



Tunisia vs. Emna Chargui

June 2021

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

ABOUT THE AUTHOR:

Knox Thames is an international lawyer who has served in a variety of U.S. government roles over a 20-year career, most recently as the Special Advisor for Religious Minorities at the U.S. Department of State. Starting in July 2020, he became a Senior Fellow at the Institute for Global Engagement. The views expressed here are his own. Mr. Thames thanks the TrialWatch initiative for helping to draft the report, which facilitated his legal conclusions and grading of the trial.

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



Knox Thames, who is a member of the Trial Watch Experts Panel, assigned this trial a grade of D:

while it is positive that the court hearings were open and that Ms. Chargui was not imprisoned during the trial, the low grade is on account of the arbitrary application of vague laws, the lack of any prosecution presentation at trial, and the severe penalty.

In July 2020, the Clooney Foundation for Justice’s TrialWatch initiative monitored the criminal trial of Emna Chargui¹ in Tunisia. The prosecution and conviction of Ms. Chargui on incitement charges for sharing a satirical poem online constituted a violation of her right to freedom of expression. Additionally, the proceedings were marred by fair trial violations, including the prosecution’s failure to prove the defendant’s guilt beyond reasonable doubt. Namely, no evidence was presented that Ms. Chargui’s posts might actually incite people to violence or discrimination or that she had intended such effects. Ms. Chargui’s trial demonstrates how the Tunisian authorities continue to arbitrarily use problematic legislation predating the 2014 Constitution to enable prosecutions for peaceful speech and the exercise of freedom of conscience – to the detriment of the rule of law and Tunisia’s international and regional obligations.

Ms. Chargui is a Tunisian blogger and self-described liberal woman who does not subscribe to any religious beliefs. In May 2020, Ms. Chargui shared a poem entitled “Verse of Corona” on her Facebook page after seeing it posted by other users and finding it amusing. The poem concerned the COVID-19 pandemic and included lines about staying home, washing hands, and following science. The poem was unrelated to religion but written in Quranic style, which is commonly employed in poetry.

Ms. Chargui, who received rape and death threats after posting the poem, was subsequently charged under Articles 52 and 53 of Decree 115 of 2011, which respectively proscribe using certain kinds of speech to “advocate[] directly ... for hatred between races, religions, or populations by inciting discrimination and the use of hostile means or violence or spreading ideas based on racial discrimination” and intentionally “undermin[ing] one of the licensed religious rites.” She was convicted of both offenses by the Tunis Court of First Instance in July 2020 and sentenced to six months in prison and a fine.

While Ms. Chargui remained at liberty during the pre-trial stage and was represented by defense counsel, her lawyer was prohibited from attending her pre-trial interrogation by

¹ Different sources use various spellings of the defendant’s name in English, including Amna Al Sharqi, Emna Charki, Emna Charqui, and Emna Chargui. This report uses the last spelling for consistency.

the Public Prosecutor's Office, consistent with Tunisian law and practice but in violation of international and regional standards on the right to counsel. The trial itself was largely conducted in line with fair trial standards, with the glaring exception of the prosecution's failure to prove the charges against Ms. Chargui. Indeed, in line with recent practices in Tunisia, the prosecution presented no evidence and made no arguments at trial. Ms. Chargui's conviction despite the prosecution's functional abstention from the proceedings violated the presumption of innocence.

Even had evidence been presented, it was impossible for the prosecution to prove its case because Ms. Chargui's conduct did not fall within the scope of the charged offenses of incitement and undermining of religious rituals. Namely, it was unforeseeable that posting a poem about a public health crisis could qualify as advocacy for hatred through incitement under Article 52, or as "undermining ... religious rites" under Article 53, especially in light of the prevalence of Quranic-style poetry. Ms. Chargui's prosecution and conviction for conduct outside the scope of Articles 52 and 53 therefore violated the principle of legality, which prohibits holding anyone criminally liable for acts or omissions that were not criminal when they were committed.

The prosecution and conviction of Ms. Chargui under Articles 52 and 53 also contravened her right to freedom of expression. In accordance with the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, restrictions on the right to freedom of expression must (i) be prescribed by law, (ii) serve a legitimate objective and (iii) be necessary to achieve and proportionate to that objective.

Ms. Chargui's prosecution for protected speech fails this test on all counts. First, the laws under which she was prosecuted were so vague as to provide the authorities unfettered discretion in applying them. As such, her prosecution was not prescribed by law, the first prong of the test. Second, while some may have found Ms. Chargui's post offensive, this is not a legitimate justification for restricting free speech. And although the State might have contended that the prosecution was instead aimed at safeguarding national security and/or public order, it presented no evidence of any danger posed by Ms. Chargui's speech.

Third, Ms. Chargui's prosecution and jail sentence were far from necessary or proportionate: imprisonment for speech offenses must be reserved for the most severe cases, such as advocacy of religious or racial hatred constituting incitement to discrimination, hostility or violence. As mentioned above, despite being charged with an incitement offense under Article 52, Ms. Chargui's speech did not qualify as such under any conceivable interpretation, falling far short of the prescribed level of severity.

More broadly, the criminalization of speech under ambiguous laws such as Articles 52 and 53 of Decree 115 of 2011 raises serious concerns. Affording the judiciary discretion to jail individuals for speech perceived by some as blasphemous or offensive will undoubtedly chill public debate and criticism, while also enabling extremists to exploit this

legislation to attack opponents and enforce their narrow view of appropriate speech across society. The abuse of such laws is moreover incompatible with Tunisia's 2014 Constitution, undermining the rule of law.

Going forward, Tunisia should establish a Constitutional Court that can evaluate the compatibility of legislation restricting freedom of expression with the 2014 Constitution. Simultaneously, Tunisia should repeal Articles 52 and 53 of Decree 115 of 2011 or initiate a reform effort to bring Articles 52 and 53 in line with Tunisia's international and regional obligations. Until such time, Tunisia should issue guidelines to police and prosecutors ensuring that only grave speech offenses leading to imminent violence are prosecuted under these provisions.

The above measures would be facilitated by engagement with UN bodies. Tunisia should invite the UN Special Rapporteur on Freedom of Expression and/or the UN Special Rapporteur on Freedom of Religion or Belief to make a country visit, following which they can provide recommendations for how to bring Tunisian law in line with international and regional obligations.

Lastly, with respect to the systemic issues evidenced by Ms. Chargui's lack of access to counsel during her interrogation by the prosecutor and the prosecutor's failure to present a case at trial, in violation of the right to counsel and right to presumption of innocence, Tunisia must ensure that all criminal proceedings comply with international and regional fair trial standards.



A. POLITICAL AND LEGAL 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 enshrined respect for democratic principles and human rights.² 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.³ While Tunisia has maintained that categorization,⁴ 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: Freedom House has warned that Tunisia may lose its “Free” status if this “democratic backslide” continues.⁵

An important concern in this regard, and of particular relevance to the present case, is Tunisia’s failure to repeal or reform laws that “appear to contradict ... the rights and freedoms protected in the constitution.”⁶ This rule of law deficit is perpetuated by the ongoing failure to establish a Constitutional Court (the law on establishing a Constitutional Court was passed in November 2015), which could help align vague or contradictory legislation with the 2014 Constitution and international human rights norms.⁷

Freedom of Expression

Article 31 of Tunisia’s 2014 Constitution provides that “[f]reedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship.” Freedom of expression is further enshrined in Decree 115

² 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.

³ 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>.

⁴ See Freedom House, “Freedom in the World 2020: Tunisia”. Available at <https://freedomhouse.org/country/tunisia/freedom-world/2020>.

⁵ 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.

⁶ See U.S. Department of State, “2019 Country Reports on Human Rights Practices: Tunisia”, March 11, 2020, pg. 10. Available at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/tunisia/>; 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>.

⁷ See id.

of 2011 – also referred to as the new Press Code – which was enacted by the interim government after the revolution to replace the restrictive 1975 Press Code.⁸ Decree 115, which has been described as an effort to “introduce more moderate and less intrusive legislation,” provides certain protections (regarding, for instance, the confidentiality of sources, access to information, and legal protection from attacks and intimidation) and abolishes custodial punishments for a number of speech offenses when committed by journalists – while imposing prison sentences for others.⁹

In this regard, the UN Human Rights Committee has expressed concern “that a number of [vague] legislative provisions set excessive limits on the content of discourse, including in the Criminal Code, the Code of Military Justice and the Telecommunications Code,” particularly “a number of legal provisions that continue to criminalize activities related to the exercise of freedom of expression, such as publication of false information, damage to the reputation of public institutions, defamation or libel.”¹⁰ According to Human Rights Watch, “[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.”¹¹ Correspondingly, it is not uncommon for courts to ignore constitutional and other legal protections in favor of convictions.¹²

Journalists, bloggers, and social media users regularly face prosecution pursuant to the above laws, especially when reporting on the security forces and other issues of public interest.¹³ As documented by Human Rights Watch, “[a]t least 14 [bloggers, journalists

⁸ Internews, “The New Tunisian Legislative Framework: A Focus on Press and Audiovisual Media”, February 2012, pgs. 1, 5. Available at https://www.internews.org/sites/default/files/resources/Internews_TunisiaMediaLaw_2012-02.pdf.

⁹ See *id.* at pgs. 4-5. Decree 115 of 2011 did not decriminalize such speech altogether; the penal code and other legislation still provide for custodial sentences for equivalent speech offenses. It is also unclear whether the protections of Decree 115 of 2011 apply to bloggers and other social media users given the strict definition of “journalist” under that law. See Internet Legislation Atlas, “Regulation of online content: Tunisia.” Available at <https://internetlegislationatlas.org/#/countries/Tunisia/frameworks/content-regulation>; Freedom House, “Freedom on the Net 2019: Tunisia”, C1. Available at <https://freedomhouse.org/country/tunisia/freedom-net/2019>.

¹⁰ 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.

¹¹ 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>.

¹² Internet Legislation Atlas, “Regulation of online content: Tunisia.” See also Article 19, “Tunisia: Imprisonment of journalist and writer Taoufik Ben Brik should be reversed”, July 29, 2020. Available at <https://www.article19.org/resources/tunisia-imprisonment-of-journalist-and-writer-taoufik-ben-brik-should-be-reversed/>.

¹³ Freedom House, “Freedom in the World 2020: Tunisia”, D1; Freedom House, “Freedom on the Net 2019: Tunisia”, C3; Human Rights Watch, “Tunisia: Prosecutions for Online Commentary”, October 15, 2019. 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/>.

and social media activists] were prosecuted under speech offenses in 2019, with six spending time in jail for criticizing state officials or revealing corruption by civil servants.”¹⁴

This pattern has persisted during the COVID-19 pandemic. In April 2020, for instance, two bloggers were arrested for “insulting a civil servant,” “accusing public officials of crimes related to their jobs without furnishing proof of guilt,” and “causing noises and disturbances to the public” under Articles 125, 128, and 316 of the Penal Code, respectively, after they posted videos on Facebook concerning, among other things, the lack of assistance available to the public amid the COVID-19 lockdown.¹⁵

Freedom House rated Tunisia as only “Partly Free” in its 2020 assessment of countries’ respect for Freedom on the Net.¹⁶

De Facto Blasphemy Laws

A further threat to freedom of expression and closely connected rights like freedom of religion or belief comes from the application of *de facto* blasphemy laws to speech and other conduct deemed by some as offensive to Islam.

Tunisia is a Muslim-majority country, with 99% of the population identifying as Sunni Muslim.¹⁷ While the 2014 Constitution guarantees freedom of religion or belief, it identifies Islam as the country’s official religion,¹⁸ and there are reports of hostility towards and threats and attacks against non-Muslims, converts, and atheists/agnostics, including harassment by law enforcement officials.¹⁹

¹⁴ Human Rights Watch, “Tunisia: Repressive Laws Cloud Rights Gains”, January 14, 2020. Available at <https://www.hrw.org/news/2020/01/14/tunisia-repressive-laws-cloud-rights-gains>. See also Human Rights Watch, “Tunisia: Prosecutions for Online Commentary”, October 15, 2019; Freedom House, “Freedom on the Net 2019: Tunisia”, C3; U.S. Department of State, “2019 Country Reports on Human Rights Practices: Tunisia”, March 11, 2020, pgs. 11-12.

¹⁵ Amnesty International, “Tunisia: End prosecution of bloggers for criticizing government’s response to COVID-19”, April 21, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/04/tunisia-end-prosecution-of-bloggers-for-criticizing-governments-response-to-covid19/>; Global Voices, “Setbacks for freedom of expression as Tunisia fights COVID-19”, April 28, 2020.

¹⁶ Freedom House, “Freedom on the Net 2020: Tunisia.” Available at <https://freedomhouse.org/country/tunisia/freedom-net/2020#:~:text=The%20agency%20signed%20contracts%20with,and%20restaurants%20in%20major%20cities.>

¹⁷ Religious minorities constituting less than 1% of the population include Christians, Jews, Shia Muslims, Baha’is, and non-believers. U.S. Department of State, “Tunisia 2019 International Religious Freedom Report”, 2020, pg. 3. Available at <https://www.state.gov/wp-content/uploads/2020/05/TUNISIA-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>.

¹⁸ Constitution of the Republic of Tunisia, 2014, Articles 1, 6.

¹⁹ See Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief on his visit to Tunisia (advance unedited version), U.N. Doc. A/HRC/40/58/Add.1, March 1, 2019, para. 64; U.S. Department of State, “Tunisia 2019 International Religious Freedom Report”, 2020, pg. 10. There have also reportedly been instances of human rights defenders and others being labeled “infidels” or “heretics” and receiving death threats and harassment from members of the public. See, e.g., Frontline Defenders, “Death threats and smear campaign against woman human rights defender Rania Amdouni”, February 5, 2020. Available at <https://www.frontlinedefenders.org/en/case/death-threats-and-smear-campaign->

Notably, attempts to explicitly outlaw blasphemy in the 2014 Constitution failed.²⁰ Some have characterized Article 6 of the Constitution, which establishes that “[t]he state is the guardian of religion” and mandates it “to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof,” as an anti-blasphemy provision.²¹

In practice, alleged blasphemy is commonly prosecuted under vague laws penalizing offenses against “public order,” “public morals,” or “public decency,”²² such as Articles 121 and 226 of the Penal Code.²³ For example, in 2012, two atheist friends were convicted under Article 121(3) of the Penal Code – which criminalizes the publishing of materials liable to harm public order or public morals – and sentenced to seven and a half years in prison for posting, respectively, satirical text and images deemed offensive to Islam on Facebook,²⁴ while in 2019, a café owner was convicted of offending public morality and modesty under Article 226(1) and (2) of the Penal Code for keeping his café open during Ramadan.²⁵

Although speech and conduct deemed offensive to religion appears to be most frequently prosecuted under the abovementioned provisions, the UN Special Rapporteur on

against-woman-human-rights-defender-rania-amdouni; Frontline Defenders, “Defamation campaign against woman human rights defender Fatma Moatemri”, May 21, 2020. Available at <https://www.frontlinedefenders.org/en/case/defamation-campaign-against-woman-human-rights-defender-fatma-moatemri>.

²⁰ The Law Library of Congress, “The Role of Islamic Law in Tunisia’s Constitution and Legislation Post-Arab Spring”, May 2013, pgs. 3-4. Available at <https://www.loc.gov/law/help/role-of-islamic-law/tunisia-constitution.pdf>.

²¹ U.N. Special Rapporteur on Freedom of Religion or Belief, Preliminary findings of the visit to Tunisia, April 19, 2018. See also Human Rights Watch, “The Problem with Tunisia’s New Constitution”, February 3, 2014. Available at <https://www.hrw.org/news/2014/02/03/problem-tunisia-new-constitution>.

²² Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief on his visit to Tunisia” (advance unedited version), U.N. Doc. A/HRC/40/58/Add.1, March 1, 2019, paras. 53-55; Association Tunisienne de défense des libertés individuelles et al., “Contribution de la Société Civile à l’Examen du Sixième (VI) Rapport de la Tunisie pour l’Application du Pacte International Relatif aux Droits Civils et Politiques”, March 2-27, 2020, pg. 11. Available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/TUN/INT_CCPR_CSS_TUN_41625_F.pdf.

²³ See U.S. Commission on International Religious Freedom, “Respecting Rights? Measuring the World’s Blasphemy Laws”, July 2017, pgs. 112-113. Available at <https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf>; The Law Library of Congress, “Blasphemy and Related Laws in Selected Jurisdictions”, 2017, pg. 42. Available at <https://www.loc.gov/law/help/blasphemy/blasphemy.pdf>.

²⁴ Human Rights Watch, “Tunisia: Seven Years in Jail for Mocking Islam”, April 6, 2012. Available at <https://www.hrw.org/news/2012/04/06/tunisia-seven-years-jail-mocking-islam>; Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief on his visit to Tunisia (advance unedited version), U.N. Doc. A/HRC/40/58/Add.1, March 1, 2019, para. 55.

²⁵ Human Rights Watch, “Tunisia: Café Owner Jailed Over Ramadan Hours”, June 7, 2019. Available at <https://www.hrw.org/news/2019/06/07/tunisia-cafe-owner-jailed-over-ramadan-hours>. For further examples of these types of prosecutions, see End Blasphemy Laws Campaign, “Tunisia”, June 18, 2020 (last updated). Available at <https://end-blasphemy-laws.org/countries/middle-east-and-north-africa/tunisia/>; Amnesty International, “Tunisia: Persepolis trial spotlights attacks on freedom of expression”, April 18, 2012. Available at <https://www.amnesty.org/en/latest/news/2012/04/tunisia/>; U.N. Special Rapporteur on Freedom of Religion or Belief, Preliminary findings of the visit to Tunisia, April 19, 2018.

Freedom of Religion or Belief has expressed concern that provisions criminalizing incitement to hatred are increasingly being used for this purpose as well.²⁶ In 2019, for instance, a lawyer and LGBT rights activist was charged with incitement to hatred, violence, and discrimination under the 2015 counterterrorism law, the 2018 racial discrimination law, and Article 52 of Decree 115 of 2011 for reposting on his Facebook page content from a “Facebook page called ‘The Untold in Islam,’ accusing the Prophet Mohamed of being a rapist and a killer.”²⁷

Fair Trial and Due Process Rights

While the 2014 Constitution provides for an independent and impartial judiciary, international and regional organizations and institutions have raised concerns in this regard. Freedom House, for example, has commented on the prevalence of executive interference.²⁸ The UN Human Rights Committee has also noted “reports that the judiciary continues to be influenced by the executive branch, particularly in politically sensitive cases.”²⁹

According to the International Commission of Jurists, this situation is exacerbated by the incompleteness of the law regulating judicial conduct: a Code of Ethics is currently in development.³⁰ Further, questions have already been raised about the independence, impartiality, credibility, and competence of the future Constitutional Court (once it is finally set up), in light of shortcomings in the law governing the Court’s establishment.³¹

Violations of the right to counsel are also of particular concern: there are reports that suspects, including those in detention, are consistently not informed of their right to legal assistance and interrogated without a lawyer present (in violation of not only international and regional standards but also Tunisian Law No. 5, adopted in February 2016); that defense attorneys are often impeded by authorities in their ability to consult with their

²⁶ Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief on his visit to Tunisia (advance unedited version), U.N. Doc. A/HRC/40/58/Add.1, March 1, 2019, paras. 56-59.

²⁷ Human Rights Watch, “Tunisia: Halt Prosecution of Prominent Activist”, January 29, 2020. Available at <https://www.hrw.org/news/2020/01/29/tunisia-halt-prosecution-prominent-activist>.

²⁸ Freedom House, “Freedom in the World 2020: Tunisia”, F1.

²⁹ Human Rights Committee, Concluding observations on the sixth periodic report of Tunisia, U.N. Doc. CCPR/C/TUN/CO/6, April 24, 2020, para. 43.

³⁰ International Commission of Jurists, “Submission of the International Commission of Jurists to the UN Human Rights Committee in View of the Committee’s Examination of Tunisia’s Sixth Periodic Report Under Article 40 of the International Covenant on Civil and Political Rights”, February 3, 2020, paras. 59-60. Available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/TUN/INT_CCPR_CSS_TUN_41399_E.pdf.

³¹ Human Rights Committee, Concluding observations on the sixth periodic report of Tunisia, U.N. Doc. CCPR/C/TUN/CO/6, April 24, 2020, paras. 7-8; International Commission of Jurists, “Submission of the International Commission of Jurists to the UN Human Rights Committee in View of the Committee’s Examination of Tunisia’s Sixth Periodic Report Under Article 40 of the International Covenant on Civil and Political Rights”, February 3, 2020, paras. 6-12.

clients and provide effective assistance; and that there are serious gaps in the provision of legal aid.³²

On a positive note, the right to a public trial is generally respected in Tunisia's court system.³³ However, courtrooms are reportedly often overcrowded, especially at the Court of First Instance in Tunis, given the large number of cases heard each day.³⁴ Local partners have relayed that in order to expedite proceedings, it is common for the prosecution not to make any arguments or present any evidence during trial, relying on the indictment alone and leaving it to defendants to prove their innocence,³⁵ and for judges to decide criminal cases and impose custodial sentences in a matter of minutes.³⁶

B. CASE HISTORY

Ms. Emna Chargui is a 29-year-old (as of June 2021) Tunisian woman. According to Ms. Chargui, she is a liberal woman with no religious beliefs, and is not fluent in Arabic.³⁷ On May 3, 2020, Ms. Chargui posted a photo of a poem entitled "Verse of Corona" ("Surat Al-Corona") to her personal Facebook page, after seeing it posted on other social media accounts. As Ms. Chargui has explained, she shared the poem with her friends on Facebook for "fun and entertainment" but deleted it the same day after receiving comments from other Facebook users insulting her and threatening to violently assault and kill her.³⁸ Ms. Chargui also received rape threats.³⁹

The poem in question concerns the COVID-19 pandemic and advises following science instead of tradition, staying home and washing one's hands, and not going out to buy

³² See Human Rights Watch, "'You Say You Want a Lawyer?' Tunisia's New Law on Detention, on Paper and in Practice", June 2018. Available at https://www.hrw.org/sites/default/files/report_pdf/tunisia0618_web.pdf; International Commission of Jurists, "Submission of the International Commission of Jurists to the UN Human Rights Committee in View of the Committee's Examination of Tunisia's Sixth Periodic Report Under Article 40 of the International Covenant on Civil and Political Rights", February 3, 2020, paras. 55-56; U.S. Department of State, "2019 Country Reports on Human Rights Practices: Tunisia", March 11, 2020, pgs. 6-7.

³³ U.S. Department of State, "2019 Country Reports on Human Rights Practices: Tunisia", March 11, 2020, pg. 8.

³⁴ See Monitor's Notes, July 2, 2020; The International Legal Foundation, "Traveling to Tunisia: A Lesson in Public Defense", May 14, 2019. Available at <https://www.theilf.org/post/traveling-to-tunisia-a-lesson-in-public-defense>.

³⁵ In practice, the prosecution generally decides to send a case to trial based on the information in the investigation report compiled by the police and, if applicable, evidence provided by the complainant. This decision is formalized in a referral text, which is generally limited to a brief statement citing the law(s) pursuant to which the defendant will be prosecuted. At trial, the presiding judge will interrogate the defendant and defense counsel can make arguments, but the prosecution often does not present any more arguments or evidence. Information from Monitor, September 17, 2020.

³⁶ See The International Legal Foundation, "Traveling to Tunisia: A Lesson in Public Defense", May 14, 2019.

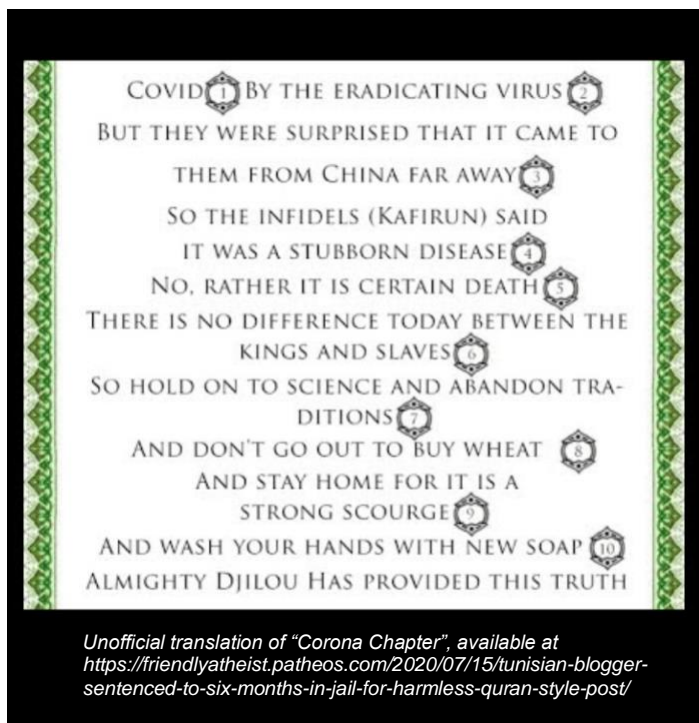
³⁷ Ministry of the Interior, Communication Technology Crime Department, Investigation Report: Hearing Session of "Amna Al Sharqi", May 5, 2020 (unofficial translation).

³⁸ *Id.*

³⁹ See Amnesty International, "Tunisia: End prosecution of Emna Chargui, and investigate alarming death and rape threats", May 27, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/05/tunisia-end-prosecution-of-emna-chargui-and-investigate-alarming-death-and-rape-threats/>.

semolina (wheat). The poem is written in rhyme and in a decorative form resembling Quranic text. It ends with the phrase “Almighty Djilou has provided this truth” (apparently referring to the author of the poem), which mirrors “Almighty God has spoken truly,” the traditional closing of Quranic recitals.⁴⁰

On May 4, 2020, the Sub-Department for Social Protection of the Ministry of the Interior requested permission from the Public Prosecutor’s Office to open an investigation into Ms. Chargui’s post, stating that in monitoring her account the police had “found illegal abuses related to hate crimes against religions as well as slandering religious rituals, in addition to posts that incite religious, racial and national hatred by instigating racist and hostile acts.”⁴¹ The request referred to Article 6 of Tunisia’s 2014 Constitution and noted that the “Facebook post was denounced and criticized by Facebook Users because it was considered an explicit defamation of Islamic religious rituals and our National Security.”⁴² The request was approved the same day.



On May 5, 2020, Ms. Ines Trabelsi was accredited as Ms. Chargui’s defense attorney and accompanied the defendant to a hearing before the judicial police.⁴³ At the hearing Ms. Chargui testified that she never had any intention of “offending any religion” or “spreading hatred about other religions and races and nationalities through the use of racism and slandering Islamic religious rituals.”⁴⁴

On May 6, 2020, Ms. Chargui was interrogated in court by at least seven members of the Public Prosecutor’s Office: her lawyer was not allowed to accompany her (as discussed

⁴⁰ Monitor’s Notes, July 2, 2020. See also Amnesty International, “Tunisia: End prosecution of Emna Chargui, and investigate alarming death and rape threats”, May 27, 2020; Archyde, “The ‘Suron of the Coronavirus’ creates controversy in Tunisia”, May 8, 2020. Available at <https://www.archyde.com/the-suron-of-the-coronavirus-creates-controversy-in-tunisia/>.

⁴¹ Ministry of the Interior, Sub-Department for Social Protection, Request to Open an Investigation, May 4, 2020 (unofficial translation).

⁴² Id.

⁴³ Accreditation Notice of Ines Trabelsi for Emna Chargui, May 5, 2020 (unofficial translation); Ministry of the Interior, Communication Technology Crime Department, Investigation Report: Executing the Order to Investigate, May 6, 2020 (unofficial translation).

⁴⁴ Ministry of the Interior, Communication Technology Crime Department, Investigation Report: Hearing Session of “Amna Al Sharqi”, May 5, 2020 (unofficial translation).

below, this is standard practice in Tunisia).⁴⁵ During the interrogation she was asked questions about the post, her faith, and her mental health.⁴⁶ One of the prosecutors allegedly said: “There is no freedom of expression when it comes to religion.”⁴⁷

On May 6, 2020, Ms. Chargui was referred for prosecution under Articles 52 and 53 of Decree 115 of 2011 (the Press Code).⁴⁸ Article 52 provides:

A penalty of one to three years imprisonment and a fine of one to two thousand dinars shall be imposed on anyone who advocates directly, by means of any of the means set forth in Article 50 of this decree, for hatred between races, religions, or populations by inciting discrimination and the use of hostile means or violence or spreading ideas based on racial discrimination.⁴⁹

Under Article 53, as relevant to the present case:

Anyone who intends, by the means mentioned in Article 50 of this decree, to ... undermine one of the licensed religious rites is punished with a fine of one thousand to two thousand dinars.⁵⁰

The trial, originally set for May 28, 2020 before the Tunis Court of First Instance, was adjourned due to the COVID-19 pandemic, resuming on July 2, 2020. The proceedings were public and lasted one day. In response to questioning by the presiding judge, Ms. Chargui testified that she was not the author of the “Verse of Corona” but found it on Facebook and shared it on her personal page because she thought it was funny.⁵¹ She emphasized that she meant it as a joke and did not intend to attack or harm the beliefs of others.⁵² Ms. Chargui was represented at trial by a defense team consisting of approximately ten lawyers, who argued that an acquittal was warranted because, among

⁴⁵ See Human Rights Watch, “Humor Comes at a Price in Morocco and Tunisia”, May 13, 2020. Available at <https://www.hrw.org/news/2020/05/13/humor-comes-price-morocco-and-tunisia>; Amnesty International, “Tunisia: End prosecution of Emna Chargui, and investigate alarming death and rape threats”, May 27, 2020; Monitor’s Notes, July 2, 2020.

⁴⁶ Amnesty International, “Tunisia: End prosecution of Emna Chargui, and investigate alarming death and rape threats”, May 27, 2020; Monitor’s Notes, July 2, 2020.

⁴⁷ Human Rights Watch, “Humor Comes at a Price in Morocco and Tunisia”, May 13, 2020.

⁴⁸ Referral Text (Charge Sheet), May 6, 2020 (unofficial translation).

⁴⁹ Decree 115 of 2011 on the Press, Printing and Publishing, November 2, 2011, Article 52 (unofficial translation).

⁵⁰ Decree 115 of 2011 on the Press, Printing and Publishing, November 2, 2011, Article 53 (unofficial translation). Article 53 further punishes “[a]nyone who intends, by the means mentioned in Article 50 of this decree, to use the houses of worship for partisan and political propaganda” with the same fine. As this part of the article is not relevant to the present case, this report will not include it when discussing this provision.

⁵¹ Monitor’s Notes, July 2, 2020.

⁵² Id.

other things, the case violated the defendant's constitutional rights to freedom of expression and privacy, the impugned conduct did not meet the requirements of Articles 52 and 53 of Decree 115 of 2011, and the prosecution violated the principle of legality.⁵³ The prosecution made no arguments and presented no evidence at trial.⁵⁴ On July 13, 2020 the Court issued its verdict convicting Ms. Chargui of both offenses and sentencing her to six months in prison and a fine of 2,000 dinars.⁵⁵ Ms. Chargui subsequently sought and obtained asylum in Germany. While Ms. Chargui's lawyers registered an appeal within 10 days of the first-instance judgment, as provided by law, they will not be permitted to defend her before the appeals court if she is not in attendance and the court may in its discretion decide to proceed *in absentia* (without either Ms. Chargui or her lawyers). The appeal is still pending.

⁵³ *Id.*

⁵⁴ *Id.*; Information from Monitor, September 17, 2020.

⁵⁵ See 5 Pillars, "Tunisian blogger who 'desecrated' Quran sentenced to six months prison", July 16, 2020. Available at <https://5pillarsuk.com/2020/07/16/tunisian-blogger-who-desecrated-quran-sentenced-to-six-months-prison/>; Amnesty International, "Tunisia: Blogger Emna Chargui sentenced to six months in prison for social media post", July 15, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/07/tunisia-blogger-emna-chargui-sentenced-to-six-months-in-prison-for-social-media-post/>; BBC, "Coronavirus: Blogger Emna Charqui given jail term over Koran-style post", July 14, 2020. Available at <https://www.bbc.com/news/world-africa-53408262>.

METHODOLOGY



A. THE MONITORING PHASE

The Clooney Foundation for Justice deployed a monitor to the trial of Emna Chargui before the Tunis Court of First Instance. The monitor spoke Arabic and was able to follow the proceedings. The monitor did not experience any impediments in entering the courtroom and was present for the entirety of the trial, which consisted of a hearing on July 2, 2020 and the delivery of the verdict on July 3, 2020.

B. THE ASSESSMENT PHASE

To evaluate the fairness of the proceedings and arrive at a grade, TrialWatch Expert Knox Thames reviewed pretrial documents, monitor notes, and an analysis of the case and the political and legal context in Tunisia prepared by the TrialWatch initiative. Mr. Thames found several serious deficiencies conflicting with Tunisia's international and regional obligations, including arbitrary enforcement of vague laws, the absence of counsel during Ms. Chargui's interrogation by the prosecutor, the failure of the prosecution to make a presentation at trial, violations of Ms. Chargui's right to freedom of expression, and the imposition of an excessive penalty.



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (“ICCPR”); jurisprudence from the United Nations Human Rights Committee, tasked with monitoring implementation of the ICCPR; the African Charter on Human and Peoples’ Rights (“African Charter”); jurisprudence from the African Commission on Human and Peoples’ Rights (“African Commission”), tasked with interpreting the Charter and considering individual complaints of Charter violations; and jurisprudence from the African Court on Human and Peoples’ Rights (“African Court”), which—complementing the African Commission’s work—is tasked with interpreting and applying the African Charter.

The African Court 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 (the Charter), the Protocol [on the Court’s establishment] and any other relevant human rights instrument ratified by the States concerned.”⁵⁶ Tunisia ratified the African Charter in 1983 and the Protocol in 2007.⁵⁷ 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.⁵⁸ Tunisia ratified the ICCPR in 1969.⁵⁹ Notably, the African Court has 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.⁶⁰ This report thus also relies on the jurisprudence of these other regional human rights courts.

In addition to the above, the report draws on domestic legislation, international criminal law, commentary and reporting from various UN Special Procedures, and resolutions and

⁵⁶ 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/>.

⁵⁷ African Union, “List of Countries which have signed, ratified/acceded to the African Charter on Human and Peoples’ Rights.” Available at https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf; African Union, “List of Countries which have signed, ratified/acceded to the Protocol of the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.” Available at https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf.

⁵⁸ African Court on Human and Peoples’ Rights, *Alex Thomas v. Tanzania*, App. No. 005/2013, November 20, 2015, paras. 88-89; African Court on Human and Peoples’ Rights, *Wilfred Onyango Nganyi et al v. Tanzania*, App. No. 006/2013, March 18, 2016, paras. 165-166.

⁵⁹ 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.

⁶⁰ 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.

guidelines from the African Commission, including the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and its Declaration of Principles on Freedom of Expression and Access to Information in Africa.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Right to Counsel

Ms. Chargui's interrogation by the Public Prosecutor's Office on May 6 without her attorney present violated her right to counsel. Her lack of access to counsel at this stage is consistent with Tunisian law and practice, reflecting broader systemic issues within the Tunisian criminal justice framework.

Article 14(3)(b) of the ICCPR provides: "In the determination of any criminal charge against him, everyone shall be entitled to ... have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing," while Article 7(1)(3) of the African Charter states: "Every individual shall have the ... right to defence, including the right to be defended by counsel of his choice."⁶¹ As the African Commission has explained, "[l]egal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms" and the right to counsel "applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings."⁶²

In this regard, the fairness of a trial is particularly undermined when an accused is interrogated without defense counsel present, given that the lack of legal advice during even a single interrogation can compromise a defendant's case.⁶³ The European Court of Human Rights has further emphasized that while a restriction on the right to counsel may be permissible in a particular case if it does not unduly prejudice the rights of the accused and is justified by "compelling reasons," the mere existence of a national law –

⁶¹ See also African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial, ACHPR/Res.4(XI)92, 1992, Article 2(e)(i); African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principles N(3)(a) and (d) [hereinafter "African Commission Fair Trial Guidelines"].

⁶² African Commission Fair Trial Guidelines, Principles N(2)(a) and (c), A(2)(f); African Commission on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v. Libya, App. No. 002/2013, June 3, 2016, paras. 93-96.

⁶³ See Human Rights Committee, Lyashkevich v. Uzbekistan, U.N. Doc. CCPR/C/98/D/1552/2007, May 11, 2010, para. 9.4; Human Rights Committee, Gridin v. Russian Federation, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.5; Human Rights Committee, Saidov v. Tajikistan, U.N. Doc. CCPR/C/122/D/2680/2015, April 4, 2018, para. 9.5; African Commission on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v. Libya, App. No. 002/2013, June 3, 2016, para. 96; European Court of Human Rights, Salduz v. Turkey, App. No. 36391/02, November 27, 2008, paras. 54-56; European Court of Human Rights, John Murray v. the United Kingdom, App. No. 18731/91, February 8, 1996, paras. 65-66.

and by extension, practice – providing for the systemic denial of counsel is not a compelling reason.⁶⁴

In the present case, although Ms. Chargui was afforded legal counsel, her attorney was not allowed to be present during her interrogation by the Public Prosecutor's Office on May 6, which has reportedly become common practice in recent years and is consistent with Article 26 of the Criminal Procedure Code.⁶⁵ On that day, the accused “entered the court room alone and reported feeling intimidated with a panel of seven officials at the prosecutor's office who interrogated her for half an hour” about the source of the post, her religious beliefs, and whether “she had consulted a psychotherapist, suggesting that she might be mentally disturbed.”⁶⁶ This denial of legal assistance during an interrogation without compelling justification constituted a violation of Ms. Chargui's right to counsel.

C. VIOLATIONS AT TRIAL

Right to the Presumption of Innocence

The prosecution failed to prove Ms. Chargui's guilt and the court's decision to convict her without such evidence effected a reversal of the burden of proof. As such, Ms. Chargui's conviction violated her right to be presumed innocent.

Article 14(2) of the ICCPR guarantees that “everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.” Article 7(1)(2) of the African Charter similarly provides that every individual has “[t]he right to be presumed innocent until proved guilty by a competent court or tribunal.” The right “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”⁶⁷

In this regard, a fair trial and in particular the right to the presumption of innocence “requires that the imposition of a sentence in a criminal offence ... should be based on

⁶⁴ European Court of Human Rights, *Salduz v. Turkey*, App. No. 36391/02, November 27, 2008, paras. 55-56.

⁶⁵ Information from Monitor, September 14 and 17, 2020.

⁶⁶ Amnesty International, “Urgent Action: Blogger Prosecuted for Humorous Post”, May 27, 2020. Available at <https://www.amnesty.org/download/Documents/MDE3024052020ENGLISH.pdf>; Amnesty International, “Tunisia: End prosecution of Emna Chargui, and investigate alarming death and rape threats”, May 27, 2020; Human Rights Watch, “Humor Comes at a Price in Morocco and Tunisia”, May 13, 2020; Monitor's Notes, July 2, 2020.

⁶⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30. See also Human Rights Committee, *Saidova v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.4; African Commission Fair Trial Guidelines, Principle N(6)(e)(i).

strong and credible evidence”⁶⁸ proving every element of a charged crime.⁶⁹ As stated by the UN Human Rights Committee, “[a] criminal court may convict a person only when there is no reasonable doubt of his or her guilt, and it is *for the prosecution* to dispel any such doubt.”⁷⁰ While the Human Rights Committee has noted that “it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals,” it may choose to comment where “it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.”⁷¹

Preliminarily, the prosecution’s failure to present a case against Ms. Chargui effectively shifted the burden of proof to the defense, in violation of the presumption of innocence (and, as discussed below, the principle of judicial impartiality). While the prosecution’s conduct is broadly consistent with the continental tradition of “free evaluation of the evidence,”⁷² it is not consistent with more recent developments in fair trial standards, and thus raises concerns. As noted above, the prosecution’s functional abstention from Ms. Chargui’s hearing reflects a broader systemic problem whereby prosecutors rarely make presentations at trial due to various factors, including case overload.

After receiving the police investigation report and interrogating the defendant (without her lawyer present), the prosecution pursued Ms. Chargui’s trial for “advocating hatred between religions, races and residents by inciting discrimination and the use of hostile means and undermining one of the authorized religious rites in accordance with articles 52 and 53 of Decree No. 115 of 2011.”⁷³ The referral text contained no other facts or legal arguments. At trial, the presiding judge interrogated the defendant and defense lawyers made a number of arguments supporting acquittal, but the prosecution did not contribute any arguments, evidence, or explanations in support of its case. Ms. Chargui was thus left to prove her innocence.

Subsequently, the court convicted Ms. Chargui despite the fact that the evidence in the case file failed to prove key elements of the charged crimes under Articles 52 and 53 of Decree 115 of 2011. To establish guilt under Article 52, the prosecution must prove the accused (a) advocated directly (b) for hatred between races, religions, or populations (c) by inciting discrimination and the use of hostile means or violence or spreading ideas

⁶⁸ African Court on Human and Peoples’ Rights, *Mohamed Abubakari v United Republic of Tanzania*, App. No. 007/2013, June 3, 2016, paras. 173-174. See also Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

⁶⁹ See African Court on Human and Peoples’ Rights, *Alex Thomas v. United Republic of Tanzania*, App. No. 005/2013, November 20, 2015, paras. 130-131.

⁷⁰ Human Rights Committee, *Larranaga v. Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.4 (emphasis added).

⁷¹ See Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

⁷² See the investigating role of the judge at trial in continental systems in Demetra F. Sorvatzioti, D.F. & Allan Manson, *Burden of Proof and L’intime conviction: Is the Continental Criminal Trial Moving to the Common Law?*. CAN. L.REV. 1, 108 (2018).

⁷³ Referral Text (Charge Sheet), May 6, 2020 (unofficial translation).

based on racial discrimination, while guilt under Article 53 requires proof that the accused (a) intended to undermine (b) one of the licensed religious rites. It must also be proved that these offenses were committed through the means mentioned in Article 50 of Decree 115 of 2011: namely speeches, writings, public threats, public posters and announcements, or audiovisual and electronic information media.

First, as the defense commented at trial, the Tunis Court of Cassation in 2018 upheld a decision finding that Article 50 of Decree 115 of 2011 does not cover publications on personal social media accounts;⁷⁴ as such, Ms. Chargui did not use the means required to commit an offense under Article 52 or 53 of that law.

With respect to the elements of Article 52, the content of the “Verse of Corona” poem concerned COVID-19 and had no content that could be construed as advocating for hatred through inciting discrimination, violence, or hostility. As such the elements of Article 52 were not proven.

With respect to Article 53, the post did not prevent anyone from practicing religious rituals. In this regard, the defense provided evidence that the use of Quranic style and rhyming is common in the arts, including in poetry, and thus cannot be said to undermine Islam.⁷⁵ Regarding the element of intent, Ms. Chargui consistently stated throughout the investigation and trial that she posted the poem because she found it humorous and wanted to share it with her friends and family: according to Ms. Chargui, she did not intend to offend or harm anyone’s religious beliefs or spread hatred of any kind.⁷⁶ She deleted the post immediately after sharing it due to the negative reaction she received, an act that the Tunis Court of Cassation has ruled, in relation to another article of Decree 115 of 2011, can negate criminal intent.⁷⁷ Notably, the prosecution did not present evidence of Ms. Chargui’s intent.

Given that the prosecution failed to prove key elements of Article 52 and 53 beyond a reasonable doubt, the court violated the presumption of innocence by finding Ms. Chargui guilty of the charged crimes.

Right to Judicial Impartiality

The court’s conduct in convicting Ms. Chargui breached her right to an impartial tribunal. Article 14(1) of the ICCPR mandates judicial impartiality. In the words of the United Nations Human Rights Committee: “[t]he requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or

⁷⁴ Tunis Court of Cassation, *Attorney General v. N.F.*, Case No. 52620-18, January 3, 2018. See also *Columbia Global Freedom of Expression, Case Analysis of Attorney General v. N.F.* Available at <https://globalfreedomofexpression.columbia.edu/cases/attorney-general-v-n-f/>.

⁷⁵ Monitor’s Notes, July 2, 2020.

⁷⁶ *Id.* See also Ministry of the Interior, Communication Technology Crime Department, Investigation Report: Hearing Session of “Amna Al Sharqi”, May 5, 2020 (unofficial translation).

⁷⁷ Tunis Court of Cassation, *Attorney General v. N.F.*, Case No. 52620-18, January 3, 2018. See also *Columbia Global Freedom of Expression, Case Analysis of Attorney General v. N.F.*

prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.”⁷⁸ In *Ashurov v. Tajikistan*, the Committee found a violation of Article 14(1) where the complainant had explained, among other things, that the judge had “effectively replaced the passive and unprepared prosecutor.”⁷⁹

Article 6(1) of the European Convention, mirroring Article 14(1) of the ICCPR, establishes a defendant’s right to an impartial tribunal. The European Court, like the UN Human Rights Committee, distinguishes between subjective and objective impartiality: courts that are in actuality biased and courts that appear to be biased. According to the Court, objective impartiality is violated when:

there are ascertainable facts which may raise doubts as to [] impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. It follows that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be regarded as objectively justified.⁸⁰

The Court has “recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality and for this reason has in the vast majority of cases rais[ed] impartiality issues focused on the objective test.”⁸¹

In the present case, a reasonable observer would have “legitimate reason to fear” that the presiding judge lacked impartiality under the objective test. As noted above, the prosecution did not make arguments during the trial. The prosecution likewise did not submit any written argumentation. In contrast, the defense put forth extensive oral arguments and also submitted written materials for the judge’s consideration.

Consequently, in convicting Ms. Chargui after interrogating her and hearing defense pleadings, the judge in effect “replaced the prosecutor”: akin to the complainant’s characterization in *Ashurov* that resulted in the UN Human Rights Committee finding a judicial impartiality violation. Ms. Chargui would have – at the least – an “objectively

⁷⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. See also Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

⁷⁹ Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, paras. 2.8, 6.6.

⁸⁰ European Court of Human Rights, *Padovani v. Italy*, App. No. 13396/87, February 26, 1993, para. 27.

⁸¹ European Court of Human Rights, *Kypraniou v. Cyprus*, App. No. 73797/01, December 15, 2015, para. 119.

justified” basis to doubt the court’s impartiality, if not even a basis to find a breach of the subjective impartiality requirement.

D. OTHER FAIRNESS CONCERNS

Principle of Legality

The principle of legality – or *nullum crimen sine lege* – was violated throughout the proceedings against Ms. Chargui. This principle is enshrined in Article 15(1) of the ICCPR, which provides, in relevant part: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” Article 7(2) of the African Charter likewise states, in relevant part: “No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed.” The principle of legality is “an essential element of the rule of law” and “should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment.”⁸²

In the present case, Ms. Chargui was prosecuted and convicted under Articles 52 and 53 of Decree 115 of 2011 – which are incompatible with the legality principle on their face – for conduct that did not constitute a criminal offense under those provisions at the time it was committed (or otherwise).

Articles 52 and 53 of Decree 115 of 2011 violate the legality principle on their face

Articles 52 and 53 of Tunisia’s Decree 115 of 2011, under which Ms. Chargui was prosecuted, are incompatible with the principle of legality. As referenced above, Article 52 provides for the imposition of a prison sentence of one to three years and/or a fine on “anyone who advocates directly, by means of any of the means set forth in Article 50 of this decree, for hatred between races, religions, or populations by inciting discrimination and the use of hostile means or violence or spreading ideas based on racial discrimination.” Article 53 provides for the levying of a fine on “[a]nyone who intends, by the means mentioned in Article 50 of this decree, to ... undermine one of the licensed religious rites.”

As the European Court of Human Rights has explained, the principle of legality not only prohibits the retroactive “application of the criminal law to an accused’s disadvantage,” it also “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty,” which it must do clearly and precisely.⁸³ The law must further be accessible and foreseeable to enable individuals to regulate their conduct accordingly,

⁸² European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, May 17, 2010, para. 185. See also European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para. 52.

⁸³ *Id.*

and must “not confer unfettered discretion ... on those charged with its execution.”⁸⁴ The rules of criminal liability may be clarified through judicial interpretation, but only to the extent “that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”⁸⁵ It follows that “[t]his requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts’ interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.”⁸⁶

The Inter-American Court of Human Rights has further elaborated on the purpose and meaning of the legality principle:

The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense ... This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws ... that fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the American Convention.⁸⁷

The language of Articles 52 and 53 of Decree 115 of 2011 is imprecise and ambiguous, failing to define the conduct criminalized. It is difficult to foresee, for example, what types of acts and omissions might incur liability under Article 53’s prohibition on speech that intentionally undermines religious rites. For instance, what factors determine whether speech “undermines” religious rites? Is an offense committed simply where speech is used with the intent to undermine religious rites or must religious rites in fact be undermined by the speech? Authorities possess unfettered discretion to make these determinations.

⁸⁴ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25. Although the Committee in this Comment is discussing the principle of legality in the context of restrictions on the right to freedom of expression, these requirements are fundamental to the legality principle in any context.

⁸⁵ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, May 17, 2010, para. 185. See also European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para. 52.

⁸⁶ *Id.*

⁸⁷ Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Series C, No. 52, May 30, 1999, para. 121.

Article 52 punishes speech that “advocates directly ... for hatred between races, religions, or populations by inciting discrimination and the use of hostile means or violence or spreading ideas based on racial discrimination.” As the UN Special Rapporteur on the promotion and protection of freedom of expression or opinion (Special Rapporteur on Freedom of Expression) has commented, such language is too ambiguous for the purposes of legality: precise definitions of key terms, such as hatred, advocacy, and incitement, are necessary so that individuals can regulate their behavior accordingly.⁸⁸

These provisions thus fail to satisfy the legality principle.

Ms. Chargui was prosecuted and convicted for conduct that did not constitute a criminal offense at the time it was committed (or otherwise), in violation of the principle of legality

Articles 52 and 53 were arbitrarily applied in the present case to prosecute and convict Ms. Chargui for conduct that did not constitute a criminal offense under these provisions at the time (or otherwise), in violation of the principle of legality.⁸⁹ Compliance with the legality principle in practice requires that laws defining criminal offenses and punishments be interpreted and applied strictly and narrowly. This is because the principle “is meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission.”⁹⁰ International human rights and criminal courts have therefore emphasized “that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy,”⁹¹ and that “[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favour of the person being investigated, prosecuted or convicted.”⁹² Thus, under the principle of *nullum crimen sine lege*, “the ‘paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object.’”⁹³

⁸⁸ See 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, paras. 12-13, 31.

⁸⁹ The fair trial guarantees of Article 14 of the ICCPR are also violated where the evaluation of the facts and evidence or the application of domestic legislation by the national courts “was clearly arbitrary or amounted to a manifest error or denial of justice”. See Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 26; Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7. See also African Court on Human and Peoples’ Rights, *Mohamed Abubakari v. United Republic of Tanzania*, App. No. 007/2013, June 3, 2016, paras. 173-174.

⁹⁰ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Galić*, IT-98-29-T, “Judgement and Opinion”, December 5, 2003, para. 93. See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, “Decision on Joint Challenge to Jurisdiction”, November 12, 2002, para. 62; European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, May 17, 2010, paras. 238-239.

⁹¹ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, May 17, 2010, para. 185. See also European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para. 52.

⁹² Rome Statute of the International Criminal Court, 1998, Article 22(2).

⁹³ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Galić*, IT-98-29-T, “Judgement and Opinion”, December 5, 2003, para. 93.

As discussed above, Ms. Chargui's conduct in posting the poem did not fall within the scope of Articles 52 and 53 when interpreted narrowly and rationally. Namely, it was unforeseeable that posting a poem about a public health crisis could qualify as advocating for religious hatred through incitement of hostility or violence under Article 52, or as "undermining ... religious rites" under Article 53, especially in light of the prevalence of Quranic-style poetry. The authorities thus broadly applied the law in this case to prosecute and convict Ms. Chargui for conduct she could not have known was criminal at the time it was committed.

Prosecutorial Misconduct

The actions of the prosecution in the case against Ms. Chargui breach best practices on prosecutorial ethics.

International standards in this regard are clear: prosecutors should terminate proceedings when there is no evidence to support the charges. The United Nations Guidelines on the Role of Prosecutors and the African Commission Fair Trial Guidelines, for example, establish that prosecutors should "perform their duties fairly, consistently and expeditiously."⁹⁴ In particular, the Guidelines stipulate that "prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charges to be unfounded."⁹⁵ Parallel guidelines issued by the International Association of Prosecutors and the Council of Europe similarly state that prosecutors should "proceed only when a case is well-founded upon evidence reasonably believed to be reliable" and should decline to prosecute a case "beyond what is indicated by the evidence."⁹⁶

In bringing charges against and trying Ms. Chargui, the prosecution's conduct fell short of the standards established by international guidelines. As discussed above, the prosecution presented no evidence that the defendant advocated hatred or intentionally undermined religious rites and thus should have discontinued proceedings at an earlier juncture.

Right to Freedom of Expression

⁹⁴ United Nations Office of the High Commissioner for Human Rights, United Nations Guidelines on the Role of Prosecutors, 1990, para. 12. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>; African Commission Fair Trial Guidelines, Principle F(h).

⁹⁵ United Nations Office of the High Commissioner for Human Rights, United Nations Guidelines on the Role of Prosecutors, 1990, para. 14; African Commission Fair Trial Guidelines, Principle F(j).

⁹⁶ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999, Principles 3.6, 4.2. Available at [https://www.iap-association.org/getattachment/Resources-Documents/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Documents/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx). See also Council of Europe, European Guidelines on Ethics and Conduct for Public Prosecutors, 2005, Section III. Available at <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5>.

The proceedings against Ms. Chargui violated her right to freedom of expression. First, Articles 52 and 53 of Decree 115 of 2011, under which Ms. Chargui was prosecuted, violate the right to freedom of expression on their face. Second, the application of Articles 52 and 53 to Ms. Chargui's Facebook post violated the accused's right to freedom of expression, especially in light of the nature of her post and the excessive penalty imposed.

The right to freedom of opinion and expression is a fundamental right guaranteed by Article 19 of the ICCPR and Article 9 of the African Charter. The UN and African human rights systems require that restrictions on the right to freedom of expression 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.⁹⁷ Articles 31 and 49 of Tunisia's 2014 Constitution mirror these international standards.

Objectives deemed legitimate for restriction of the right to freedom of expression under the ICCPR and the African Charter include the protection of public health or morals, national security, public order, and the rights and reputation of individuals.⁹⁸ According to the UN Human Rights Committee and as discussed in detail above, in order to comply with the principle of legality, legislation restricting freedom of expression must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."⁹⁹

With respect to the element of necessity and proportionality, the African Court has elaborated that "the need for a restriction on freedom of expression ... must be assessed within the context of a democratic society" and "this assessment must ascertain whether that restriction is a proportionate measure to achieve the set objective."¹⁰⁰ As further stated by the 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."¹⁰¹ The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the "least intrusive instrument amongst those which

⁹⁷ 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 on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019, Principle 9 [hereinafter "African Commission Principles on Freedom of Expression"]; 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.

⁹⁸ *Id.*

⁹⁹ 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 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).

¹⁰⁰ African Court on Human and Peoples' Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, paras. 143, 145.

¹⁰¹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

might achieve their protective function.”¹⁰² In this vein, laws cannot be overbroad¹⁰³ and any prescribed punishment should not be excessive.¹⁰⁴

Article 52 of Tunisia’s Decree 115 of 2011 violates the right to freedom of expression guaranteed by international law

Freedom of expression may be restricted for the aforementioned enumerated objectives. Article 20(2) of the ICCPR specifically states that freedom of expression may be restricted to prohibit “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁰⁵ Any such limitation, however, “must remain an exception. ... Indeed the three-part test (legality, proportionality and necessity) for restrictions also applies to cases involving incitement to hatred, in that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest.”¹⁰⁶

In particular, the Rabat Plan of Action – adopted by experts convened by the Office of the United Nations High Commissioner for Human Rights for workshops on the prohibition of incitement to national, racial or religious hatred – emphasizes that “States should ensure that their domestic legal framework on incitement to hatred is guided by express reference to article 20, paragraph 2, of the Covenant ... and should consider including robust definitions of key terms such as hatred, discrimination, violence, hostility, among others.”¹⁰⁷

The Plan advises that:

national legal systems should make it clear, either explicitly or through authoritative interpretation, that the terms “hatred” and “hostility” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term “advocacy” is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term “incitement”

¹⁰² Id. at para. 34.

¹⁰³ Id.

¹⁰⁴ African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, December 5, 2014, para. 149.

¹⁰⁵ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 48; Human Rights, General Comment No. 11, U.N. Doc. CCPR/C/GC/11, 1983, para. 2; 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, paras. 26-31; 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. 8; African Commission Principles on Freedom of Expression, Principle 23(1).

¹⁰⁶ U.N. Human Rights Council, U.N. High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: “Rabat Plan of Action”), U.N. Doc. A/HRC/22/17/Add.4, January 11, 2013, para. 18. See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 48, 50.

¹⁰⁷ U.N. Human Rights Council, U.N. High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: “Rabat Plan of Action”), U.N. Doc. A/HRC/22/17/Add.4, January 11, 2013, para. 21. See also 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. 31.

refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.¹⁰⁸

Furthermore, as the Special Rapporteur on Freedom of Expression has clarified, while States may prohibit advocacy constituting incitement pursuant to Article 20(2) of the ICCPR, such expression need not be criminalized.¹⁰⁹ In fact, criminal penalties should only be imposed in the most severe cases of incitement.¹¹⁰ According to the Rabat Plan of Action and the African Commission, for speech allegedly constituting incitement to be severe enough to amount to a criminal offense and be subject to criminal penalties, it must meet a six-part threshold test that establishes: (a) the social and political context at the time the speech was made and disseminated, (b) the speaker's position or status within society and vis-à-vis the audience to whom the speech was directed, (c) the speaker's intent to incite hatred, (d) the content and form of the speech, (e) the extent of the speech act, and (f) the reasonable probability that the speech would cause imminent harm against the target group.¹¹¹

As discussed above, Article 52 of Decree 115 of 2011 – which punishes “anyone who advocates directly ... for hatred between races, religions, or populations by inciting discrimination and the use of hostile means or violence or spreading ideas based on racial discrimination” – falls afoul of the legality requirement. Although its language is similar to that of Article 20(2) of the ICCPR, its failure to define vague terms such as “hatred”, “hostile means”, and “incitement” renders the provision overbroad, as does its inclusion of conduct not necessarily constituting incitement.

Moreover, in contravention of the standards discussed above, Article 52 lacks an intent requirement and is overly intrusive, imposing a prison sentence of up to three years without regard to the severity of the case.

Article 53 of Tunisia's Decree 115 of 2011 violates the right to freedom of expression guaranteed by international law

The UN Human Rights Committee has made clear that outside the narrow exception restricting advocacy of hatred constituting incitement, “[p]rohibitions of displays of lack of

¹⁰⁸ Id. at para. 21, fn. 5. Although it is for Tunisia to define terms in its own legislation, any definition must be consistent with the standards of international human rights law.

¹⁰⁹ Id. at para. 8.

¹¹⁰ Id. at para. 18; U.N. Human Rights Council, U.N. High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: “Rabat Plan of Action”), U.N. Doc. A/HRC/22/17/Add.4, January 11, 2013, para. 34; African Commission Principles on Freedom of Expression, Principle 23(2).

¹¹¹ U.N. Human Rights Council, U.N. High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: “Rabat Plan of Action”), U.N. Doc. A/HRC/22/17/Add.4, January 11, 2013, para. 29; African Commission Principles on Freedom of Expression, Principle 23.

respect for a religion or other belief systems” are not compatible with the right to freedom of expression.¹¹²

The Special Rapporteur on Freedom of Expression has reached similar conclusions, stating: “anti-blasphemy laws fail to meet the legitimacy condition of article 19 (3) of the Covenant, given that article 19 protects individuals and their right to freedom of expression and opinion; neither article 19 (3) nor article 18 of the Covenant protect ideas or beliefs from ridicule, abuse, criticism or other ‘attacks’ seen as offensive.”¹¹³ The Rapporteur has further noted that with respect to speech on religion, only incitement to hostility, discrimination, or violence should merit criminal penalties in light of the “significant chilling effect” that occurs.¹¹⁴

Likewise, the Special Rapporteur on Freedom of Religion or Belief has emphasized that restrictions on speech concerning religion must meet a high threshold, regardless of “subjective feelings of offensiveness.”¹¹⁵ According to the Special Rapporteur, “the employment of criminal sanctions against expressions which do not advocate for violence or discrimination but which are deemed ‘blasphemous’” is “incompatible” with the right to freedom of expression.¹¹⁶

Article 53 of Tunisia’s Decree 115 of 2011 broadly punishes speech “intend[ed] to undermine one of the licensed religious rites,” which encompasses expression beyond the narrow exception for restrictions on advocacy constituting incitement. Article 53 thus restricts expression for illegitimate purposes. It is moreover incompatible with the legality principle due to its imprecision and conferral of “unfettered discretion” on the authorities. Finally, with respect to necessity and proportionality principles, it fails to pursue the “least intrusive” route, imposing criminal penalties on those who violate the provision. As such, Article 53 is inconsistent with the right to freedom of expression.

Articles 52 and 53 were applied to Ms. Chargui in a manner that violated her right to freedom of expression

The application of Articles 52 and 53 to Ms. Chargui’s Facebook post violated her right to freedom of expression, especially considering that her post constituted artistic

¹¹² Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 48. The Special Rapporteur on Freedom of Expression has commented that “the blasphemy would be beside the point; only the advocacy constituting incitement would be relevant.” 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. 21, fn. 26.

¹¹³ 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. 21.

¹¹⁴ 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.

¹¹⁵ U.N. Human Rights Council, Report of the Special Rapporteur on Freedom of Religion or Belief, U.N. Doc A/HRC/31/18, December 23, 2015, para 61.

¹¹⁶ *Id.*

expression, that her post concerned public affairs, and that the court imposed a harsh penalty.

The UN Human Rights Committee places a high value on “uninhibited expression” and has emphasized the importance of safeguarding artistic expression and commentary on public affairs.¹¹⁷ The European Court of Human Rights has also concluded that artistic expression should be afforded heightened protection – even in instances where the speech therein could otherwise be restricted.¹¹⁸ As noted above, restrictions on protected speech must (i) be prescribed by law (the legality principle), (ii) serve a legitimate objective and (iii) be necessary to achieve and proportionate to that objective.¹¹⁹

To this end, in order to justify a restriction of the right to freedom of expression a State must not only show that the “particular restriction is imposed by law,” but must also provide evidence that the law in question is applicable in the particular case.¹²⁰ The State must further “demonstrate in specific and individualized fashion the precise nature of the threat [allegedly posed by the author’s exercise of freedom of expression]”¹²¹ and establish “a close causal link between the risk of harm and the expression.”¹²²

In the present case, Ms. Chargui’s speech – re-posting a satirical poem about the COVID-19 pandemic – was a form of artistic expression concerning a public issue and should therefore have received heightened protection. Her prosecution, however, failed to comply with any of the requirements necessary for restricting protected speech.

As discussed above, Articles 52 and 53 are too vague to comply with the legality requirement and, in any event, Ms. Chargui’s conduct fell outside their scope.

With respect to legitimacy, according to police documents the investigation into Ms. Chargui’s case was opened because her “post was denounced and criticized by Facebook Users because it was considered an explicit defamation of Islamic religious rituals and our National Security,” and because it allegedly related to inciting religious

¹¹⁷ Human Rights Committee, General Comment 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 11-13, 38. See also U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression, U.N. Doc. A/HRC/44/49/Add.2, July 24, 2020.

¹¹⁸ See European Court of Human Rights, *Karatas v. Turkey*, App. No. 23168/94, July 8, 1999, para. 52; European Court of Human Rights, *Alinak v. Turkey*, App. No. 40287/98, March 29, 2005, paras. 41-45.

¹¹⁹ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

¹²⁰ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 27; Human Rights Committee, *Jaona v. Madagascar*, U.N. Doc. CCPR/C/24/D/132/1982, April 1, 1985, para. 13.

¹²¹ Human Rights Committee, *Shin v. Republic of Korea*, U.N. Doc. CCPR/C/80/D/926/2000, March 19, 2004, para. 7.3. See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35; Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/64/D/574/1994, January 4, 1999, para. 12.5; Human Rights Committee, *Coleman v. Australia*, U.N. Doc. CCPR/C/87/D/1157/2003, August 10, 2006, para. 7.3.

¹²² African Commission Principles on Freedom of Expression, Principle 22(5). See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

hate, discrimination, and hostile acts.¹²³ Preliminarily, basing prosecutions on the reactions of Facebook users sets a dangerous precedent. And although the State may have a legitimate interest in protecting national security/public order and preventing advocacy and/or incitement of hatred, violence, and discrimination, the State's failure to provide any details as to how Ms. Chargui's conduct constituted such advocacy or incitement or otherwise endangered national security, coupled with the case file's many references to "slandering" or "defaming" Islam – as well as the recent pattern, mentioned above, of Tunisia employing anti-incitement provisions like Article 52 to restrict purportedly blasphemous speech – suggests that the government prosecuted Ms. Chargui for the illegitimate purpose of punishing speech perceived as offensive.

Notably, the State neglected to demonstrate in "specific and individualized fashion the precise nature of the threat" posed by Ms. Chargui's speech or "a close causal link between the risk of harm and the expression." At no point in the proceedings did the State discuss what the particular threat was and how the reposting of a poem might lead to harm.

Finally, the use of criminal prosecution and penalties in Ms. Chargui's case – particularly the imposition of a six-month prison sentence – was disproportionate and unnecessary. As discussed above, criminal penalties are "last resort measures to be applied only" to the gravest offenses: namely, severe cases of advocacy constituting incitement to violence, hostility, or discrimination that meet the Rabat Plan's six-part threshold test: (a) the social and political context at the time the speech was made and disseminated, (b) the speaker's position or status within society and vis-à-vis the audience to whom the speech was directed, (c) the speaker's intent to incite hatred, (d) the content and form of the speech, (e) the extent of the speech act, and (f) the reasonable probability that the speech would cause imminent harm against the target group.¹²⁴ Ms. Chargui's speech fell far short of this level of severity. The speech consisted of a poem about the COVID-19 pandemic, posted in the context of that pandemic. Its content discussed washing hands, staying home, and following science over tradition. Although the poem was written in Quranic style, this is common in Arabic poetry and not necessarily provocative in itself. Moreover, Ms. Chargui was not even the author of the poem but merely reposted it to her personal Facebook page to share with friends and family. She immediately deleted it after receiving negative and threatening responses, including rape and death threats.

These circumstances, as well as Ms. Chargui's repeated testimony, show that she had no intent to promote religious or other hatred or to incite violence, hostility, or discrimination against Muslims or any other group by circulating the poem. Correspondingly, such a result was completely unforeseeable (and did not in fact occur).

¹²³ Ministry of the Interior, Sub-Department for Social Protection, Request to Open an Investigation, May 4, 2020 (unofficial translation).

¹²⁴ U.N. Human Rights Council, U.N. High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: "Rabat Plan of Action"), U.N. Doc. A/HRC/22/17/Add.4, January 11, 2013, para. 29; African Commission Principles on Freedom of Expression, Principle 23.

Given the lack of proof of either intent or a risk that the poem would incite violence, hostility, or discrimination against a target group, prosecuting and imposing a custodial sentence on Ms. Chargui for her post was unnecessary and inappropriate.

Failure to Address Threats

Finally, Tunisia's failure to investigate or otherwise address the threats of violence Ms. Chargui has received in response to her post undermines her ability to enjoy the rights afforded to her under the ICCPR and African Charter – in particular, the right to life under Article 6 of the ICCPR and Article 4 of the Charter, the right to security of person under Article 9 of the ICCPR and Article 6 of the Charter, and the right to freedom of expression under Article 19 of the ICCPR and Article 9 of the Charter. Pursuant to Article 2(1) of the ICCPR, Tunisia is obligated “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ... Covenant, without distinction of any kind.” As the UN Human Rights Committee has explained:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹²⁵

Article 1 of the African Charter, under which States must “recognize the rights, duties and freedoms enshrined in this Chapter and ... undertake to adopt legislative or other measures to give effect to them,” imposes a similar obligation.

This obligation, when read in conjunction with the right to life and right to liberty and security of person, requires states “to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors,” including “measures to prevent future injury.”¹²⁶ States are moreover required to “take special measures of protection towards persons in vulnerable situations

¹²⁵ Human Rights Committee, General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, May 26, 2004, para. 8.

¹²⁶ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 9. See also Human Rights Committee, General Comment No. 36, U.N. Doc. CCPR/C/GC/36, September 3, 2019, paras. 18, 20-21.

whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence,” such as human rights defenders, journalists, and members of ethnic and religious minorities.¹²⁷ “States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection [or] the issuance of protection and restraining orders against potential aggressors.”¹²⁸

The right to freedom of expression is also undermined where a person receives threats as a result of exercising that right. States should accordingly “put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression.”¹²⁹

As discussed above, Ms. Chargui received rape and death threats after posting the “Verse of Corona.” There has yet to be an investigation into these threats. Indeed, the only legal action taken thus far is the prosecution of Ms. Chargui. In failing to take appropriate measures to investigate and address the threats against Ms. Chargui, Tunisia has violated – and continues to violate – Article 2(1) of the ICCPR and Article 1 of the African Charter.

¹²⁷ Human Rights Committee, General Comment No. 36, U.N. Doc. CCPR/C/GC/36, September 3, 2019, para. 23.

¹²⁸ *Id.*

¹²⁹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 23.

CONCLUSION AND GRADE



The proceedings against Ms. Chargui violated her right to freedom of expression. Her trial and conviction set a dangerous precedent, opening the door for the Tunisian authorities to prosecute individuals merely for re-posting information, to limit discussion of topics some deem “blasphemous,” and to leverage the reactions of social media users to initiate a criminal case.

Further, the proceedings were marred from start to finish by an egregious disregard for the fundamental principle of legality. It was unforeseeable to Ms. Chargui that her reposting of a poem about COVID-19 would qualify as criminal conduct under the laws used to prosecute her. Indeed, this case is just one instance in a broader pattern of the Tunisian authorities arbitrarily applying vague criminal laws to conduct that in any event falls outside of their scope, undermining the rule of law. In contrast, Tunisian authorities took no actions against individuals threatening physical violence against Ms. Chargui.

Going forward, Tunisia should prioritize establishing a Constitutional Court that meets international and regional standards. Such a court would be able to pronounce on the incompatibility of specific laws with the 2014 Constitution and international and regional human rights law and prompt the necessary legislative reforms.

Simultaneously, Tunisia should repeal Articles 52 and 53 of Decree 115 of 2011 or initiate a reform effort to bring them into line with Tunisia’s international obligations.¹³⁰ To assist in a reform process, Tunisia should invite the UN Special Rapporteur on Freedom of Expression and/or the UN Special Rapporteur on Freedom of Religion or Belief for a country visit and fully implement their recommendations. Until such reforms are completed, Tunisia should issue guidelines to police and prosecutors so as to ensure that only grave speech offenses leading to imminent violence are prosecuted under Articles 52 and 53.

Lastly, with respect to the systemic issues evidenced by Ms. Chargui’s lack of access to counsel during her interrogation by the prosecutor and the prosecutor’s failure to present a case at trial, in violation of the right to counsel and right to presumption of innocence, Tunisia must ensure that all criminal proceedings comply with international and regional fair trial standards.

GRADE

D

¹³⁰ Tunisia has reported that a review of Decree 115 of 2011 was initiated in 2016, but the status and results of that review are unclear. See Human Rights Committee, “Sixth periodic report submitted by Tunisia under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2019”, U.N. Doc. CCPR/C/TUN/6, June 28, 2019, para. 269.



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹³¹ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹³¹ ICCPR, Article 26.