



Tunisia vs. Myriam Bribri

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE’S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, LGBTQ+ persons, women and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries’ performance and use it to support advocacy for systemic change.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



Despite Tunisia's advances towards democracy and rule of law since the Arab Spring uprising a decade ago, respect for freedom of expression has been deteriorating. The authorities are increasingly using criticism of the State as grounds for criminal prosecution. One such prosecution is that of Myriam Bribri, which the Clooney Foundation for Justice's TrialWatch initiative has been monitoring. Ms. Bribri is facing charges under Article 86 of the Telecommunications Code for "offend[ing] security officials." The charges stem from expletive-laced comments that she posted on social media in response to a video circulating of a police officer beating someone. The next hearing in her case is on June 28.

Ms. Bribri's prosecution violates her right to freedom of expression, which protects criticism of public officials and institutions. The state has yet to present any evidence demonstrating that the prosecution has a legitimate objective, is necessary, or is proportional. The perceived offensiveness of Ms. Bribri's commentary on police misconduct cannot justify her criminal prosecution and a potential jail sentence.

Ms. Bribri's prosecution reflects the overbreadth of Article 86 of the Telecommunications Code, which is inconsistent with international and regional standards as well as with Tunisia's new Constitution. While the right to freedom of expression is not absolute, Article 86 falls outside the scope of permissible limitations. Namely, the Article's language is so imprecise as to permit the authorities unfettered discretion in application, making it ripe for abuse.

The court should dismiss the case against Ms. Bribri or the prosecution should withdraw the charges. Moreover, the State should either repeal or narrow Article 86 to ensure that it encompasses only the gravest speech offenses – not merely speech that offends.

Ms. Bribri's case demonstrates the need for the establishment of a Constitutional Court, which could bring legislation in line with the 2014 Constitution and with international and regional standards. Such a court could also provide remedies for those whose constitutional rights have been violated. In the interim, even in the absence of a formal declaration that Article 86 of the Telecommunications Code is unlawful, Tunisia's international and regional commitments require that state organs refrain from applying it.

BACKGROUND



A. POLITICAL CONTEXT

Tunisia has made important advances since the 2011 revolution that overthrew the repressive Ben Ali regime, including the adoption of a constitution in 2014 that affirmed the country's respect for democratic principles and human rights.¹ Notably, Freedom House's Freedom in the World report – its annual assessment of countries' respect for political rights and civil liberties – categorized Tunisia as “Free” for the first time in 2015 after consistently rating the country “Not Free” and “Partly Free” in previous years.² While Tunisia has maintained that categorization,³ its scores have dipped due to the ongoing state of emergency imposed in response to terrorist attacks in 2015 and stalled progress in implementing constitutional protections and key reforms. Indeed, Freedom House has warned that Tunisia may lose its “Free” status if its “democratic backslide” continues.⁴

This “backslide” has included systematic impunity for excessive use of force by security officials.⁵ To evade liability, the security forces have attempted to push through draft legislation that would legalize impunity for arbitrary or abusive use of force.⁶ Tunisian society – in particular its youth – have increasingly turned to public protest to voice concerns about the mounting incidence of police brutality. Since the new year, nationwide demonstrations against police brutality and corruption have erupted across the country.⁷

¹ Constitution of the Republic of Tunisia, 2014. Available at https://www.constituteproject.org/constitution/Tunisia_2014.pdf. Notably, Article 20 of the Constitution gives international treaties ratified by Tunisia superiority over national laws other than the Constitution.

² Freedom House, “Freedom in the World 2015: Tunisia”, pgs. 689-694. Available at https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_2015_complete_book.pdf. Past editions of Freedom House's “Freedom in the World” Reports are available at <https://freedomhouse.org/report/freedom-world>.

³ See Freedom House, “Freedom in the World 2020: Tunisia”. Available at <https://freedomhouse.org/country/tunisia/freedom-world/2020>.

⁴ Freedom House, “Democratic Backsliding in Tunisia: The Case for Renewed International Attention”, September 2018. Available at https://freedomhouse.org/sites/default/files/2020-02/policybrief_democratic_backsliding_in_tunisia.pdf.

⁵ Id.; Amnesty International, “Tunisia: Where Running from the Police Can Be Deadly”, April 4, 2019. Available at <https://www.amnesty.org/en/documents/mde30/0085/2019/en>.

⁶ See Amnesty International, “Tunisia: Members of Parliament Must Reject Legalizing Impunity for Security Forces”, October 5, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/10/tunisia-members-of-parliament-must-reject-legalizing-impunity-for-security-forces>.

⁷ See The National, “‘We are Living in a Police State’: Tunisia's Security Forces Are Cracking Down on Dissent with Deadly Results”, May 10, 2021. Available at <https://www.thenationalnews.com/mena/we-are-living-in-a-police-state-tunisia-s-security-forces-are-cracking-down-on-dissent-with-fatal-results-1.1219578>; Human Rights Watch, “Tunisia: Police Use Violent Tactics to Quash Protests”, February 5, 2021. Available at <https://www.hrw.org/news/2021/02/05/tunisia-police-use-violent-tactics-quash-protests>;

France 24, “Hundreds Protest Corruption and Police Brutality in Tunisia”, January 23, 2021. Available at <https://www.france24.com/en/africa/20210123-hundreds-protest-corruption-and-police-brutality-in-tunisia>; Amnesty International, “Tunisia: Authorities Must Refrain from Using Unnecessary and Excessive Force against Protesters”, January 18, 2021. Available at

Meanwhile, those who express views about sensitive issues, such as the failings of state institutions or the prevalence of police brutality, routinely face criminal charges.⁸ Although Article 31 of Tunisia’s 2014 constitution unequivocally guarantees the right to “[f]reedom of opinion, thought, expression, information and publication,” the U.N. Human Rights Committee – the body tasked with monitoring implementation of the ICCPR – has observed “that a number of [vague] legislative provisions set excessive limits on the content of discourse, including . . . the Telecommunications Code,” and that “a number of legal provisions . . . continue to criminalize activities related to the exercise of freedom of expression.”⁹ As Human Rights Watch describes the situation: “[w]hen people express themselves via social media, a charge under article 86 of the 2001 Telecommunication Code of ‘willfully or knowingly harming others via public telecommunications networks’ [which alone carries a penalty of up to two years in prison] is routinely added to the other [speech-related] charges.”¹⁰

Criminal prosecutions under such legislation have been on the uptick. As documented by Amnesty International, “[o]ver the past two years, the Tunisian authorities have displayed increasing intolerance towards those who criticize public officials or institutions and have increasingly initiated prosecutions of bloggers and internet users for peaceful speech deemed insulting or disrespectful.”¹¹ The Ministry of Interior has openly threatened to initiate criminal prosecutions for criticism of police conduct and “there has been a steady increase of prosecutions for Facebook posts that reveal cases of alleged corruption, criticize the authorities, or are deemed to ‘insult’ officials online.”¹² Criminal prosecutions for speech offenses since 2017 include:

- In January 2019, in two different cases stemming from social media posts criticizing officials and government institutions and alleging corruption, a Tunis First Instance Court found blogger Sahbi Amri guilty of violating Article 86 of the

<https://www.amnesty.org/en/latest/news/2021/01/tunisia-authorities-must-refrain-from-using-unnecessary-and-excessive-force-against-protesters>.

⁸ Freedom House, “Freedom in the World 2020: Tunisia”, D1; Freedom House, “Freedom on the Net 2019: Tunisia”, C3. Available at <https://freedomhouse.org/country/tunisia/freedom-net/2020>; Human Rights Watch, “Tunisia: Prosecutions for Online Commentary”, October 15, 2019. Available at <https://www.hrw.org/news/2019/10/15/tunisia-prosecutions-online-commentary>. See also Global Voices, “Setbacks for Freedom of Expression as Tunisia Fights COVID-19”, April 28, 2020. Available at <https://globalvoices.org/2020/04/28/setbacks-for-freedom-of-expression-as-tunisia-fights-covid-19/>.

⁹ Human Rights Committee, “Concluding Observations on the Sixth Periodic Report of Tunisia”, U.N. Doc. CCPR/C/TUN/CO/6, April 24, 2020, para. 45. See also Freedom House, “Freedom on the Net 2019: Tunisia”, C2; U.S. Department of State, “2019 Country Reports on Human Rights Practices: Tunisia”, March 11, 2020, pg. 11. Available at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/tunisia>.

¹⁰ Human Rights Watch, “Tunisia: Prosecutions for Online Commentary”, October 15, 2019.

¹¹ Amnesty International, “Criminal Prosecution of Online Speech: Outdated and Flawed Laws Used to Restrict Speech in Tunisia”, November 9, 2020, pg. 5. Available at <https://www.amnesty.org/download/Documents/MDE3032862020ENGLISH.PDF>.

¹² Amnesty International, “Tunisia: Freedom of Expression at Risk as Prosecutions Rise”, November 9, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/11/tunisia-freedom-of-expression-at-risk-as-prosecutions-rise>.

Telecommunications Code and Article 128 of Penal Code.¹³ He was sentenced to five and a half years in prison.¹⁴ Amri's son, Mohamed Yacine Amri, was subsequently prosecuted and found guilty of violating Article 128 of the Penal Code for reposting one of his father's posts and denouncing his father's imprisonment.¹⁵

- On April 13, 2019, Ahmed Najeh was convicted under Article 86 of the Telecommunications Code in connection with a Facebook post he made referencing a popular song that condemned police repression and corruption.¹⁶ He served a one-month sentence.¹⁷
- On October 6, 2020, activist Imed Ben Khoud shared a Facebook post of a cartoon image depicting police officers as dogs.¹⁸ That same day, Khoud was told by police officers that "he would be punished for sharing content against police."¹⁹ An investigation was opened against Khoud.²⁰
- On November 12, 2020, blogger Wajdi Mahouechi was sentenced to two years in prison for posting a video on Facebook that denounced a public prosecutor for failing to investigate and arrest an imam who allegedly justified killing those who insulted the Prophet Muhammad.²¹ Mahouechi was found guilty under several articles of the Penal Code and Article 86 of the Telecommunications Code.²²
- In March 2021, LGBTQ+ activist Rania Amdouni was sentenced to a fine and six months in prison under Article 125 of the Penal Code for "insulting a public officer during performance of his duty."²³ The charges were based on Amdouni "shouting outside a police station after officers refused to register her harassment complaint."²⁴ An appeals court subsequently suspended her sentence and ordered her release.²⁵

These cases reflect the ongoing deterioration of respect for free speech in Tunisia, in violation of the country's higher-order legal commitments: the 2014 Constitution and international and regional human rights law. Myriam Bribri's case should thus be viewed

¹³ Human Rights Watch, "Tunisia: Prosecutions for Online Commentary", October 15, 2019.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Amnesty International, "Criminal Prosecution of Online Speech: Outdated and Flawed Laws Used to Restrict Speech in Tunisia", November 9, 2020, pg. 9.

¹⁹ Id.

²⁰ Id.

²¹ Human Rights Watch, "Tunisia: Harsh Sentence Against Blogger", November 24, 2020. Available at <https://www.hrw.org/node/377088/printable/print>.

²² Id.

²³ Human Rights Watch, "Tunisia: Harassment, Arbitrary Detention of LGBT Rights Activist", March 9, 2021. Available at <https://www.hrw.org/news/2021/03/09/tunisia-harassment-arbitrary-detention-lgbt-rights-activist>.

²⁴ Id.

²⁵ Id.

not in isolation, but as part of a broader pattern of state abuse of the Telecommunications Code to stifle criticism of government officials.

B. PROCEDURAL HISTORY

Myriam Bribri is a 34-year-old fashion designer,²⁶ blogger, and anti-impunity activist.²⁷ On October 2, 2020, a video circulated on Facebook of a police officer beating a person; Ms. Bribri shared the video and commented, “God damn you, fuck you.”²⁸ The next day, on October 3, the Secretary-General of the Regional Section of the Security Forces Union in Sfax filed a complaint against Ms. Bribri for “offend[ing] security officials by posting such inappropriate and offensive phrases that are against morals” and offending the Secretary-General “in particular.”²⁹

Specifically, the Secretary-General stated that Ms. Bribri had “attacked and offended the security officials by downloading her post with this video” and that his children and friends had watched the video and asked him to file a complaint.³⁰ He noted that he had been “adversely affected” by the video, without further specification.³¹ That same day, Ms. Bribri received a call from a person claiming to be from the Judicial Police Brigade, who instructed Ms. Bribri to report to police headquarters for an investigation.³² Ms. Bribri thought the phone call was a friendly prank until the caller insulted her and her family.³³ Ms. Bribri declined to go to the police headquarters, stating that the request did not constitute an official summons.³⁴

On October 7, Ms. Bribri received an official summons for investigation from the Judicial Police in Sfax.³⁵ She was questioned by the Judicial Police the next morning.³⁶ During her questioning, she stated that she had commented on the video because she “condemn[ed] violence, no matter its kind or its source,” and had intended the phrase

²⁶ Amnesty International, “Criminal Prosecution of Online Speech: Outdated and Flawed Laws Used to Restrict Speech in Tunisia”, November 9, 2020, p. 8.

²⁷ SMEX, “Freedom of Speech Crisis in the Tunisian ‘Facebook Republic’”, February 22, 2021. Available at <https://smex.org/freedom-of-speech-crisis-in-the-tunisian-facebook-republic>.

²⁸ See Security Department of Sfax, Investigation Report (unofficial translation); Amnesty International, “Criminal Prosecution of Online Speech: Outdated and Flawed Laws Used to Restrict Speech in Tunisia”, November 9, 2020, pg. 8. Amnesty reported that Ms. Bribri wrote, “cursed be the best of you bastards.”

²⁹ Security Department of Sfax, Investigative Report, pg. 4 (unofficial translation). In Tunisia, private parties can file complaints to initiate certain kinds of criminal prosecutions but the public prosecutor must take such prosecutions forward.

³⁰ *Id.*

³¹ *Id.*

³² Amnesty International, “Criminal Prosecution of Online Speech: Outdated and Flawed Laws Used to Restrict Speech in Tunisia”, November 9, 2020, pg. 8.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at pg. 9.

³⁶ *Id.*

“God damn you, fuck you” to apply to any person who unlawfully engaged in violence – not to the Secretary-General specifically.³⁷

When the questioning concluded, the Judicial Police ordered that Ms. Bribri be detained and transferred to court to be formally charged under Article 86 of the Telecommunications Code, which provides for a jail sentence of up to two years for acts that “intend[] to offend others or disturb their comfort through public telecommunications networks.”³⁸ After arriving at the courthouse, Ms. Bribri waited over two hours before her lawyers were informed that Ms. Bribri’s trial would proceed that very day.³⁹ Defense counsel requested to postpone the hearing, which was rescheduled to December 14, 2020.

Subsequently, the hearing on December 14 was delayed until February 8 due to judicial strikes and then again to April 12 due to a COVID-19 ordinance requiring courts to only hear cases in which accused are detained. On April 12, defense counsel requested an adjournment for further preparation. The hearing was postponed to June 28.

³⁷ Security Department of Sfax, Investigative Report, pg. 2 (unofficial translation).

³⁸ Amnesty International, “Criminal Prosecution of Online Speech: Outdated and Flawed Laws Used to Restrict Speech in Tunisia”, November 9, 2020, pg. 8.

³⁹ *Id.* at pg. 9.

ANALYSIS



A. LEGAL FRAMEWORK

The right to freedom of expression is guaranteed internationally through the International Covenant on Civil and Political Rights (“ICCPR”) and regionally through the African Charter on Human and Peoples’ Rights (“African Charter”). Article 19 of the ICCPR states: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 9 of the African Charter sets out a similar standard: “Every individual shall have the right to express and disseminate his opinions within the law.”

Tunisia ratified the ICCPR in 1969⁴⁰ and the African Charter in 1983.⁴¹ Tunisia has also ratified the Protocol to the African Charter establishing the African Court on Human and Peoples’ Rights, which has “jurisdiction [over] all cases and disputes submitted to it in respect of the interpretation and application of the African Charter on Human and Peoples’ Rights . . . and any other relevant human rights instrument ratified by the States concerned.”⁴² The African Court has stated that where the ICCPR provides for broader rights than those of the Charter, it can apply the ICCPR if the country under consideration has already acceded to or ratified it.⁴³ Notably, the African Court has also frequently relied on jurisprudence from both the European Court of Human Rights and the Inter-American Court of Human Rights, stating that the two bodies have analogous jurisdiction and are guided by instruments similar to the African Charter.⁴⁴

International human rights law is incorporated into Tunisian law: Article 20 of the Constitution states that “[i]nternational agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws.” The Constitution also protects the right to freedom of expression. Article 31 of the Constitution states: “Freedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship.” Since both the Constitution and international human rights law are superior to ordinary laws, ordinary

⁴⁰ United Nations Treaty Collection, “ICCPR Status as of August 24, 2020.” Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

⁴¹ African Commission on Human and Peoples’ Rights, “Ratification Table: African Charter on Human and Peoples’ Rights.” Available at <https://www.achpr.org/ratificationtable?id=49>.

⁴² African Court on Human and Peoples’ Rights, “Welcome to the African Court.” Available at <https://www.african-court.org/wpafc/welcome-to-the-african-court/>.

⁴³ African Court on Human and Peoples’ Rights, *Alex Thomas v. Tanzania*, App. No. 005/2013, November 20, 2015, para. 88; African Court on Human and Peoples’ Rights, *Wilfred Onyango Nganyi et al v. Tanzania*, App. No. 006/2013, March 18, 2016, para. 165.

⁴⁴ See Jamil Ddamulira Mujuzi, “The African Court on Human and Peoples’ Rights and Its Protection of the Right to a Fair Trial”, *The Law and Practice of International Courts and Tribunals*, December 5, 2017, pg. 193. Available at https://brill.com/abstract/journals/lape/16/2/article-p187_187.xml.

laws that contradict the legal norms enshrined in the Constitution and/or international treaties are invalid.

At present, enforcing constitutional rights protections is challenging. While a law establishing a Constitutional Court was passed in November 2015, the Court has yet to start operating. With respect to next steps, “[t]he constitution requires the president, parliament and the judiciary each to name four judges to the court, which then needs the approval of parliament and the signature of the president.”⁴⁵ The current president of Tunisia, Kais Saied, has resisted the legislature’s attempts to move forward with the Constitutional Court, deeming it a bid to “settle accounts.”⁴⁶ As such, the Court’s establishment is at an impasse.

The future Constitutional Court has a crucial role to play in aligning vague or contradictory legislation with the 2014 Constitution as well as with international and regional human rights norms and providing remedies where constitutional rights have been violated.⁴⁷ Given that a court remains to be established and that the contours of Article 31 have yet to be flushed out, this analysis draws on international and regional standards. As is detailed below, even in the absence of a Constitutional Court decision, Article 86 of the Telecommunications Code and Bribri’s prosecution contravene Tunisia’s international and regional commitments.

B. RIGHT TO FREEDOM OF EXPRESSION

Protected Speech, Including Criticism of Public Officials and Institutions

The United Nations Human Rights Committee has asserted that under Article 19 of the ICCPR, “[a]ll forms of opinion [must be] protected,” including commentary on “public affairs, . . . discussion of human rights, [and] journalism.”⁴⁸ According to the Committee, “[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential”⁴⁹ and “the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”⁵⁰

⁴⁵ Reuters, “Tunisian President Resists Parliament’s Bid to Create Constitutional Court”, April 6, 2021. Available at <https://www.reuters.com/article/uk-tunisia-politics-idUSKBN2BT1PF>.

⁴⁶ *Id.*

⁴⁷ See U.S. Department of State, “2019 Country Reports on Human Rights Practices: Tunisia”, March 11, 2020, pg. 10. See also Human Rights Watch, “World Report 2020: Tunisia”, 2020, pg. 567. Available at https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf; U.N. Special Rapporteur on Freedom of Religion or Belief, Preliminary Findings of the Visit to Tunisia, April 19, 2018. Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22956&LangID=E>.

⁴⁸ General Comment No. 34, U.N. Doc. CCPR/C/GC/34, OL MYS 2/2018, Sep. 12, 2011, paras. 9, 11.

⁴⁹ *Id.* at para. 13.

⁵⁰ *Id.* at para. 34.

While many countries have laws on the books that curtail speech to protect the honor and reputation of public officials, the Committee has raised particular concerns about such legislation given that speech critical of public figures and institutions is covered by the right to freedom of expression:

[T]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials . . . States parties should not prohibit criticism of institutions, such as the army or the administration.⁵¹

Thus, in a democratic setting, public officials “must tolerate a higher degree of scrutiny than ordinary individuals because of their public functions, and should not be granted a higher level of protection against defamatory statements in media.”⁵²

Ms. Bribri’s speech concerned matters of public interest. In condemning the violence depicted in the video of the police officer, Ms. Bribri was expressing her disapproval of conduct perpetrated by state actors that was already being debated publicly: as noted above, the video was being circulated online. As such, the value of Ms. Bribri’s speech was “particularly high.” Correspondingly, the subject of Ms. Bribri’s commentary, a police officer and thereby public official, was legitimately subject to criticism and, indeed, required to “tolerate a higher degree of scrutiny” because of his public functions.

Permissible Restrictions on Freedom of Expression

The ICCPR acknowledges that freedom of speech is not unlimited. As stated in the Covenant, free expression “carries with it special duties and responsibilities” and

⁵¹ Id. at para. 38 [internal citations omitted].

⁵² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/20/17, June 4, 2012, para. 88. See also African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019, Principle 46 [hereinafter “African Commission Principles on Freedom of Expression”].

therefore may “be subject to certain restrictions ... as are provided by law and are necessary.”⁵³

The ICCPR sets forth an exhaustive list of potential justifications for restricting the right to freedom of expression: “[f]or respect of the rights or reputations of others ... [and for] the protection of national security or of public order (ordre public), or of public health or morals.”⁵⁴ The African Commission has likewise stated that potential objectives for restricting the right to freedom of expression are “to preserve respect for the rights or reputations of others; or to protect of national security, public order, public health or morals.”⁵⁵

In general, human rights bodies have held that rights limitations, including those on freedom of expression, must fulfil three criteria: they must i) be prescribed by law (the principle of legality); ii) serve a legitimate objective; and iii) be necessary to achieve and proportionate to that objective.⁵⁶ Many national constitutional courts employ a similar framework. Although Tunisia has not yet established a Constitutional Court, it is likely that limitations on the free speech protections in the Tunisian Constitution would have to satisfy the same test. Indeed, the drafters of the Tunisian constitution appear to have contemplated a similar test in Article 49, which states: “limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law [and] can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.”

Legality

For States to comply with the first prong, the principle of legality, the UN Human Rights Committee, which is entrusted with interpreting the ICCPR, has held that legislation restricting freedom of expression may not be overbroad⁵⁷ and must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”⁵⁸

⁵³ ICCPR, Article 19(3).

⁵⁴ Id. Article 20 further notes that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

⁵⁵ African Commission Principles on Freedom of Expression, Principle 12.

⁵⁶ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2; U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion, U.N. Doc. A/74/486, October 9, 2019, para. 6; African Commission Principles on Freedom of Expression, Principle 9; African Commission on Human and Peoples’ Rights, *Media Rights Agenda and Others v. Nigeria*, Communication Nos. 105/93, 128/94, 130/194, 152/96, 1998, paras. 68–70; African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 125 et seq.

⁵⁷ General Comment No. 34, U.N. Doc. CCPR/C/GC/34, Human Rights Committee, Sep. 12, 2011, para. 34.

⁵⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25. See also U.N. General Assembly, Report of the Special Rapporteur on the promotion and

More specifically, the Committee has stated that legislation may not “confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”⁵⁹ The UN Special Rapporteur on the promotion and protection of freedom of opinion and expression has likewise noted: “the restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion.”⁶⁰ Similarly, under the African regional system, laws that limit freedom of expression must be “clear, precise, accessible and foreseeable.”⁶¹

Article 86 of the Telecommunications Code stipulates that “whoever intends to offend others or disturb their comfort through public telecommunications networks” is subject to imprisonment for a period between one year and two years, and a fine from one hundred and up to one thousand dinars.⁶² The language of Article 86 is imprecise and ambiguous, failing to define the conduct that is criminalized.

It is unclear, for example, what factors would determine whether speech “offend[ed]” or “disturb[ed]” others. Is an offense committed simply where speech is used with the intent to offend or disturb others or must others in fact be offended or disturbed by the speech? Is an offense committed if anyone is offended or disturbed by the speech in question, or is the reaction and/or position of the subject of the speech dispositive? What happens where a person is offended but their reaction appears unreasonable?

The authorities possess unfettered discretion to make determinations regarding the breadth and meaning of the provision, as demonstrated by Ms. Bribri’s case. This provision thus fails to satisfy the legality principle, violating Ms. Bribri’s right to freedom of expression. Notably, the Human Rights Committee recently urged the Tunisian government to “expedite the process of revising” the Telecommunications Code to “bring [it] into line with” freedom of expression guarantees.⁶³

Legitimate Objective

protection of freedom of expression, U.N. Doc, A/74/486, October 9, 2019, para 6; African Commission Principles on Freedom of Expression, Principle 9(2).

⁵⁹ General Comment No. 34, U.N. Doc. CCPR/C/GC/34, Human Rights Committee, Sep. 12, 2011, para. 25.

⁶⁰ 82nd U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc, A/74/486, October 9, 2019, para. 6(a).

⁶¹ African Commission Principles on Freedom of Expression, Principle 9(2).

⁶² See Amnesty International, “Criminal Prosecution of Online Speech: Outdated and Flawed Laws Used to Restrict Speech in Tunisia”, November 9, 2020, pg. 8.

⁶³ Human Rights Committee, “Concluding Observations on the Sixth Periodic Report of Tunisia”, U.N. Doc. CCPR/C/TUN/CO/6, April 24, 2020, para. 46(a).

Under the ICCPR and the African Charter, a restriction on the right to freedom of expression may be imposed only to “preserve the rights and reputation of individuals,” or to protect “public health, public morals, national security, or public order.”⁶⁴

In the present case, the charges against Ms. Bribri stemmed from her alleged “offend[ing of] security officials,” including the Secretary-General personally.⁶⁵ As stated by the Secretary-General in his complaint, the post allegedly included “inappropriate and offensive phrases ... against morals” that disturbed not only him but also his children and friends.⁶⁶

While the protection of public morals is a legitimate aim under both the UN and regional systems, there has been no demonstration of how Ms. Bribri’s speech might undermine public morals beyond its perceived offensiveness. Perceived offensiveness, however, is not a permissible basis for restricting speech. As stated by the UN Human Rights Committee, the right to freedom of expression “embraces” speech that “may be regarded as deeply offensive.”⁶⁷ The European Court of Human Rights has likewise found that restrictions on freedom of expression cannot be imposed purely because the speech “offend[s], shock[s], or disturb[s] the State or any sector of the population.”⁶⁸ As such, shielding the Secretary-General and other security officials from injured feelings caused by critical commentary does not qualify as a legitimate objective for restricting the right to freedom of expression.

Necessity and Proportionality

Even if a restriction meets the legality and legitimacy tests, it must comply with necessity and proportionality standards. As stated by the UN Human Rights Committee, a restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”⁶⁹ The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”⁷⁰ In

⁶⁴ ICCPR, Article 19(3). See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 28–29; African Commission Principles on Freedom of Expression, Principle 9(3).

⁶⁵ Security Department of Sfax, Investigation Report, pg. 4 (unofficial translation).

⁶⁶ *Id.*

⁶⁷ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

⁶⁸ European Court of Human Rights, *Handyside v. The United Kingdom*, App. No. 5493/72, December 7, 1976, para. 49.

⁶⁹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

⁷⁰ *Id.* at para. 34.

this vein, laws cannot be overbroad⁷¹ and any prescribed punishment should not be excessive.⁷²

In the words of the African Commission on Human Rights, “any limitation on freedom of expression must “originate from a pressing and substantial need that is relevant and sufficient; [must] have a direct and immediate connection to the expression . . . and be the least restrictive means of achieving the stated aim; and [must] be such that the benefit of protecting the stated interest outweighs the harm to the expression.”⁷³

States must thus meet a high threshold to institute criminal prosecutions. The UN Special Rapporteur on the promotion and protection of freedom of opinion and expression has noted that only speech that constitutes child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred should ever be criminalized and that “all other types of expression . . . should not be criminalized” given the “significant chilling effect” that occurs.⁷⁴ The African Court has likewise held that apart from “serious and very exceptional circumstances,” speech offenses “cannot be sanctioned by custodial sentences.”⁷⁵

In the present case, Ms. Bribré’s speech falls short of this level of gravity. It neither incites nor advocates for violence: it is merely impassioned commentary on police brutality. As such, even assuming a restriction was appropriate (which, as described above, it was not), the use of a criminal prosecution is unnecessary and excessive. Further, basing criminal prosecution on the reactions of aggrieved social media users sets a dangerous precedent.

⁷¹ *Id.*

⁷² African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 149.

⁷³ African Commission Principles on Freedom of Expression, Principle 9(4). See also African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, paras. 143, 145.

⁷⁴ U.N. General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40.

⁷⁵ African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 165 (“Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences”).

CONCLUSION



The court should dismiss the case against Myriam Bribri, or the prosecution should withdraw the charges. That the charges were brought at all demonstrates that the expansive terms of Article 86 of the Telecommunications Code are ripe for abuse. Ms. Bribri's case is part of a broader pattern in which Tunisian security forces have targeted those critical of police brutality through the judicial system.

Going forward, Tunisia must narrow or repeal Article 86 to ensure that it complies with the right to freedom of expression, no longer affording the authorities unfettered discretion to criminalize protected speech.

Correspondingly, Tunisia should establish its long-awaited Constitutional Court, which would have the jurisdiction to review constitutional challenges to ensure that domestic legislation such as Article 86 of the Telecommunications Code meets relevant constitutional, international, and regional standards and which could provide remedies to those whose rights have been violated. In the interim, even in the absence of legislative amendments or a court decision on the compatibility of Article 86 with the Constitution, international and regional standards require state organs to refrain from applying it.

The above measures would be facilitated by engagement with UN bodies. Tunisia should invite the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression to make a country visit, following which the Rapporteur can provide recommendations for how to bring the Tunisian legal framework in line with international and regional obligations.