the three accused spent 15 days in police custody before being brought before a judicial authority. Thus, the three accused’s detention in police custody, without judicial oversight, extended well beyond 48 hours and, as such, violated their right to be brought “promptly before a judge or other officer authorized by law to exercise judicial power”, under article 9(3) of the ICCPR.

Fourthly, under article 9(1) of the ICCPR, Tunisia is under an obligation to ensure that no person is arrested or detained “except on such grounds and in accordance with such procedure as are established by law”. The authorities violated this provision in the following ways during the course of the criminal proceedings against the accused over the course of 14 months:

- i .Under article 85 of the Criminal Procedure Code, the pre-trial detention time limits arising

41. Ibid, para. 38.

42. Criminal Procedure Code, art. 85, *supra* note 16.

43. Aljazeera, Tunisian judge frees two leading opponents of president saied, 14 July 2023, available at: <https://www.aljazeera.com/news/2023/7/14/tunisian-judge-frees-two-leading-opponents-of-president-saied>.

44. Organic Law No. 2015-26 of 7 August 2015, art. 41, *supra* note 17.

45. UN Human Rights Committee, General Comment No.35 on Article 9, Liberty and security of person, 16 December 2014, para. 33, *supra* note 40.

46. Ibid, para 32.

47. The prosecutor's disregard for the domestic procedural requirement of providing written reasons for detention extensions, as mandated by law, also undermines the principles enshrined in article 9(1) of the ICCPR.

from the criminal charges against Turki, Jelassi, Mbarek, Chaouachi, Belhaj and Chebbi could not exceed 14 months. On 18 and 19 April 2024, their pre-trial detention time limits expired. Under article 85 of the Criminal Procedure Code, upon the expiry of their custody time limits, and pending the Indictment Chamber's referral of the Case for trial, the Tunisian authorities were obliged to release the six accused. Instead, in violation of Tunisia's obligation to ensure that no person is detained contrary to procedures established by law, the Tunisian authorities unlawfully and arbitrarily prolonged their detention from 19 April to 2 May 2024, when the Indictment Chamber took the decision to refer the Case to trial and remanded the accused in custody pending trial.⁴⁸

- ii. Under article 13bis of the Criminal Procedure Code, at the time of arrest, the Counter-Terrorism Brigade is obliged to provide details of the allegations against a suspect on the basis of which they are being arrested. However, during the arrests carried out between 12 and 24 February 2023, the authorities failed to provide all eight accused with details of the allegations, let alone charges against them, in violation of Tunisia's obligations under article 9(2) of the ICCPR, which guarantees that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." As such, their arrest and detention was, therefore, arbitrary, in violation of article 9(1) of the ICCPR.
- iii. Following the President's request to the Minister of Justice to facilitate the "accountability process",⁴⁹ the Tunisian authorities instigated criminal proceedings against the accused under provisions of the Penal Code and "Counter-Terrorism" Law proscribing very serious criminal conduct, including "forming a terrorist organization intended to commit terrorist crimes"⁵⁰ and "planning an attack intended to change the nature of the State".⁵¹ At no point in the 15-month long investigation have the prosecuting and investigating authorities produced any credible evidence to substantiate these serious charges or provided the accused with sufficiently detailed information about the accusations against them. Moreover, the prosecuting authorities, and ultimately the courts, have decided to maintain all eight accused in extended remand detention pending trial,⁵² notwithstanding the manifest lack of any credible evidence against them of the offences with which they were charged. The ICJ is concerned that the Tunisian investigating authorities and the courts have used article 85 of the Criminal Procedure Code to arbitrarily target the accused solely on the basis of their political views and affiliations, in violation of Tunisia's international obligations not to detain persons other than "on such grounds and in accordance with such procedure as are established by law."
- iv. Additionally, under articles 39 and 41 of the "Counter-Terrorism" Law, while a public prosecutor may extend the detention of suspects in police custody for up to 15 days, in doing so they must provide reasons in writing as to why any such extension is necessary. Furthermore, under article 85 of the Criminal Procedure Code, an investigating judge must provide reasons as to why remand detention pending trial, and any extensions of such, are deemed necessary as a security measure to prevent new offences, to prevent absconding or to prevent the accused from interfering with the course of justice. At no point in the course of the criminal proceedings in this case did the public prosecutor provide any such reasons, nor did the investigating judge or the Indictment Chamber. By failing to abide by domestic criminal procedure and omitting to satisfy the requirements under domestic law for any extension of detention in police custody, for remand detention pending trial and for maintaining the accused in prolonged remand detention on several occasions, the Tunisian authorities have further violated Tunisia's obligations under international human rights law to guarantee the accused's right to liberty and freedom from arbitrary detention.
- v. Finally, under article 261 of the Criminal Procedure Code, any appeal against the decision of the Tunis Court of Appeal must be transferred to the Court of Cassation. On 5 April 2024, despite the Defence Committee lodging an appeal against the dismissal by Tunis Court of Appeal's Indictment Chamber of the appeal by Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj against the investigating judge's refusal to release them on bail, the Tunis Court of Appeal failed to transfer the accused's case to the Court of Cassation and, instead,

48. Sana Ben Achour, Facebook post, 24 April 2024, *supra* note 29.

49. The Presidency of Tunisia, Meeting between President Kais Saied and the Minister of Justice, 10 February 2023, *supra* note 11.

50. Organic Law No. 2015-26 of 7 August 2015, art. 32, *supra* note 17.

51. Penal Code, art. 72, respectively, *supra* note 6.

52. Criminal Procedure Code, art. 85, *supra* note 16.

returned the file to the investigating judge at the Counter-Terrorism Judicial Pole. The failure of the Tunisian authorities to abide by the Criminal Procedure Code led to a manifest breach of domestic law with regard to the unlawful and arbitrary pre-trial detention of the accused, thus constituting a violation of Tunisia's obligation to ensure that no person is detained except on such grounds as are established by law, and that anyone deprived of their liberty by arrest or detention shall be entitled to challenge the lawfulness of their detention before a court of law and to be released if the detention is deemed unlawful in accordance with article 9(4) of the ICCPR.

The right to a fair and public hearing before an independent, impartial and competent tribunal

Under article 14(1) of the ICCPR, Tunisia must guarantee the right of the accused in Case 36/6835 to have their criminal case tried before "a competent, independent and impartial tribunal established by law". The Human Rights Committee has stated that the requirement of independence includes an obligation to ensure the absence of executive or legislative influence over the appointment, tenure, retirement, promotion, transfer and dismissal of judges.⁵³

However, since 21 July 2021, President Saïed has taken successive measures to undermine the independence of judges and prosecutors in Tunisia, including through the dissolution of the independent High Judicial Council, and by arrogating to himself the power to appoint and dismiss judges at will, thus paving the way for a cowed judiciary to be directed against perceived political opponents and dissenters.⁵⁴

Indeed, President Saïed unlawfully seized full executive and legislative powers on 25 July 2021, and has proceeded since then to rule by decree, dismantling the rule of law, judicial independence, and other constitutional safeguards under the 2014 Tunisian Constitution.⁵⁵ In the aftermath of a flawed constitution-making process that lacked all the essential hallmarks of an effective consensus-based process, the President entrenched the far-reaching powers he had arrogated to himself through the promulgation of the 2022 Tunisian Constitution on 17 August 2022.⁵⁶ The 2022 Constitution undermines the institutional and individual independence of the judiciary in the following ways:

- i. The High Judicial Council: the 2022 Constitution is silent on how the High Judicial Council should be established, featuring no constitutional provision guaranteeing its protection from executive interference nor enshrining its role in safeguarding the independence of judges and prosecutors. Under Presidential Decree 11-2022, President Saïed dissolved the former High Judicial Council and replaced it with a Temporary High Judicial Council, with the majority of its members selected by the President of the Republic.⁵⁷ Given the 2022 Constitution's silence on the composition of, and selection or election of members to, the High Judicial Council, the ICJ is concerned that the President has thus retained executive control over the institution.
- ii. The appointment of judges and prosecutors: article 120 of the 2022 Constitution transfers the powers to appoint judges and prosecutors, including senior judges, to the President by way of presidential decree based on a mere proposal by the High Judicial Council, which the President may or may not adopt.
- iii. The security of tenure of judges: the 2022 Constitution is silent on the role of the High Judicial

53. UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19, available at: <https://digitallibrary.un.org/record/606075?ln=en&v=pdf>.

54. ICJ, Tunisia: Authorities must end Attacks on Judges and Prosecutors, 18 December 2023, supra note 38. See also, ICJ, Tunisia: End judicial harassment of lawyers, 5 October 2023, supra note 34; ICJ, Tunisia: End crackdown on journalists, 9 April 2024, available at: <https://www.icj.org/tunisia-end-crackdown-on-journalists/>; ICJ, Tunisia: Immediately release Sihem Bensedrine, the Truth Commission's former President, 6 August 2024, available at: <https://www.icj.org/tunisia-immediately-release-sihem-bensedrine-the-truth-commissions-former-president/>.

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

56. ICJ, Tunisia: a rigged referendum delivers Constitution threatening democracy and human rights, 27 July 2022, supra note 38.

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

Council in decisions regarding the transfer, dismissal, suspension or punishment of judges, with article 121 merely stating that, in cases in which judges are found to have committed offences in flagrante delicto, the High Judicial Council shall be informed. This is in keeping with Presidential Decree-Law 35-2022, under which the President assumed the power to unilaterally dismiss judges and prosecutors, further to which he unilaterally dismissed 57 judges and prosecutors on 1 June 2022.⁵⁸ Given that the 2022 Constitution is largely silent on the High Judicial Council's role in decisions regarding the transfer, dismissal, suspension or removal of judges and prosecutors, the ICJ is concerned that the executive has retained the power to arbitrarily dismiss and transfer judges and prosecutors, such as through the system of arbitrary rotations that the Ministry of Justice currently uses to rotate judges and prosecutors, including those who assert their independence and reject the politicization of criminal proceedings under the direction of the executive.⁵⁹

The President's control over the judiciary runs counter to Tunisia's obligations under international law. As the Human Rights Committee has authoritatively held, the independence of the judiciary requires its actual independence from "political interference by the executive branch and legislature".⁶⁰ However, since the initiation of criminal proceedings, President Saïed has explicitly interfered in Case 36/6835 on at least three occasions:

- i. On 10 February 2023, President Saïed met the Minister of Justice, Leila Jaffel, and urged her to speed up what he referred to as "the accountability process."⁶¹ Further to this, the Minister of Justice contacted the Public Prosecutor's Office at the Tunis Court of First Instance and requested that they "undertake and authorize the necessary investigations." The next day, the Counter-Terrorism Brigade arrested the first of the accused in Case 36/6835;
- ii. On 14 February 2024, commenting on the initial arrests in Case 36/6835, President Saïed stated that: "the judicial system must cooperate, history has proven these people guilty before the courts can prove that";⁶² and
- iii. On 22 February 2023, President Saïed declared that, "whoever dared to exonerate [the detainees] will be deemed complicit".⁶³

By both undermining the institutional independence of the judiciary, and by directly intervening in the initiation and unfolding of Case 36/6835, the President has acted in violation of the separation of powers, the rule of law and Tunisia's obligations under article 14(1) ICCPR.

The role of public prosecutor

UN Guidelines state that prosecutors shall carry out their functions impartially and objectively, including by avoiding political discrimination, and "shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."⁶⁴ Additionally, while international standards set out that the prosecutorial services' independence from the executive is preferred, but not required, they caution against case-specific instructions from the executive to prosecutors, and require that prosecutors retain the power to challenge any such instructions received.⁶⁵ In Case 36/6835, the Public Prosecution failed to uphold these standards on at least two occasions:

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

59. The Association of Tunisian Magistrates (AMT), Statement on the extremely dangerous situation that the Tunisian judiciary has reached, 16 April 2024, supra note 10.

60. UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to a fair trial, supra note 53.

61. The Presidency of Tunisia, Meeting between President Kaïs Saïed and the Minister of Justice, 10 February 2023, supra note 11.

62. Business News, Kaïs Saïed: They were planning my assassination!, 15 February 2023, available in French at: <https://www.businessnews.com.tn/kais-saied--ils-planifiaient-mon-assassinat,520,126881,3>

63. Kaïs Saïed, Speech of 22 February 2023, available at: <https://www.facebook.com/Presidence.tn/videos/742766854160830/>.

64. 1990 UN Guidelines on the Role of Prosecutors, Guidelines 13(a) & (b) & 14, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>.

65. Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012, UN Doc. A/HRC/20/19, paras 116 and 114, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/20/19.

- i. On 10 February 2023, President Saïed met with the Minister of Justice and urged her to speed up what he referred to as "the accountability process," declaring it to be "unacceptable that those against whom there is evidence of guilt...escape accountability."⁶⁶ Subsequently, the Ministry of Justice instructed the public prosecutor at the Tunis Court of First Instance to initiate an investigation against the accused, an instruction with which the public prosecutor duly complied by, in turn, instructing the Counter-Terrorism and Organized Crime Police Unit to carry out investigations. However, under articles 21 and 23 of the Criminal Procedure Code, the Minister of Justice may only provide prosecutorial instructions to Prosecutors General based at the Court of Appeal. The public prosecutor's compliance with the case-specific instructions in contravention of the Criminal Procedure Code is evidence of undue executive influence, particularly given the well-publicized nature of the meeting between the Minister of Justice and the President immediately prior to the receipt of the instructions, and the pressures associated with the erosion of the institutional independence of judges and prosecutors outlined above; and
- ii. On 24 February 2023, further to the President Saïed's three direct instances of interference in Case 36/6835 outlined above, the Public Prosecutor's Office of the Counter-Terrorism Judicial Pole formerly opened an investigation against the accused despite the Counter-Terrorism and Organized Crime Police Unit having found no credible evidence to substantiate the serious allegations against the accused. Given the absence of evidence, there are reasonable grounds to believe that the decision to move forward with Case 36/6835 was made only to give effect to President Saïed's will to silence his political opponents.

On both occasions, by failing to challenge the executive's case-specific instructions in contravention of the Criminal Procedure Code, and by taking decisions to continue criminal proceedings against the accused despite a manifest lack of evidence, the public prosecutor at the Tunis Court of First Instance and at the Counter-Terrorism Judicial Pole failed to uphold the principles of prosecutorial impartiality and objectivity, and thus further violated the accused's right to a fair and public hearing before an independent, impartial and competent tribunal under article 14(1) of the ICCPR.

The right to the presumption of innocence

Throughout the course of Case 36/6835, the Tunisian authorities have violated the accused's right to the presumption of innocence as guaranteed under article 14(2) of the ICCPR, which requires that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

Immediately preceding and during the course of accused's arrests, President Saïed made at least two public statements liable to undermine the suspects' rights to the presumption of innocence, namely:

- i. On 10 February 2023, President Saïed declared it to be "unacceptable that those against whom there is evidence of guilt...escape accountability"⁶⁷; and
- ii. On 14 February 2023, the President stated that those arrested "conspired against the State and against the President" and "are terrorists."⁶⁸

Through these and the other above-mentioned statements, the President prejudged the entirety of the investigations,⁶⁹ and thus undermined the accused's right to the presumption of innocence under article 14(2) of the ICCPR.

Additionally, at the time of publication, the authorities have detained Jelassi, Mbarek, Turki, Chebbi, Chaouachi and Belhaj in prolonged pre-trial detention for over 23 months, despite the

66. The Presidency of Tunisia, Meeting between President Kaïs Saïed and the Minister of Justice, 10 February 2023, *supra* note 11.

67. The Presidency of Tunisia, Meeting between President Kaïs Saïed and the Minister of Justice, 10 February 2023, *supra* note 11.

68. Business News, Kaïs Saïed: They were planning my assassination! 15 February 2023, *supra* note 65.

69. The UN Human Rights Committee has stated that, "it is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused." UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 30, *supra* note 53.

investigating judge producing little to no evidence of the offences with which they have been charged.⁷⁰ The UN Human Rights Committee has stated that, “extremely prolonged pretrial detention may...jeopardize the presumption of innocence”.⁷¹

The right to adequate time and facilities to prepare a defence and the right to examine and call witnesses

Under article 14(3)(b) of the ICCPR, Tunisia is required to guarantee the accused’s right to have adequate time and facilities for the preparation of their defence and to communicate with legal counsel of their choosing. With respect to Case 36/6835, the Tunisian authorities failed to guarantee this right on at least two occasions:

- i. Under article 57 of the “Counter-Terrorism” Law, accused in terrorism-related cases are denied the right to speak with a lawyer for the first 48 hours of their detention. In Case 36/6835, not only did the Tunisian authorities violate their obligations under article 14(3) (b) of the ICCPR insofar as it guarantees the accused’s access to legal counsel for the adequate preparation of their defence, but also article 9(2), under which Tunisia must “permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention” in order to prevent the detention being deemed arbitrary;⁷² and
- ii. On 3 May 2023, the Tunisian authorities widened the scope of Case 36/6835 to include lawyers who are members of the accused’s Defence Committee, including Ayachi Hammami.⁷³ Furthermore, the authorities then also initiated investigations into other members of the Defence Committee under Decree-Law 54 for alleged “fake news” dissemination stemming from statements made in their professional capacity as defence lawyers in Case 36/6835.⁷⁴ By initiating arbitrary prosecutions against members of the Defence Committee, ostensibly as a means to intimidate and harass them for carrying out their professional duties in Case 36/6835, the Tunisian authorities have undermined the accused’s right to adequate time to prepare their defence and to access legal counsel of their choosing under article 14(3) (b) of the ICCPR.

Finally, under articles 14(3)(b) and 14(3)(e) of the ICCPR, Tunisia must also guarantee: (i) the accused’s access to the evidence on which the prosecuting authorities intend to rely in their case against the accused and exculpatory evidence, if any exists; and (ii) the accused’s right to examine, cross-examine and call witnesses on their behalf. ⁷⁵ Throughout Case 36/6835, these rights were undermined through the investigating judge’s failure to allow the accused to examine key evidence allegedly obtained by the Counter-Terrorism Judicial Pole, including, purportedly, the anonymous testimony of at least two prosecution witnesses, or to summon the “foreign diplomats” with whom the accused were alleged to have conspired, thus denying the accused the right to properly examine the evidence against them, all in violation of Tunisia’s international obligations under articles 14(3)(b) and 14(3)(e) of the ICCPR.

70. ICJ, Tunisia: The authorities must release opposition figures and end politically motivated prosecutions, 7 May 2024, *supra* note 1.

71. UN Human Rights Committee, General Comment No.35 on Article 9, Liberty and security of person, 16 December 2014, para. 37, *supra* note 40.

72. *Ibid*, para. 35.

73. Amnesty International, Tunisia: Authorities add human rights lawyers to trumped-up conspiracy case, 9 May 2023, available at: <https://www.amnesty.org/en/latest/news/2023/05/tunisia-authorities-add-human-rights-lawyers-to-trumped-up-conspiracy-case/>.

74. ICJ, Tunisia: End judicial harassment of lawyers, 5 October 2023, *supra* note 34.

75. UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 33, *supra* note 53.

III. Recommendations

In light of the concerns outlined above, the ICJ calls on the Tunisian authorities to comply with their obligations under international human rights law and:

1. In relation to Case 36/6835:
 - a. Drop all charges against the 40 accused;
 - b. Immediately release all accused currently held in pre-trial detention, including Khayam Turki, Abdelhamid Jelassi, Issam Chebbi, Jaouhar Ben Mbarek, Ghazi Chaouachi and Ridha Belhaj;
 - c. Ensure all accused whom the authorities subjected to arbitrary arrest and detention in the Case have access to effective remedies and reparation; and
 - d. Drop all charges against members of the Defence Committee in distinct cases.
2. End all forms of arbitrary detention, including:
 - a. Unduly prolonged pre-trial detention in the absence of evidence against the accused;
 - b. Unlawful pre-trial detention in contravention of domestic criminal procedure determining the maximum periods of such detention;
 - c. Police custody and pre-trial detention without the provision of individualized assessments as to why detention is necessary and proportionate in the circumstances; and
 - d. Pre-trial detention without recourse for the detainees to appeal decisions on the initiation and extension of detention.
3. Guarantee the presumption of innocence in all criminal cases, including by holding accountable officials who make public statements undermining such presumption.
4. Amend Organic Law No. 2015-26 of 7 August 2015 on combating terrorism and preventing money-laundering to ensure that all detainees be granted access to legal counsel from the outset of detention.
5. Ensure that any decision extending detention in police custody be taken by a judge and not left to the discretion of a prosecutor, and that it be based on an individualized determination that such an extension is both necessary and proportionate taking into account all the circumstances.
6. Re-establish a fully independent High Judicial Council with sole responsibility for the selection, discipline, dismissal, rotation and training of judges and prosecutors, with its members selected independently of the executive, and whose separation from the legislative and executive branches of power is codified in the Constitution, including by:
 - a. Revoking Presidential Decree-Law 11-2022, under which the President dissolved the former High Judicial Council;
 - b. Revoking Presidential Decree-Law 35-2022, under which the President assumed the power to unilaterally dismiss judges and prosecutors; and
 - c. Revoking article 120 of the 2022 Constitution, under which the President holds the power to appoint judges and prosecutors, including senior judges, by presidential decree.
7. End the Ministry of Justice's intimidation and harassment of judges and prosecutors through arbitrary judicial rotations.
8. End the Ministry of Justice's interference in judicial affairs, including through politicized referrals of cases for investigation and instructions to Prosecutors in individual cases.
9. With respect to the power of the executive to issue written instructions to prosecutors, define in law the nature and scope of any power to issue such written instructions, and include a prohibition on issuing instructions not to prosecute or to require prosecution in a specific case, as well as a recognition that the issuance of written instructions does not constrain the ability of the prosecutor to submit to the court appropriate legal arguments.

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June 2024 (for an updated list, please visit www.icj.org/commission)

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