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10 May 2022

Your Excellency,

### **Tunisia: Arrest, Detention and Prosecution of Lawyer Abderrazak Kilani**

The Law Society of England and Wales (the “Law Society”),<sup>1</sup> Lawyers for Lawyers,<sup>2</sup> the International Bar Association’s Human Rights Institute (“IBAHRI”),<sup>3</sup> and Lawyers’ Rights Watch Canada (“LRWC”)<sup>4</sup> are gravely concerned about the arrest, detention and prosecution before a military tribunal of Mr. Kilani, a lawyer and former President of The Law Society of Tunisia from 2010 until 2012, as well as a former ambassador of Tunisia to the UN in Geneva.

On 2 January 2022, Mr. Kilani was contacted by the spouse of Mr. Nouredine Bhiri, asking for legal representation by Mr. Kilani for her husband. Mr. Bhiri is a lawyer, former Minister of Justice, and opposition politician. She told Mr. Kilani that her husband had been abducted by plainclothes police officers in front of their house on 31 December 2021. He had been held at an undisclosed location for two days and was subsequently admitted to Habib Bougatfa hospital in Bizerte with a deteriorated health condition [. We were informed that, only at that

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<sup>1</sup> The Law Society of England and Wales (the “Law Society”)<sup>1</sup> is the professional body representing more than 180,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world. The Law Society holds special consultative status with the Economic and Social Council of the United Nations since 2014.

<sup>2</sup> Lawyers for Lawyers is an independent and non-political foundation that seeks to promote the proper functioning of the rule of law by pursuing freedom and independence of the legal profession. Lawyers for Lawyers has Special Consultative status with the Economic and Social Council of the United Nations since 2013.

<sup>3</sup> The International Bar Association (“IBA”), established in 1947, is the world’s leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of 80,000 individual lawyers and more than 190 Bar Associations and Law Societies, spanning all continents. The IBA’s Human Rights Institute (IBAHRI), an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

<sup>4</sup> Lawyers’ Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law internationally. LRWC advocates for the independence and integrity of the legal profession, and for the protection of lawyers and other human rights defenders in danger because of their advocacy. LRWC has held Special Consultative status with the Economic and Social Council of the United Nations since 2005.

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stage, was he issued with an order for “house arrest”, without having been charged with any offence.

Mr. Bhiri’s spouse asked Mr. Kilani to accompany her to the hospital. Mr. Kilani asked police officers guarding Mr. Bhiri to meet with his client. That request was conveyed by the police to the Minister of the Interior, who denied it. Only Mr. Bhiri’s wife and the President of the Bar Council were permitted to meet with Mr. Bhiri. Mr. Kilani then told the security officers at the hospital that the Tunisian Constitution establishes that security forces should be neutral and serve the republic rather than any particular interest.

On 3 January 2022, the Minister of the Interior held a press conference where he said that “a respectable person had [incited the police and the public]” referring to a recording of Mr. Kilani’s encounter with the police at the hospital that was shared on social media. Mr. Kilani was subsequently investigated on charges of incitement to disobedience, as well as “belonging to a group likely to disturb public order”, “insulting public officials”, and “inciting [police officials] by violence, assault, threats, or fraudulent practices to cease performing their individual or collective duties”..

On 2 March 2022, a hearing took place before the military tribunal of Tunis during which Mr. Kilani’s pre-trial detention was ordered. He was sent to Mornaguia prison in Tunis where he remained in detention for approximately three weeks. On 21 March 2022, the investigating judge of the military tribunal of Tunis issued an order for his release and established the date of the next hearing before the military tribunal, which will take place on 12 May 2022. During this hearing, the merits of the charges against Mr. Kilani will be addressed.

We believe that Mr. Kilani’s arrest, detention, and prosecution are politically motivated and related to Mr. Kilani’s alleged involvement with the movement “Citizens against the Coup” and the fact that his client is, in addition to being a lawyer, an opposition politician.

In light of the above, and ahead of the hearing in Mr. Kilani’s case on 12 May 2022, we draw your attention to the following international legal obligations and international standards binding upon, or applicable to, Tunisia.

We especially note that there are strict limitations on the exercise of military jurisdiction over civilians (see **Annex A**). The UN Human Rights Committee has held that such exercise of jurisdiction should be exceptional, the burden of any justification is on the State, and any lack of adequate justification entails a violation of article 14 of the International Covenant on Civil and Political Rights. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa excludes the exercise of military jurisdiction over civilians in all circumstances. The African Commission on Human and Peoples’ Rights has held that such exercise of jurisdiction is in breach of article 7 of the African Charter of Human and Peoples’ rights.



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**On the right to liberty and security of the person, the right to a fair trial before a civilian court, the right to freedom of expression, and the independence of the legal profession:**

**African Charter on Human and Peoples' Rights** ratified by Tunisia in 1983

6. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested and detained.

7.1 Every individual shall have the right to have his cause heard. This comprises: a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) The right to be presumed innocent until proved guilty by a competent court or tribunal; c) The right to defence, including the right to be defended by counsel of his choice; d) The right to be tried within a reasonable time by an impartial court or tribunal.

9.2 Every individual shall have the right to express and disseminate his opinions within the law.

**International Covenant on Civil and Political Rights** ratified by Tunisia on 18 March 1969

9.1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

14.1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...]

19.2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The **UN Basic Principles on the Role of Lawyers** state:

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.



18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

We urge the relevant authorities in Tunisia to:

1. Vacate the charges against Mr Kilani and discontinue any proceedings against him;
2. Ensure compliance with Tunisia's international legal obligations, specifically the right to a fair trial (and lack of military jurisdiction over civilians), as well as the right to freedom of expression; and
3. Ensure that all lawyers in Tunisia can practice their profession without undue interference in compliance with international standards on the independence of the legal profession.

We will continue to monitor the situation of Mr Kilani, as well as that of other lawyers in Tunisia.

**The Law Society of England and Wales**

**Lawyers for Lawyers**

**The International Bar Association's Human rights Institute**

**Lawyers' Rights Watch Canada**

**ANNEX A: Lack of Military Jurisdiction over Civilians**



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CC.

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## **ANNEX A - Lack of military jurisdiction over civilians:**

### **United Nations Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 22**

The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.

### **United Nations Human Rights Committee Ebenezer Derek Mbongo Akwanga v. Cameroon, CCPR/C/101/D/1813/2008, 19 May 2011, para. 7.5**

Nor does the mere invocation of conduct of the military trial in accordance with domestic legal provisions constitute an argument under the Covenant in support of recourse to such courts. The State party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. The Committee concludes that the trial and sentencing of the author by a military court discloses a violation of article 14 of the Covenant.

## **The United Nations Basic Principles on the Independence of the Judiciary**

Principle 5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

## **The Draft Basic Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles)**

### **Principle 5 - Jurisdiction of military courts to try civilians**

Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.

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**United Nations Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity (31 December 2003), E/CN.4/2004/60, para. 60.**

Using military or emergency courts to try civilians in the name of national security, a state of emergency or counterterrorism poses a serious problem. This regrettably common practice runs counter to all international and regional standards and established case law. The Human Rights Committee has time and again asserted that military courts may only hear cases involving military personnel charged with crimes or offences relating to military matters. The Inter-American Court of Human Rights has established a wealth of case law in this regard and has also considered that bringing civilians before military courts is a violation of due process and the principle of the “lawful judge”. The European Court of Human Rights has also asserted this principle: although military courts are not competent to try civilians in the European system, it has had to pronounce on the action of national security courts composed of civilian and military judges. The African Commission on Human and Peoples’ Rights has held that the trial of civilians by military courts is contrary to articles 6 and 7 of the African Charter and the Basic Principles on the Independence of the Judiciary.

**Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.**

Principle A.2.1.(e): Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.

Principle G. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS:

- a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.
- b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.
- c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

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**African Commission on Human and Peoples' Rights, 222/98-229/99, Law Office of Ghazi Suleiman / Sudan**

62: In its Resolution on Nigeria (adopted at the 17th session), the African Commission stated that among the serious and massive acts of violation committed in the country, there was "the restriction of the independence of the court and the establishment of military courts which had no independence nor rules of procedure to try individuals suspected of being opponents of the military regime".

64: This composition of the military court alone is evidence of impartiality [sic]. Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial. Likewise, depriving the court of qualified staff to ensure its impartiality is detrimental to the right to have one's cause heard by competent organs.

65: In this regard, it is important to recall the general stand of the African Commission on the question of civilians being tried by military courts. In its Resolution on the Right to a Fair Trial and Legal Aid in Africa, during the adoption of the Dakar Declaration and Recommendations, the African Commission noted that: In many African countries, military courts or specialised criminal courts exist side by side with ordinary courts to hear and determine offences of a purely military nature committed by military staff. In carrying out this responsibility, military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts.

**African Commission on Human and Peoples' Rights, 281/03, Marcel Wetsh'okonda Koso and others / Democratic Republic of Congo**

84: [...] the Commission already stated several times its Resolution No ACHPR/Res.41(XXVI)99 on the right to a fair trial. In the Forum of Conscience v. Sierra Leone case, for instance, the Commission quoted the preceding Resolution as follows: "In many African countries, Military Tribunals and Special Courts co-exist with ordinary legal institutions. The objective of the military tribunals is to adjudicate on offences of a purely military nature perpetrated by military personnel. In the dispatch of these duties, the military tribunals should abide by the norms governing a fair trial".

85. Consequently, in this particular case, the fact that civilians and soldiers accused of civilian offences are tried by a Military Court presided over by military officers for the theft of drums of gas oil is a flagrant violation of the above-mentioned requirements of good justice.

86. Furthermore, in its ruling on the Media Rights Agenda v Nigeria case, the Commission decided as follows: "the appearance, sentencing and conviction of Malaolu, a civilian, by a special military court, presided over by military officers in active duty is nothing short of a violation of the fundamental tenets of free trial as stipulated under Article 7 of the Charter."





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87. Consequently, in the present case, the trial of both civilian and militaries [sic] by a military tribunal presided over by a military officer on matters of a civilian nature constitutes an infringement of the requirements of fair justice as mentioned earlier.

89. The Commission therefore finds that the verdict of the Military Court which consisted solely of Army Officers with no qualities of a Magistrate, did not offer the guarantees of independence, impartiality and equity and constitutes a violation of its Resolution No ACHPR/Res.41(XXVI)99 on the Right to a Fair Trial and Legal Aid in Africa.

94. Consequently, declares, the Democratic Republic of Congo has violated the relevant provisions of the African Charter on Human and Peoples' Rights, namely Articles 7.a, 7.b, 7.d and 26.

95. Finds that the establishment of a Military Court, albeit legally, whose competence extends to hearing civil acts perpetrated by civilians is a flagrant ignorance of the Article 7 of the African Charter on Human and Peoples' Rights.