Killing in the Name of Islam? Assessing the Tunisian Approach to Criminalising the Practice of *Takfīr* and Incitement to Religious Hatred against International and Regional Human Rights Instruments

Abstract

The rise of different strands of political Islam in Africa, Asia, and the Middle East since the 1970s and the lack of a robust political alternative during the Arab Spring have paved the way for the widespread issuance of 'accusations of unbelief' (*takfīri* 'fatwas'), i.e. pronouncements of unbelief against individuals, groups of people or even institutions by Islamist movements. These fatwas fit into the broader context of radical Islamist ideologies spread by systematic hate propaganda and together form a deadly combination amounting to instigation to murder. A need to address this particular form of incitement, together with the spread of terrorist ideology in general, has arisen in states with large Muslim populations in order to protect the essential human rights impacted by such speech and to fulfil the obligations imposed by UN Security Council Resolutions.

Tunisia has chosen a head-on approach to addressing this problem by criminalising accusations of *takfīr* and incitement to religious hatred and loathing as terrorist offences. Such an approach can be seen as an encroachment upon the right to freedom of expression, yet it has to be balanced against states' positive obligations in protecting essential competing human rights. Drawing on the jurisprudence of the Human Rights Committee of the ICCPR and the African Commission of the ACHPR as well as literature in the field of human rights, this paper demonstrates the interrelation between the right to life, freedom from fear, security of the person and the right to dignity and their violation through unfettered *takfīrism*.

1. Introduction

Mainstream Sunni Islam considers it wrong for Muslims to engage in the practice of *takfīr* (excommunication), a right they consider to be held solely by God.[1] An explicit condemnation of such practice can be found in the second sacred source of Islam, the Sunna (the teachings,

[1] For the prohibition of declaring *takfir* in the Quran see M Badar *et al*., 'The Radical Application of the Islamic Concept of Takfir', (2017) 31 *Arab Law Quarterly* 134-162, 136-139; Ismail ibn Kathir, *Tafsir ibn Kathir* (Vol. 3, 2nd edn, Dar-us-Salam Publications, 2003) 436. According to Ibn Kathir, verse 6:108 of the Quran means that Allah has forbidden Prophet Muhammad and his followers from insulting other religions, as such insults could lead to their followers retaliating in kind.

sayings, actions, and omissions of the Prophet Muhammad). Three *hadiths* (corpus of reports that document the actions and saying attributed to Muhammad) demonstrate that he considered such declaration to be a sin. In one of the *hadith*, the Prophet warned Muslims 'not to declare a person a disbeliever for committing a sin, and not to expel him from Islam by an action.'[2] In another *hadith* it is narrated that he said: If a man says to his brother, 'O infidel,' it redounds upon one of them'.[3]

Accusations of *kufr* (unbelief), levelled particularly against fellow Muslims, have nevertheless been often uttered by certain Muslim groups for centuries. From the Khawarīj in the 7th century CE through to the Iraqi insurgency led by Abu Mus'ab al-Zarqawi, to the so called Islamic State of Iraq and Syria (IS) in modern times, *takfīrism* has been their political weapon of choice.[4] IS employed it liberally 'to license a fratricidal civil war against the Iraqi Shi'a community'.[5] *Takfīr* can be compared to papal and episcopal excommunication levied against kings and their ministers on the one hand or rebels on the other, which played a significant role in thirteenth-century English politics and carried various political and social consequences.[6] The main difference is however that *takfīr* can be theoretically pronounced by any Muslim against another Muslim.

The devastating implications of the practice of *takfīr*, are evident across Muslim majority states today. As noted by Shiraz Maher, '[f]rom Indonesia to Pakistan, the Levant, the Arabian Peninsula, and across North Africa, militant groups have frequently invoked the doctrine to justify mass casualty attacks against ordinary Muslims – ironically, the very constituency in whose defence they often claim to act.'[7] In the past three decades, the Arab world has witnessed a significant number of *takfīr* campaigns and trials, through the accusations of apostasy, blasphemy and unbelief, which 'have mainly been instigated by the Islamist lobby and coincided with their demand for the codification and implementation of Islamic Law (Sharia).'[8] Such practice can be aimed at any individual, regime, or society based

[2] Abu Dawud, *English Translation of Sunan Abu Dawud*, translated by Nasiruddin al-Khatab (Vol. 3, Dar-us-Salam Publications, 2008).
[3] Muhammad ibn Ismail al-Bukhari, *The Translation of Meanings of Sahih Al-Bukhari*, translated by Dr. Muhammad Muhsin Khan (Vol. 8, Kazi Publications, 1997), no. 6103, 77.
[4] Badar *et al*., 'The Radical Application of Takfir', n. 1, 135.
[5] S Maher, *Salafi-Jihadism: The History of an Idea*, (London: Hurst & Co. Publishers, 2016) 71.
[6] F Hill, *Excommunication and Politics in Thirteenth Century England* (unpublished doctoral thesis, University of East Anglia, 2016) 12.
[7] Maher, n. 5, 83 (emphasis added).
[8] R Badry, 'On the *Takfir* of Arab Women's Rights Advocates in Recent Times' in C Adang *et al*. *Accusations of Unbelief in Islam: A Diachronic Perspective on Takfīr* (Brill, 2016) 354.

on their supposed un-Islamic actions, regardless of their own profession of belief, thereby making them subject to discrimination and even lawful killing.[9] From the outset, it should be noted that three forms of *takfīr* may be identified: a) *takfīr* of individuals by private persons, b) *takfīr* of the state or democracy by private persons or Islamist parties, and c) *takfīr* of individuals by the state or its judicial and/or religious institutions.

The practice of each of these forms depends on the ideology behind them. In the Arab region in general, and in the Tunisian context in particular, different forms of *takfīr* have been utilised by different radical groups. *Takfīr* of the society, the government or democracy are mainly practiced by *Salafī-Jihādīst* movements who are influenced by the Wahhabi ideology such as Ansar al-Sharia in Tunisia and Libya and Jabhat al-Nusra and Ahrar al-Sham in Syria. They, together with al-Qā'ida, very often reject democracy as an un-Islamic system and genuinely believe that democracy, which entails humans legislating and enforcing laws, as *kufr* (unbelief) because they are taking the place of God as the ultimate source of power and authority.[10]

Takfīr of democracy or the government was rarely practiced by Islamists groups such as the Muslim Brotherhood (MB) in Egypt as long as they had a good political representation in the Parliament.[11] Al Nahda party in Tunisia followed this strategy of political inclusion but it has led to a loss of support from other radical groups particularly Ansar al-Sharia.

In post-revolutionary Tunisia there was a fear that *takfīr* could be used by the newly emerged Salafī groups 'as a blind ideological justification of the conflict between a small group of people and the rest of the society or the world. In the latter case, the concept of [the unbeliever] can be expanded indefinitely. As in the 1980s in Egypt or in Algeria in the 1990s, the anathema of being [an unbeliever] was extended to almost all of society, guilty of not rising up against the tyrant (*Taghout*).'[12]

[9] T Izutsu, *The Concept of Belief in Islamic Theology: A Semantic Analysis of Îmân and Islâm*, (Yurindo Publishing, 1965) 11; I Karawan, 'Takfir', in J Esposito (ed) *The Oxford Encyclopaedia of the Modern Islamic World*, vol. 5 (OUP, 2009).
[10] J Wagemakers, '"The *Kāfir* Religion of the West": Takfīr of Democracy and Democrats by Radical Islamists' in Adang et al. n. 8, 327, 329-330
[11] The Muslim Brotherhood was banned in Egypt in September 2013 and declared a terrorist organisation in December of the same year.
[12] F Merone, 'Between Social Contention and *Takfirism*: The Evolution of the Salafi-Jihadi Movement in Tunisia' (2017) 22 *Mediterranean Politics* 71, 76, referrences omitted.

Conscious of the dramatic consequences of *takfīri* practice and *fatwas* (accusations of unbelief based on non-binding legal opinion) and their devastating results in tearing societies apart the Tunisian Constitution of January 2014 included a declaration of the State's commitment to prohibiting campaigns of accusations of apostasy (*takfīr*) together with incitement to violence and incitement to hatred.[13] The new Tunisian Anti-Terrorism Law subsequently included a provision criminalising the charge of *takfīr*.[14] This controversial criminalisation, which required complex political compromising, provides a valuable example for Muslim majority states as well as states with large Muslim minorities to consider when tackling one of the main catalysts of Islamist terrorism, i.e. religious hate propaganda and particularly the charge of *takfīr*.

Most Arab countries did not pay adequate attention to this phenomenon, i.e. the practice of *takfīr* during their legislative processes and there was a concern that criminalising *takfīr* would open the door to widespread blasphemy. Exception can be found in Article 7(1) of the 2005 Iraqi Constitution, which prohibits the accusation of unbelief by any entity or organisation[15] and Article 10 of the UAE's Federal Decree Law No. 2 of 2015 punishing anyone for calling other religious groups or individuals as infidels or unbelievers with the aim of achieving their own interests or illegal purposes.[16]

Since the early 2000s, there were several attempts in Arab countries to criminalise such practice. In Morocco, an opposition party (Authenticity & Modernity) proposed in 2018, unsuccessfully, the adoption of a provision criminalising *takfīr*.[17] A call was made in Algeria by a group of intellectuals for such criminalisation, but this too did not come to fruition.[18] There have been, however, judicial consequences for uttering *takfīr* both in Morocco and Saudi Arabia, despite the lack of criminalisation. In February 2014, a Moroccan sheikh, was

[13] The second paragraph of Article 6 of the Tunisian Constitution of 2014 https://www.constituteproject.org/constitution/Tunisia_2014.pdf

[14] The eighth paragraph of Article 14 of the Tunisian Law No. 26 of 2015 regarding Anti-terrorism and Money-laundering, Official Gazette no. 63, Aug. 7, 2015.

[15] First paragraph of Article 7 of Iraq's Constitution of 2005 https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

[16] United Arab of Emirates, Federal Decree Law No. 2 of 2015 On Combating Discrimination and Hatred, Issued on 15 July 2015. Most notably the second para. of Article 10 reads: 'The sentence shall be death penalty if the call of infidelity was as associated with death, and where the crime was committed thereof.' https://www.tamm.abudhabi/-/media/Project/TAMM/Tamm-Images/PDF-attachments/Anti-discrimination-and-hate-law.pdf

[17] L Arbaoui, 'Moroccan opposition party proposes draft law to criminalize accusations of apostasy' 12 Jan. 2014, Morocco World News, https://www.moroccoworldnews.com/2014/01/119336/moroccan-opposition-party-proposes-draft-law-to-criminalize-accusations-of-apostasy

[18] L Ghanmi, 'Algerian intellectuals defy extremists, rally for anti-takfir law', 25 June 2017, The Arab Weekly https://thearabweekly.com/algerian-intellectuals-defy-extremists-rally-anti-takfir-law

provisionally sentenced for broadcasting a video on YouTube in which he declared prominent Moroccan figures in politics, literature, and culture as unbelievers.[19] In 2016, in Saudi Arabia, a court sentenced an Imam to 45 days for declaring a Saudi comedian a *kafīr* under *ta'azir*, i.e. a punishment for offences at the discretion of the judge.[20]

While criminalising the 'accusations of unbelief', or *takfīr*, raises concerns over such provisions excessively restricting freedom of expression and religion, it is imperative to recognise that the practice does not merely subjectively classify people as unbelievers or excommunicates them from society but combined with the religious hate propaganda in which it is embedded it also includes an inherent call for their killing. As such, the criminalisation of both *takfīr* and incitement to religious hatred and loathing are not merely justified but necessary in light of duties placed on states with respect to combatting terrorism by UN Security Council Resolutions 1373 (2001) and 1624 (2005) as well as protecting the fundamental human rights of their citizens, including the right to life, the right to security, the right to equality and the right to dignity.

This paper particularly focuses on Tunisian legislation enacted in response to the socio-religious phenomenon of *takfīr*. Part 2 of the article provides an explication of the religious ideologies underpinning *takfīr*, in addition to the social and political developments in relation thereto. Part 3 canvasses Tunisia's criminalisation of incitement to religious hatred, loathing, violence, and *takfīr*, while highlighting the hurdles faced by Tunisian lawmakers in formulating and passing the relevant legislation. Part 4 examines the prohibition of incitement to hatred and violence in light of Security Council (SC) Resolutions and under international and regional human rights instruments, particularly focusing on the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR) with a view to assessing the compatibility of Tunisia's legislation therewith. Part 5 considers concerns that have been raised vis-à-vis the principle of legality potentially being violated by the legislation discussed while Part 6 provides an insight into how the law operates in practice.

[19] S Ashto, 'Morocco, Judicial decision that provoked public debate with regard to the accusation of Unbelief' 23 Feb. 2014, DW Arabic https://p.dw.com/p/1BCzp

[20] H Toumi, 'Self-proclaimed preacher arrested by Saudi Arabia authorities after accusing actor of being an apostate' 4 Oct. 2017, World Gulf https://gulfnews.com/world/gulf/saudi/self-proclaimed-preacher-arrested-saudi-arabia-after-accusing-actor-of-being-an-apostate-hypocrite-1.2100293

2. An Overview of *Takfīr*: From the Khawarīj to the *Salafī-Jihādī* Ideology

The practice of *takfīr* appeared very early within Islamic history, first being given prominence by the al-Muhakkimah sect who subsequently became the Khawarīj during the civil wars that immediately followed the Prophet's era (656-661CE). Viewed from the present-day standpoint, the Khawarīj were a political party formulating their political positions in theological terms and seeking to defeat their political opponents by branding them as unbelievers and wishing to excommunicate them from the Muslim community.[21] The concept of *takfīr* was not merely the centre on which their main thought revolved and evolved but also the very origin of their movement.[22] Based on their conviction that Caliph 'Ali should not have used human decision-making in the form of an arbitration decision but should have instead turned to God as the only arbiter and applied the law of retaliation against those accused of the murder of Caliph Uthman as envisioned in the Quran[23] they declared 'Ali an infidel. The Khawarīj also condemned as an infidel any Muslim who commits a grave sin and considered it incumbent upon all believers to revolt against unjust rulers.[24] Their fanaticism manifested itself in the senseless slaughter of thousands of ordinary people, keeping the population in a constant state of terror.[25] While being preoccupied with excluding others from the Muslim community, the Khawarīj in fact only removed themselves from the *Ummah*.

However, within the fifth/eleventh century there was a shift towards more strict judgments on infidelity. The writings of al-Ghazāli may be considered as the ultimate stage in this development. Crucially, al-Ghazāli considered not merely openly professed apostasy, but unbelief itself as an offence that required the death of the offender (either through a ruling or assassination) thereby knowingly deviating from the practice of the Prophet and his companions but justifying such deviation with the interest of the state.[26] He recognized that judgments on apostates provided a forceful weapon against the Ismaili which threatened the Seljuq state, thus his understanding must be regarded as primarily a political interpretation of them.[27] Al-Ghazāli did not accept the universal obligation to grant the right to the *istitāba*

[21] Izutsu, n. 9, 3; see also A Amin, *Duhà al-Islâm*, Vol. III, (Dar al-Kitab al-Arabi, 1963), at 5.
[22] Izutsu, n. 9, 5.
[23] Muhammad ibn Jarir al-Tabari, Vol. 7 *The History of al-Tabari*: *The Foundation of the Community, Muhammad At Al-Madina A.D. 622-626/Hijrah-4 A.H*., translated by M McDonald, annotated by W. Montgomery Watt (State University of New York Press. 1987), 99-100; see also Ibn Kathir, n.1, Vol. 33 at 186.
[24] Izutsu, n. 9, 4.
[25] Ibid., 6.
[26] al-Ghazālī, *Fadā'ih al-bātiniyya*, 156, al-Ghazālī, *Shifā' al-ghalīl*, 252 as quoted and cited by F Griffel, 'Toleration and Exclusion: Al-Shāfi'ī and Al-Ghazālī', (2001) 64 *Bulletin of the School of Oriental and African Studies* 353.
[27] Griffel, ibid., 353

(repentance and profession of belief (*shahāda*)) prior to judgment but limited it only to those 'from the mass of the people, who does not know things.'[28] On the other hand he stressed that 'the secret apostate' (*zindīq*) merely professes the *shahāda* but stays an unbeliever,[29] referring particularly to the *taqiyya* as an element of the Shi'a creeds which made it possible for them to deny their Shi'a allegiances in a situation of religious persecution.[30]

Takfīr was further developed by Ibn Taymiyya (d. 728 AH/1328 CE). He classified the unbelievers into several groups and considered the most evil among them outwardly Muslims who did not perform their religious duties, since they rejected Islam while still claiming to belong to it.[31] He also rejected the possibility of any peace agreements with the murtadd (apostates), such as the Persians and Romans, as well as other Arab tribes who had returned to their pre-Islamic beliefs. Security could not be granted to them and fighting them was obligatory.[32] Ibn Taymiyya argued that the customary law of the ruling Mongols at the time had strayed from divine law, thus despite their claim to Islam and the introduction of aspects of Sharia in their code, they were not to be considered Muslims and should be actively fought against.[33]

The concept of takfīr was further developed in the 18th century CE by Muhammad Ibn 'Abd al-Wahhab (d. 1206 AH/1792 CE), the founder of the Wahhabi doctrine. He considered the traditions that had emerged in the aftermath of the first generation of Islam as idolatry (*shirk*) and branded Muslims practicing them as polytheists.[34] On this basis he was thus perceived as declaring *takfīr* on the Muslim mases and by the admission of his own brother, al-Wahhab made *takfīr* into the sixth pillar of the faith.[35]

Takfīr was revived in the 20th century when Sayyid Qutb (d.1966), a leading member of the Muslim Brotherhood in Egypt, referred to the notion of contemporary *jahiliyya* to denounce Muslim societies and governments who were following Western laws.[36] He effectively stated

[28] Arabic: *min jumlat 'awāmmihim wa-juhhālihim;* al-Ghazālī, *Fadā'ih al-bātiniyya*, 162, as quoted by Griffel, n. 26, 353.
[29] al-Ghazālī, *Shifā' al-ghalīl*, 222, as quoted by Griffel, n. 26, 351.
[30] Griffel, n. 26, 351
[31] Ibn Taymiyyah, The Religious and Moral Doctrine of Jihad (dd Maktabah al Ansaar Publications, 2001), 9-10
[32] *Ibid*., 9.
[33] *Ibid*., 12.
[34] F Augustus Klein, The Religion of Islam (Curzon Press, 1971), 237
[35] A Dahlan, al-Durar al-Saniyyah fi al-Rad 'ala al-Wahhabiyya (Maktabat al-Halabi, 1980) 43–4
[36] S Qutb, *Milestones*, edited by A al-Mehri (Maktabah Publications 2006) 27.

that a ruler should not be obeyed unless he fully implements Islamic law.[37] In the same vein, Abul A'la Maududi (d. 1979), the founder of the Islamic group (al-Jamā'ā al-Islāmīya), claimed that the borrowing of laws from non-believers had reduced Islamic law to mere personal law or nothing at all.[38] He coined the term 'Islamic State' to describe what he saw as the form of government to which Muslims must aspire.[39] Such 'intellectual framework of 'Islamic State' appears to sit within the mainstream tradition of *Salafī-Jihādī* thought.'[40] *Salafī-Jihādī* fundamentalist approach to the doctrine of God's oneness (*tawhīd*)[41] and the principle of *hakimiyyah* (ruling in accordance with God's sovereignty) necessitates the accusation of unbelief (*takfīr*) upon those who have deviated from these principles. *Jihādī-Salafīsm* can thus be described as 'a revolutionary program of overthrowing regimes in the Muslim world declared as un-Islamic'.[42]

However the level of extremeness of the application of *takfīr* has been a point of contention between the various groups as well as within the same groups.[43] ISIS, for example, strongly criticises Al Qaeda for not branding the Shi'a sect as unbelievers (*kuffār*). Their approach to purging members of society through the practice of *takfīr* reached absurd proportions when a fatwa was issued on the 17th May 2017 with "the second most important seal" in ISIS, i.e. the Delegated Committee which was directly subordinate to Baghdadi the then leader of ISIS. The ruling declared 'making of *takfīr* of the *mushrikin* [those who worships anyone or anything besides Allah] as one of the *utmost principles of the religion*, which must be known before

[37] R Scott, 'An 'official' Islamic Response to the Egyptian al-jihād Movement', (2003) 8 *Journal of Political Ideologies* 39-61, 44.

[38] Abū al-A'la al-Maudūdī, *Witnesses unto Mankind: The Purpose and Duty of the Muslim*, (Khurram Murad trans.) (Islamic Foundation, 1986) 36.

[39] Abū al-A'la al-Maudūdī, *Jihad in Islam* (The Holy Koran Publishing House 2006) 22. See also Abū al-A'la al-Maudūdī, *The Islamic Law and Constitution*, (Khurshid Ahmad trans.) (Islamic Publications Ltd, 1960) 144-145 where it states, 'Everyone who desires to remain a Muslim is under an obligation to follow the Qur'an and the Sunnah which must constitute the basic law of an Islamic State'.

[40] Maher, n. 5, 6.

[41] B Haykel, 'On the Nature of Salafi Thought and Action' in R Meijer (ed.), *Global Salafism: Islam's New Religious Movement* (OUP, 2014) 38-39; N Shama, 'Al-Jamā'ā al-Islāmīya and The Al-Jīhad Group in Egypt' in J Esposito and E El-Din Shahin (eds) *The Oxford Handbook of Islam and Politics* (OUP, 2013) 608.

[42] P Nesser, 'Abū Qatāda and Palestine', (2013) 53 *Welt des Islams* 416, 417; Q Wiktorowicz, 'The New Global Threat: Transnational Salafīs and Jihad', (2001) 8 *Middle East Policy* 18–38; Q Wiktorowicz, 'Anatomy of the Salafi Movement', (2006) 29 *Studies in Conflict and Terrorism* 207; A Moghadam, 'The Salafi-Jihad as a Religious Ideology', (*Combating Terrorism Centre at West Point* February 2008) 14–7; J Wagemakers, *A Quietist Jihadi: The Ideology and Influence of Abu Muhammad al-Maqdisi* (CUP, 2012).

[43] J Zenn and Z Pieri, 'How much Takfir is too much Takfir? The Evolution of Boko Haram's Factionalization' (2017) 11 *Journal for Deradicalization* 281-307, 287.

knowing the prayer and other obligations that are known of the religion by necessity.'[44] By elevating *takfīr* to a principle of the religion, they essentially declared *takfīr* on any Muslim, who failed to exercise *takfīr* on others.[45] This created some controversy within the group and the ruling was eventually rescinded in an effort to quell the disagreement.[46] Interestingly, those who adhered to the group's ideology were provided with certificates of non-infidelity (*shahādet ghayr kāfir*).[47]

On the other side of the spectrum are *Salafīs* who reject widespread accusations of *takfīr* and consider that every Muslim committing a crime deserves punishment, but he remains Muslim unless he commits serious sins (*al-kabba'ir*). This was the position of Hasan al-Hudaybi, the second leader of the Muslim Brotherhood, who rejected the approach of Qutb.[48] Yet the prohibition of *takfīr* in the Tunisian law does not make a distinction between different kinds of *takfīr* and regardless of which individual or institution it is pronounced by, it is considered incitement to violence.

The implicit threat in *takfīr* of mobilising elements of society against its targets makes it a powerful tool for political blackmail, although its success is not always assured. Comparing the experiences of Yemen and Tunisia during moments of regime remaking and consolidation, Hartshorn and Yadav observed vastly different outcomes following its use by Islamists intent on disciplining internal members and pressuring secular-left opponents.[49]

Considering its mission, it is unsurprising that the spread of *takfīr* many times comes as a direct response to steps being taken towards the separation of religion and State. In the case of Tunisia this occurred after the independence and the implementation of secular policies under

[44] IS, Delegated Committee, 'That Those Who Perish Would Perish Upon Proof and Those Who Live Would Live Upon Proof', 17 May 2017, emphasis added http://www.jihadica.com/wp-content/uploads/2018/09/That-Those-Who-Perish.pdf

[45] T Joscelyn, 'Islamic State rescinds one of its most problematic religious rulings', *FDD's Long War Journal*, (20 September 2017) https://www.longwarjournal.org/archives/2017/09/islamic-state-rescinds-one-of-its-most-problematic-religious-rulings.php

[46] T Joscelyn, 'Islamic State radio tries to quell controversy over takfir', *FDD's Long War Journal*, (26 September 2017) https://www.longwarjournal.org/archives/2017/09/islamic-state-radio-tries-to-quell-controversy-over-takfir.php

[47] Adang et al., n. 8, ix.

[48] P Longo, 'Salafism and Takfirism in Tunisia Between Al-Nahda's Discourses and Local Peculiarities', (November 2016) *Middle East Studies Center, The American University in Cairo*, 7 http://schools.aucegypt.edu/GAPP/mesc/Documents/Working%20Paper%20Series/MESC%20Working%20Paper_1.pdf.

[49] I Hartshorn and S Yadav, '(Re) Constituting Community: *Takfir* and Institutional Design in Tunisia and Yemen', (2020) 32 *Terrorism and Political Violence* 970, 980.

former President Habib Bourguiba.[50] His efforts at fighting Islamism proved to be counter-productive. The University of Zaytuna and the *al-taharrur* movements which sprung from it previously acted as a balance against *Jihādī-Salafīsm*.[51] Ending the University's independence left a vacuum for the extremists to fill.[52] Following the 2011 revolution, Tunisia experienced more freedoms[53] while at the same time the new government took a soft approach to the issue of *takfīr* and radical *Salafīsm*. In addition, the ruling Ennahda Party proclaimed a general amnesty which freed several radical *Salafī* leaders jailed under Ben Ali's Terrorism Act.[54] A number of mosques were overseen by Salafīst Imams who opposed the secular traditions of the country and sought to instrumentalise Islam for political purposes.[55] This environment encouraged *takfīri* militants 'to persist in their attacks as they perceive themselves as the protectors of truest Islam'.[56] However, following criticism and the killings of two Tunisian members of Parliament (MPs) by a *jihādī* cell, the government changed its approach by stating that anyone who violates the law will be punished, regardless of their affiliation.[57] The new law on Counter-Terrorism was drafted in this spirit. In other words, the use of *takfīr* eventually backfired in Tunisia. Instead of driving popular sentiment against the accused, negative attention was brought to Islamist politics and secular-left collaboration was galvanized and the ongoing constitutional process was nearly derailed.[58]

By comparison, in Yemen, *takfīr* has been essential to structuring Islamist-Leftists relations as well as North-South relations more broadly.[59] After the unification of North and South Yemen, it helped to ensure the recognition of Sharia as the only source of legislation in the new constitution and it also incapacitated socialist opposition to the islamisation of educational and judicial institutions.[60] It furthermore inspired vigilante attacks on people deemed un-Islamic,[61] derailed institutional reforms and suspended elections.[62] At the end of

[50] *Ibid* 4.
[51] *Ibid.*
[52] *Ibid* 4-5.
[53] *Ibid* 5.
[54] *Ibid*.
[55] Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief, A/HRC/40/58/Add. 1 (1 March 2019), para. 45.
[56] Longo, n. 48, 5.
[57] N Hitti, 'Tunisia's Ruling Ennahda Confronts an Islamist Rival', *Al-Monitor*, 4 June 2013, available at: http://www.al-monitor.com/pulse/originals/2013/06/tunisia-islamists-nahda-salafist.html.
[58] Hartshorn and Yadav, n. 49, 982.
[59] *Ibid* 974
[60] *Ibid* 975
[61] *Ibid*.
[62] *Ibid* 976.

the first decade of the 21st century *takfīr* also played an increasingly important role in the sectarian polarisation of Yemen.[63] In short, the *takfīr* discourse 'obtained concessions from opponents, undergirded cross-ideological fronts and became a justification for violence depending on the configuration of societal powers and institutions.'[64]

It is important to note that the fatwa monitoring observatory department at the Dar Al-Iftaa in Egypt, which is considered the premier institute for Islamic legal research, recently condemned *takfīri* fatwas and described them as using religion to polarise its followers and use their religious fervour in order to achieve political gains by targeting their opponents, including the cultured.[65] The body furthermore made it clear that by giving permission for killings and bloodshed, such fatwas undermine the objectives of Islamic law.[66] Dr. Ibrahim Negm, who is the advisor to the Grand Mufti of Egypt and who supervised the report, stressed that *takfīri* fatwas 'lead thousands of youths towards extremism and murder, seeking alleged martyrdom.'[67]

3. Background to the Tunisian Criminalisation of Incitement to Religious Hatred, Loathing, Violence, and *Takfīr*

The Tunisian approach to incitement to religious hatred and violence reflects the effort at curtailing significant extremist religious agitation in its society. After a month of protests in 2011, Tunisia witnessed the fall of the political regime of former President Ben Ali. As countries in North Africa underwent profound evolution, terrorist and rebel groups exploited the ensuing security vacuum to radicalize new recruits and spread their message of hate and violence.[68] Tunisia was no exception. In the immediate years following the revolution, the country experienced a rise in terrorist attacks carried out by individuals and groups driven by religious motives.[69] During the first three years of the revolution, intellectuals, artists, human

[63] *Ibid* 977.
[64] *Ibid* 982.
[65] 'The fatwa monitoring observatory; infidelizing fatwas are seen as legal permits for killing which undermine the objectives of Islamic law' (website of Dar Al-Ifta Al-Missriyyah) http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=479&text=The%20fatwa%20monitoring%20observatory:%20infedilizing%20fatwas%20are%20seen%20as%20legal%20permits%20for%20killing%20which%20undermine%20the%20objectives%20of%20Islamic%20law.
[66] *Ibid*.
[67] *Ibid.*
[68] Peace and Security Council, 455th Meeting at the Level of Heads of State and Government, Nairobi, Kenya, 2 September 2014, Report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa PSC/AHG/2(CDLV) https://caert.org.dz/Reports/psc-rpt-terrorism-nairobi-2-09-2014.pdf, https://caert.org.dz/Reports/psc-rpt-terrorism-nairobi-2-09-2014.pdf, para. 18.
[69] Report of the Special Rapporteur (2019), n. 55, para. 57.

rights activists, journalists and politicians were all targets of attacks.[70] This section paints the picture of the battle fought between opposing political camps until a compromise was reached bringing the welcome criminalisation of incitement to religious hatred, loathing, violence, and *takfīr* alongside wording potentially problematic from the perspective of guaranteeing freedom of religion as well as freedom of expression.

3.1 The 2014 Tunisian Constitution – Secular Tendencies versus Political Islam

With the revolution, Tunisia had emerged from five decades worth of so-called modernising, bureaucratic, and authoritarian presidential regimes, and has since had to redefine essential characteristics of the country and society. A succession of provisional governments followed the 2011 revolution, and until the presidential and legislative elections held in late 2014, the main focus of the Tunisian authorities was to establish new democratic institutions, restore the rule of law, and draft a new constitution.[71] The Constitution was drafted by the Constituent Assembly, and was only completed after two turbulent years of trying to reach the necessary compromise between radically differing visions.[72] Opinions were particularly divided on Article 1 of the 1959 Constitution; some called for a clear separation between religion and State in the new text, while others demanded an express reference to Sharia as a source of law.

The final version of the Constitution retained the first article of the 1959 Constitution, which reads: 'Tunisia is a free State, independent and sovereign, Islam is its religion, Arabic its language and the Republic its regime.' Article 2 continues by stating 'Tunisia is a civil state, based on citizenship, the will of the people and the rule of law.' The two provisions reflect a historical identity endorsed by the postcolonial state (Article 1), "enlarged" in a democratic context (Article 2).[73] Article 1 has always been interpreted by legal doctrine as referring to Islam as the religion of Tunisia, in terms of a sociological fact. However, in drafting the new constitution, another article was proposed declaring inviolable the status of 'Islam as the State

[70] *Ibid*.
[71] MENA FATF, Anti-money laundering and counter-terrorist financing measures, Tunisia Mutual Evaluation Report (May 2016) 4 http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-tunisia-2016.html
[72] H Abdelkefi, 'The Tunisian Constitution: The Evolution of a Text', http://www.arabstates.undp.org/content/dam/rbas/doc/Compendium%20English/Part%202/13%20Hédi%20Abdelkefi%20EN.pdf , 1.
[73] H Redissi, 'Opinion: Raison publique et laïcité islamique: la constitution tunisienne de 2014', *Leaders*, (4 July 2014) https://www.leaders.com.tn/article/14489-hamadi-redissi-raison-publique-et-laicite-islamique-la-constitution-tunisienne-de-2014.

religion' which caused major division which was not resolved until the article was removed in the final phases of the process.[74]

Controversy also surrounded the drafting of Art. 6 which eventually introduced the prohibition of *takfīr* as well as incitement to hatred and violence. The article now reads:

> L'État est le gardien de la religion. Il garantit la liberté de croyance et de conscience et le libre exercice des culter; il est le garant de la neutralité des mosques et lieux de culte par rapport à toute instrumentalization partisane.
> [The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalisation.]
>
> L'État s'engage à diffuser les valeurs de modération et de tolérance et à protéger le sacré et empêcher qu'on y porte atteinte. Il s'engage également à prohiber et empêcher les accusations d'apostasie, ainsi que l'incitation à la haine et à la violence et à les juguler.
> [The state commits to disseminating the values of moderation and tolerance and to protecting the sacred and preventing injury to it. It equally commits to prohibiting and stopping accusations of apostasy (campaigns of takfīr), as well as incitement to hatred and violence and to halting them.]

The provision loosely mimics Article 18 of the ICCPR however the latter is undoubtedly much broader in guaranteeing religious freedom. Accordingly, the European Commission for Democracy through Law, expressed that the wording 'protector of the freedom of religion' would be more appropriate than 'protector of religion' and would rule out the possibility of the Constitution protecting Islam to the detriment of other religions.[75] It furthermore suggested a rewording of Article 6 to proclaim the freedom of religion, conscience and belief (protecting theistic, non-theistic and atheistic beliefs), and to guarantee the freedom to have or adopt a religion or belief of one's choice, and the freedom to manifest one's religion or belief, individually or in community with others, both publicly and in private, through worship and

[74] Abdelkefi, n. 72.
[75] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Final Draft Constitution of the Republic of Tunisia' adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013), Opinion 733/2013 (17 October 2013) 9.

the observance of rites, practices and teachings. The Commission particularly criticised the part of the above provision which commits the state to protecting 'that which is sacred' and suggested its removal.[76] In response, the Tunisian authorities pointed out that the phrase does not refer to the protection of religious unity and theological purity but rather the protection of places and buildings held to be sacred. The Commission thus submitted that this interpretation should be laid down more clearly in the text of Article 6, if it was maintained.[77]

The Article was however not amended according to these suggestions, and the UN Special Rapporteur on Freedom of Religion raised similar concerns in his 2019 report.[78] He stated that the lack of an elaboration as to what 'protector of religion' entails could problematically be interpreted as an obligation upon the State to protect religion *per se*, rather than individuals.[79] He further noted that Article 226(2) of the Tunisian Penal Code which protects 'public morals' and 'public decency' is being used by the courts to issue decisions restricting the exercise of freedom of expression[80] and that some officials he had spoken to considered the ongoing application of public morals provisions as being integral to implementing the constitutional mandate to protect the 'sacred'.[81] Criticising the lack of proper definition of said mandate in the Constitution, the Rapporteur reiterated the position of the UN Human Rights Committee that it was not permissible to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith or to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers.[82]

Unsurprisingly thus, on the constitutional obligation to prohibit *takfīr*, no issue was identified by the Special Rapporteur. On the contrary, his report recognised the legitimate challenges in formulating effective responses that counter violent extremism considering the violence perpetrated in the country in the name of religion.[83] He considered measures such as the ban on incitement to violence among religions and races to be clearly integral to protecting

[76] *Ibid*.
[77] *Ibid*.
[78] Report of the Special Rapporteur (2019), n. 55
[79] *Ibid* para. 28.
[80] *Ibid* para. 55: On 28 March 2012, a trial court in Mahdia convicted two Internet users for posting writings deemed offensive to the sacred values of Islam and sentenced them to seven-and-a-half years imprisonment. The Court of Appeal and cassation upheld the verdict in 2014.
[81] *Ibid* para. 56.
[82] *Ibid*.
[83] *Ibid* para. 57.

the space for freedom of religion or belief.[84] By analogy, the prohibition of *takfīr* is also such a fundamentally necessary measure.

The drafting history of the Constitution reveals that Article 6 sparked great controversy and underwent several changes as the secular forces and those more religiously conservative struggled to reach a compromise.[85] In the words of one commentator, Article 6, in the end, attempts 'the impossible task of reconciling two radically different visions of society…in a complicated and wordy fashion'.[86] After the inclusion of 'freedom of conscience' into the wording, some delegates brought amendments on two separate occasions which sought to remove this freedom, but they were both rejected by a strong majority.[87]

The Rights and Freedoms Commission, which was working on the drafts, cited Islamic values as its main guidance, followed by the aspirations of the revolution and the universal principles of human rights.[88] While some within the Commission regarded the criminalisation of attacks against the sacred to be a restriction on the freedom of expression, others were in favour thereof.[89] On the other hand, the most liberal and secular amendment which sought to extend the protection of the state to all religions and to shield places of worship from political struggles was rejected by a strong majority despite the democratic bloc voting unanimously in its favour.[90]

The amendment introducing a ban on *takfīr* and incitement of hatred and violence showed again a striking polarisation between Ennahda (main Islamist party) and the democratic left-wing block. In fact the amendment was initially rejected on the 4th of January 2014, but the debate was reopened after a governing member of the National Constitutional Assembly from Ennahda declared another member of the assembly from the left coalition, the Popular Front, 'an enemy of Islam.'[91] Mongi Rahoui proposed an amendment to Article 1 which read

[84] *Ibid* para. 58.
[85] H Redissi and R Boukhayatia, 'The National Constituent Assembly of Tunisia and Civil Society Dynamics, EUSpring Working Paper No. 2, 8 July 2015 http://aei.pitt.edu/66141/
[86] A Guellali, 'The Problem with Tunisia's New Constitution' Human Rights Watch/World Policy Journal (3 Feb. 2014) https://www.hrw.org/news/2014/02/03/problem-tunisias-new-constitution
[87] Amendment no. 23: 104 votes against, 35 for and 23 abstentions; Amendment no. 62: 96 against, 49 for and 39 abstentions in Redissi and Boukhayatia, n 61, 11-12.
[88] *Ibid* 3.
[89] *Ibid*.
[90] Amendment no. 127: votes by party Al-Nahda (77 against, 5 abstentions), Block (12 for), other groups were divided.
[91] Guellali, n. 86.

that Islam was the religion of the people and not the state, which prompted Habib Ellouze from Ennahda to attack him and to declare that he was fighting against Islam:[92]

> 'Rahoui est connu, c'est un ennemi de l'Islam en tant que laïc. Il aimerait bien qu'il n'y air aucune référence à l'Islam (dans la Constitution)…Mais heureusement que nous avons adopté cet article qui énonce l'Islam en tant que religion de l'Etat, avec l'approbation de tous, sauf de Mongi Rahoui. Et le people tunisien prendra position sur ce type de personnes.'[93]

Within 48 hours, a fatwa was issued against Rahoui calling for his assassination.[94] It is important to note that Rahoui was member of the same party as Chokri Belaïd, the politician who had been assassinated in an Islamist attack the year prior, causing large protests against Ennahda.[95]

The incident in the Assembly led to outrage and the proposal of a new, almost identical amendment on the 5th of January 2014 which stated '*takfīr* and the incitement of violence are prohibited.'[96] The amendment was adopted the same day.[97] Ennahda largely opposed the inclusion of the prohibition of *takfīr*, while the democratic left unanimously backed it.[98] While Elluze apologised for his accusations against Rahoui, he nevertheless rejected the amendment as being contrary to Islam, insisting that *kufr* and apostasy must be adjudicated by Muslim scholars or judges who determine the presence of necessary conditions to issue this kind of ruling. Rached Ghannouchi, the leader of the Ennahda Movement, also claimed that while individuals or groups could not be entitled to pronounce *takfīr*, government bodies should have the ability to do so. He nevertheless accepted the amendment, stating that his party was a movement which exerts legal reasoning "*harakat ijtihadiyya*" and does not set itself up as

[92] Longo, n. 48, 6.
[93] Hartshorn and Yadav, n. 49, 978: 'Rahoui is known, he is an enemy of Islam as a secularist. He would have liked very much for there to be no reference to Islam (in the Constitution)… Fortunately, however, we have adopted this article that states Islam is the religion of the State, with the approval of everyone, except Mongi Rahoui. And the Tunisian people will take a position on this type of persons.'
[94] A Mousa, 'Opinion: Eradicating Takfirism in Tunisia', (21 Jan 2014) *Asharq Al-Aswat* https://eng-archive.aawsat.com/a-mousa/opinion/opinion-eradicating-takfirism-in-tunisia
[95] Importantly, El-Louz had already stirred controversy in the months preceding the incident by stating that if he were a young man, he would have gone to Syria to take part in *jihad*. These comments came during an atmosphere of general political and social opposition to the phenomenon of young Tunisians going to Syria to join terrorist groups, ibid.
[96] Abdelkefi, n. 72.
[97] *Ibid*.
[98] Amendment no. 95: votes by party Al-Nahda (53 against, 10 for and 18 abstentions), Kotla (12 for), the independents (38 for, 3 against, 8 abstentions).

spokesman of Islam.[99] Several religious leaders and Imams, contrarily, strongly condemned the amendment, with some even circulating a petition within the Assembly to demand its withdrawal, while the Mufti of the Republic went as far as issuing a statement saying that charging people with apostasy was one of the 'pillars' of Islam.[100] Salafī sheikh Khamis al-Majri called it 'the worst law ever adopted in the Arab world'.[101]

This prompted the Assembly to renegotiate the article. A new amendment attempting to strike the difficult balance between 'violation of the sacred' and 'incitement to hatred' was presented by the presidents of the parliamentary groups.[102] This amendment replaced the wording '[the state] is the protector of the sacred' and the previous phrase regarding *takfīr* with the final wording of the provision which passed with a consensus three days before the final vote on the constitution.

From this drafting history, it is apparent why the text of Article 6 is so contradictory and replete with trade-offs between the different elements.[103] It is nevertheless a great political success, as is the Constitution as a whole. The inclusion of a prohibition of *takfīr* is undoubtedly one of its important innovations, particularly from the point of view of protecting the right to life and security as well as the freedom of conscience and belief.

In a later interview, Rahoui spoke about the context of the *takfīr* declaration and revealed that a clear plan for his assassination had been uncovered and that the Ministry of Interior believed his assassination would be carried out within 48 hours of Ellouze's statement. Rahoui characterized the declaration as a 'fatwa for assassination.'[104]

3.2 The 2015 Counter-Terrorism Law[105]

President Ben Ali fully exploited the aftermath of the attacks of 11 September 2001. After several terrorist attacks, the country rushed to respond to UN Security Council Resolution 1373 (2001) by adopting anti-terrorism legislation in 2003, making it the first Arab country to do

[99] Longo, n. 48.
[100] *Ibid*.
[101] *Ibid* 6.
[102] Abdelkefi, n. 72.
[103] Abdelkefi n. 72.
[104] Mongi Rahoui and Parliamentarian, January 13, 2016 quoted and cited Hartshorn and Yadav, n. 49, 981.
[105] Tunisia Basic Law No. 26 dated 7 August (2015) as amended and supplemented by Basic Law No. 9 of 2019 dated 23 January 2019

so.[106] The legislation severely restricted civil liberties and fundamental rights, primarily by providing a mechanism that could easily be arbitrarily wielded by the public authorities against any form of political opposition.[107] A particularly broad and vague definition of the terrorism offense (Articles 4 and 6), which included terms such as 'disturbing public order' and 'causing harm to persons or property', and the increase in the criminal penalties for offenses described as terrorist (Articles 8 and 10), were all particularly problematic in this regard.[108] The government tried about 3,000 people on terrorism charges under the law, many of which were brought against individuals for political dissent, with convictions often based on confessions extracted under torture, and for 'offences' such as "growing beards, wearing specific clothing and consulting prohibited sites".[109]

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism visited Tunisia in May 2011 and expressed concerns over the law, indicating that, if it was not possible to amend it, it would be better to repeal it and rely on the Criminal Code.[110] However, he also recognised that, in view of the country's security situation, and with a terrorist threat that had both an international and internal dimension ('indigenous' terrorism), and in light of Tunisia's international commitments in the fight against terrorism, the adoption of a new anti-terrorism law was desirable.[111] In May 2013, the Ministry of Human Rights and Transitional Justice announced the preparation of a new draft law which would respect human rights and would contain 'a precise and clear definition of terrorist crime, unlike the old law, where the definition of the crime of terrorism was loose and open to many interpretations'.[112]

The government began the process of drafting a new law in January 2014 and its final version, Tunisian Law No. 26 of 2015 regarding Anti-Terrorism and Money-Laundering

[106] F Alzubairi, *Colonialism, Neo-Colonialism, and Anti-Terrorism Law in the Arab World*, (CUP, 2019), 188.
[107] Jean-Philippe Bras, 'Tunisie: L'élaboration de la loi antiterroriste de 2015 ou les paradoxes de la démocratie sécuritaire', (2016) 15 *L'Année du Maghreb*, 309-323, 309.
[108] *Ibid*.
[109] Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, Addendum, mission to Tunisia from 22 to 26 May 2011. A/HRC/20/14/Add.1, para. 13.
[110] *Ibid*.
[111] *Ibid* para. 18.
[112] Alzubairi, n. 106, 196.

(Counter-Terrorism Law 2015),[113] was passed with a massive majority.[114] However, the new law has not escaped criticism; Human Rights Watch quoted eight NGOs in its claim that it imperils human rights and lacks the necessary safeguards against abuse, while others have deemed it the revival of Ben Ali's law.[115] According to Article 13:

> Shall be considered a perpetrator of terrorist offence whoever deliberately implements by any means individually or jointly with another a criminal enterprise to commit any act listed in article 14 and in articles 28 to 36 and that this conduct aims by its nature or context to spread fear among the population or to compel a state or international organization to do or to refrain from doing an act.

The Counter-Terrorism law criminalises *takfīr* along with other types of expression as a tool of counter-terrorism, such as 'incitement to terrorism' (Article 5); and 'incitement to hatred' (Article 14.8); 'glorification of terrorism' and 'apology of terrorism' (Article 31). As noted by Fatima Al Zubairi, 'incitement to hatred or to religious or other fanaticism' was already part of Tunisia's first definition of 'terrorism' as codified in the 1993 Penal Code.[116] In this sense Tunisia was ahead of international regulations in targeting speech associated with terrorism, yet the inspiration at the time came from the French Press Law of 1881.[117]

In terms of speech related terrorism, Article 14 (8) of the 2015 legislation criminalises '*Takīr* or advocating for [excommunication], or incitement of or calling for hatred or loathing among races, religions and faiths.'[69] Apart from the French secular influence, prohibiting *takfir* also has a purely religious origin, since Sharia law condemns excommunication among Muslims.[118] During the negotiations of the 2015 law, the Minister of Interior raised the question of whether *takfīr* as criminalised in this provision would constitute a mode of liability or an offence *per se*. He remarked that to declare *takfīr* of the society constituted the very ideological

[113] Tunisia Basic Law No. 26 dated 7 August (2015) as amended and supplemented by Basic Law No. 9 of 2019 dated 23 January 2019.
[114] Bras, n. 107.
[115] https://www.hrw.org/news/2015/07/31/tunisia-counterterror-law-endangers-rights, see also Anouar Jamaoui, 'The Dangers of Tunisia's Anti-Terrorism Law, Published on https://www.fairobserver.com/region/middle_east_north_africa/the-dangers-of-tunisias-anti-terrorism-law-12852/ 6 June 2015 (last accessed 19 July 2017)
[116] Alzubairi, n. 106, Article 52*bis*, amended by Law 93–112 of November 22, 1993, and abolished in 2003.
[117] *Ibid* Article 24 of the French Press Law of 1881.
[118] See Badar *et al*., n. 1.

basis of terrorist organisations and also according to the Constitution this practise should be considered as a stand-alone crime and not merely a mode of liability.[119]

According to one commentator[120], the most delicate moment of the drafting process of the Counter-Terrorism law was the night of June 15 to 16 during the longest sitting which was supposed to be the last of the general legislation commission. At 3 in the morning, MP Noureddine Ben Achour (Union Patriotique Libre) submitted to the committee an amendment to introduce *takfīr* (the accusation of apostasy) in the list of terrorist offenses, on the grounds of bringing the newly formulated provisions into compliance with Article 6 of the 2014 Constitution. Some of the Ennahda deputies attempted to block this proposal on the basis of a claim that the terminology posed definitional problems on which judges and legislators may not agree. According to Samir Dilou, there had to be a more general offense which did not target Islam so explicitly. Yet the push for the inclusion from the other members of the commission, including the Popular Front, was too strong to ignore the matter. Moreover, Ennahda had already agreed to this prohibition in the constitution. The position was sketched out that if *takfīr* was included among the culpable acts, the law must also include any form of incitement to racial or religious hatred, in order to despecify (relatively) the criminalisation in its relationship to Islam. Even though the Popular Front expressed disapproval of such a modification, it was retained in the final version. There was no further definition of *takfīr* included, but the words 'the call' to *takfīr* were added, which reinforced criminal responsibility.

In response to opposition by Ennahda to the inclusion of the crime of *takfīr* in the law, Ahmed Seddik of the Popular Front stated that the whole anti-terrorism bill was built on the notion of *takfīr*, and that it would be pointless absent the inclusion of said crime. In a similar vein, Rahoui posited that, by definition, *takfīr* 'frames and governs suicide terrorism', and Hayet Kebaier of Nidaa Tounes pointed out the direct relation between *takfīr* and murder.[121]

4. The Prohibition of Incitement to Hatred and Violence in International and Regional Human Rights Instruments and UN Security Council Resolutions

Virtually all states, apart from the United States, have accepted national, regional or

[119] Minister of Interior, 39th Peoples' Assembly Meeting, 22nd of July 2015, 1337, on file with the authors.
[120] Bras, n. 107, 315-16.
[121] Hartshorn and Yadav, n. 49, 981.

international restrictions on hate speech since the 1960s.[122] Systems which include hate speech bans consider that this minimal restriction on freedom of expression is out-weighed by the benefit of enhancing the participation of marginalised groups in democratic society.[123] The balancing between freedom of expression on the one hand and the right to health and life, security, equality, dignity and non-discrimination on the other must be struck.[124] Particular forms of speech may affect multiple rights. The prohibition of certain speech acts is thus 'the corollary to an implicit right of everyone to be free from incitement to acts of hatred, a right particularly significant for members of ethnic, religious or other minorities.'[125]

However, restrictions on hate speech vary, and consensus on what exactly constitutes hate speech is yet to be established. The threshold factor for any hate speech is that it targets a group, or an individual as a member of a group, usually based on nationality, ethnicity, religion or race, gender, gender identity or sexual orientation.[126]

Most notably, Article 20(2) of the ICCPR instructs States parties to adopt incitement laws for advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility, or violence, i.e. forms of harm that are 'contingent' and 'measurable'.[127] Even narrower definitions of hate speech than that in Article 20(2) of the ICCPR demand not solely incitement but instigation of the listener and thus a causal link with the discrimination, hostility, violence, or other harm subsequently committed, which is what is mainly the trend in international criminal law.[128] Approaches in the middle, require the likelihood of subsequent harm occurring, in which case context is essential in defining such likelihood. The European Court of Human Rights (ECtHR) has at times used a multi-faceted test that considers a variety of factors including the likelihood and seriousness of the

[122] Eric Heinze, 'Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech', in I. Hare, J. Weinstein, Extreme Speech and Democracy (OUP, 2009) 184; Eric Heinze, 'Truth and Myth in Critical Race Theory and LatCrit: Human Rights and the Ethnocentrism of Anti-ethnocentrism' (2008) 20 *National Black Law Journal* 107.
[123] Heinze, 'Wild-West Cowboys', *ibid* 197.
[124] ARTICLE 19, Global Campaign for Free Expression, *Towards an interpretation of Article 20 of the ICCPR: Thresholds for the prohibition of incitement to Hatred, Work in Progress,* 2010, 2.
[125] J Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination*, (OUP, 2015) xiii.
[126] A Sellars, 'Defining Hate Speech', Berkman Klein Center for Internet and Society Research Publication No. 2016-20, Dec. 2016 available on SSRN at papers.ssrn.com/sol3/papers.cfm?abstract_id=2882244.
[127] R Post, 'Hate Speech', in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (OUP, 2009) 127, 133-5.
[128] See M Badar and P Florijančič, 'The *Prosecutor* v. *Vojislav Šešelj*: A Symptom of the Fragmented International Criminalisation of Hate and Fear Propaganda', (2020) 20 *International Criminal Law Review* 405-491

consequences of a particular expression and the intention of the speaker, while at other times it has disregarded this for an open-ended and context based so-called *democratic necessity* approach.[129]

While the right of freedom of expression is enshrined in Article 19(1) and (2) of the ICCPR, its limitations are set out in Article 19(3) and Article 20. In the balancing between seemingly conflicting rights, Article 20 weighs in favour of the right to be free from incitement and in favour of non-discrimination, the right to life, physical integrity, freedom from fear,[130] and arguably other rights, such as the right to dignity.[131] It prohibits in absolute terms advocacy of 'religious hatred that constitutes incitement to discrimination, hostility or violence' on an equal footing with advocacy of national or racial hatred.[132] Article 20(2) represents one of strongest condemnations of hate speech in international law, and arguably constitutes a customary norm.[133]

There are important interactions between the right to security, the freedom from fear and other related rights. It is submitted that the right to security of the person as provided for in Article 9 of the ICCPR should be read in conjunction with the freedom from fear as enshrined in the third recital of the Preamble to the ICCPR. In addition, the jurisprudence of the Human Rights Committee (HRC) of the ICCPR has made it clear that the right to security of the person 'has been given an independent operation from the right to liberty'.[134] In *Delgado Paez v. Columbia*, the HRC found that the Applicant's right to security under Article 9(1) was violated because of the State's failure to take proper measure to ensure his safety after he had received death threats. The HRC stated that:

[129] S Sottiaux, 'Leroy v France: Apology of Terrorism and the Malaise of the European Court of Human Rights' free speech jurisprudence', 3 *European Human Rights Law Review* (2009) 419-420, 425.
[130] The second paragraph of the Preamble to the Universal Declaration of Human Rights of 1948 identifies Freedom from fear, among other three freedoms, 'as the highest aspiration of the common people'. See J Spigelman, 'The Forgotten Freedom: Freedom from Fear' (2010) 59 *International and Comparative Law Quarterly* 543-570, arguing that 'without recognition of the importance of freedom from fear, the fulfilment of many human rights is compromised, particularly physical security', 543. Contra see, B Saul, *Defining Terrorism in International Law* (OUP, Oxford, 2006) 29, contending that human rights instruments contain 'no explicit human right to freedom from fear'.
[131] J Waldron, *The Harm in Hate Speech*, (Harvard University Press, 2012) 105-43.
[132] See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 20(2)
[133] K Boyle, 'Hate Speech: The United States versus the Rest of the World?' (2001) 53 *Maine Law Review* 487, 495-6.
[134] Spigelman, n. 130, 535.

> Although in the Covenant the only reference to the right to security of person is to be found in Article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situation of formal deprivation of liberty…. It cannot be the case that, as a matter of law, states can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. State parties are under an obligation to take reasonable and appropriate steps to protects them. An interpretation of Article 9 which would allow a state party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the covenant.[135]

As remarkably noted by Spigelman, human rights discourse is manifestly comfortable when favouring a right over an interest but 'that literature often flounders when faced with a conflict between rights.'[136] As Waldron has put it:

> Rights versus rights is a different ballgame from rights versus social utility. If *security* is also a matter of rights, then rights are at stake on both sides of the equation, and it might seem that there is no violation of the trumping principle or of the idea of lexical probity when some adjustment is made to the balance. This business of conflicts of rights is a terribly difficult area – with which moral philosophers are only just beginning to grapple.[137]

Difficulty arises in the context of anti-terrorism legislation where human rights scholars tend to treat 'the issue of security as a form of 'national security', rather than as security of the person, which the State has a duty to protect.'[138] The tension is exacerbated when *freedom from fear* is considered as a dimension of a right, which the State has a responsibility to protect.[139] Writings on terrorism and anti-terrorism legislations often neglect to mention the concept of freedom from fear. Recognizing the connection between the two, however, Williams notes:

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[135] *Delgado Paez v Columbia*, 12 July 1990, Communication No 195/1985, UN Doc. CCPR/C/39/D/195/1985 [5.5].
[136] Spigelman, n. 130, 566.
[137] J Waldron, 'Security and Liberty: The Imagery of Balance' (2003) 11 *Journal of Political Philosophy* 191, 198-199.
[138] Spigelman, n. 130, 566.
[139] *Ibid* (emphasis added).

'Terrorism is an attack on our most basic human rights. It can infringe our rights to life and personal security and our ability to live our lives *free of fear*.'[140]

Under the ACHPR the 'right to security of the person' as provided for in Article 6 has two components: individual security and national security.[141] The former has been approached by the African Commission from two different perspectives: public and private. According to the Commission, '[b]y public security, the law examines how the State protects the physical integrity of its citizens from abuse by official authorities, and by private security, the law examines how the State protects the physical integrity of its citizens from abuse by other citizens (third parties or non-state actors)'.[142]

Individual security under Article 6 of the ACHPR is associated with other rights such as those protected under Article 5 "the right to the respect of the dignity inherent in a human being" and can be seen as an expansion of such rights.[143] 'Dignity' according to the African Commission 'is the soul of the African human rights system … [and] consubstantial, intrinsic and inherent to the human person.' The Commission adds, 'when the individual loses his dignity, it is his human nature itself which is called into question, to the extent that it is likely to interrogate the validity of continuing to belong to human society … When dignity is lost, everything is lost. In short when dignity is violated, it is not worth the while to guarantee most of the other rights.'[144]

It is vital to note that international criminal law also places great importance on the violation of human dignity as well as the right to security in the context of speech acts. Jurisprudence at international criminal tribunals has acknowledged that speech acts may constitute persecution as a crime against humanity when they are committed as part of a widespread or systematic attack, if the hate speech involves the denial of a fundamental right and discriminates in fact.[145] When the hate speech targets a population based on ethnicity, or

[140] G Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (UNSW Press, Sydney, 2004) 27.
[141] Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudani,* 27 May 2009, para. 174.
[142] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (OUP, 2019) 200.
[143] Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudani,* 27 May 2009, para. 177. See also G Safari, 'State Responsibility and the Right to personal Security in the DRC: A Human Rights Law Perspective' (2014) 7 *African Journal of Legal Studies* 233-251.
[144] Communication 318/06, *Open Society Justice Initiative v Côte d'Ivoire*, 27 May 2016, para 139.
[145] M Badar and P Florijančič, 'Assessing Incitement to Hatred as a Crime Against Humanity of Persecution' (2020) 24 *The International Journal of Human Rights* 656-687. See also R Kapoor and S Aravindakshan, 'Hate

any other discriminatory grounds, it violates the right to respect for the human dignity of the members of the group, whereas in situations where the speech constitutes a call for violence against a population on such grounds, it violates the group members' right to security.[146] When *takfīr* rhetoric targets entire groups of people it threatens both their right to dignity as well as their right to security. In the context of international criminal law such accusations could furthermore even be considered direct and public incitement to genocide since they include an inherent call for the extermination of the targeted groups.

It is also worth noting that in her dissenting opinion in the recent case of *Gbagbo and Blé Goudé* before the International Criminal Court, Judge Carbuccia referred to the European Court of Human Rights in *Féret v. Belgium* to highlight that a politician's comments which constitute public incitement to racial hatred against outsiders, without requiring a call to this or that act of violence or another delinquent act, violated the dignity and security of the affected groups of people, posing a danger to social peace and the political stability of democratic states.[147]

In contrast to the ICCPR, the ACHPR[148] adopts a slightly different approach to limitations on freedom of expression. Article 9(2) of the Charter states that '[e]very individual shall have the right to express and disseminate his opinions within the law'.[149] This formulation of freedom of speech has raised concerns that it constitutes a 'claw-back clause', that is to say, that the term 'law' is interpreted as 'domestic law' thus enabling state parties to the Charter to simply deny their citizens the right of freedom of expression through domestic legislation.[150] However, the African Commission on Human and People's Rights has made it clear that, as a general principle, governments should avoid restricting rights, and take special care with regard to

Speech as Persecution: Tackling the Gordian Knot', (EJIL: Talk! 12 August 2020) https://www.ejiltalk.org/hate-speech-as-persecution-tackling-the-gordian-knot/

[146] *Prosecutor v. Ferdinand Nahimana et al*, Appeal Judgment, Case No. (ICTR-99-52-A), 28 November 2007, para. 986; *Prosecutor v. Vojislav Šešelj*, Appeal Judgment, Case No. (MICT-16-99-A), 11 April 2008, para. 134. Badar and Florijančič, n. 128.

[147] *Féret v Belgium*, App no. 15615/07 (ECtHR, 16 July 2009) para. 73, as quoted in *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11- 01/15-1263-AnxC, Dissenting Opinion Judge H. Carbuccia, 16 July 2019, para. 569.

[148] African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

[149] *Ibid* Article 9.

[150] See M Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments' (2003) 7 *The International Journal of Human Rights* 63, 65-66.

those rights protected by constitutional or international human rights law.[151] In other words, the reference to 'law' in Article 9 is a reference to 'international law'. The provision does not provide any specific derogation clause. Instead, the limitation mechanism within the Charter is a general one, covering multiple individual rights, and is contained within Article 27. It states that these rights shall be exercised with due regard to the rights of others, collective security, morality and common interest.[152]

Furthermore, states also have an obligation to prohibit incitement to terrorism under the UN Security Council (SC) Resolution 1624 of 2005. Already in 2001, SC Resolution 1373 in its preamble equalized incitement to terrorist acts with the acts themselves in their contradiction to the purposes and principles of the United Nations.[153] Building on this, Resolution 1624 stressed in its preamble the concern 'that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, undermines global stability and prosperity, and must be addressed urgently and proactively by the UN and all States'.[154] It also emphasized the need to take all necessary and appropriate measures to protect the right to life. In the first paragraph of its operational part, the resolution expressly called upon states to 'adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to… [p]rohibit by law incitement to commit a terrorist act or acts.'[155]

The Tunisian criminalisation of incitement to hatred and violence as well as accusations of *takfīr* is compatible with the ICCPR, and therefore also the lawful limitations on freedom of expression within the African Charter. During the *travaux préparatoires* of Article 20(2) of the ICCPR, the term 'hate propaganda' was preferred, as the drafters sought to prohibit incitement roughly comparable to Nazi-like propaganda.[156] When the term 'advocacy' was introduced during the drafting, some delegates maintained that it must be understood as 'systematic and persistent propaganda'[157] while others interpreted it as 'repeated and insistent expression'.[158]

[151] ACHPR, 101/93: Civil Liberties Organisation (in respect of the Nigerian Bar Association) / Nigeria ACHPR\A\101/93, para. 16, ACHPR, 102/93: Constitutional Rights Project, Nigeria ACHPR\A\102/93, paras. 57-58.
[152] Article 27 of the African Charter.
[153] UN Security Council Res 1373 (28 September 2001) [1](b).
[154] UN Security Council Res 1624 (14 September 2005), preamble, para. 4.
[155] *Ibid* para. [1](a).
[156] Ibid. 169.
[157] E/CN.4/SR.174, at 9 (Mr. Malik, Lebanon)
[158] A/C.3/SR.1079, para. 2.

The latter raises the question of whether a one-off statement could ever qualify as advocacy. The question may be answered in the affirmative, depending on the context.[159] Considering pronouncements of *takfīr*, despite potentially being one-off statements, such statements do not fall into an ideological or cultural vacuum, but rather inevitably merge with and contribute to the *Salafī-Jihādī*/*takfīri* ideology that has been propagated by a number of highly influential figures for decades, if not centuries, in the affected communities using classical propaganda techniques.[160] Such propaganda spread today by groups such as ISIS and al-Qaeda is not unlike Nazi propaganda, and can certainly be considered on par with it.[161]

The second draft of General Comment No. 34 also proposed that incitement 'refers to the need for the advocacy to be likely to trigger imminent acts of discrimination, hostility or violence against a specific individual or group.'[162] The UN Special Rapporteur on freedom of expression and the Camden Principles reflect a similar sentiment, stating that incitement needs to 'create' such an imminent risk'.[163] The risk need not, however, materialise into further harm, as incitement is an inchoate offence. *Takfīr* can provoke strong reactions in Muslim-majority countries, ranging from public media campaigns against the accused, to vigilante violence, and in some instances, criminal penalties where aspects of Islamic jurisprudence are enshrined in law, such as defamation or indecency, which can have a stifling effect on political expression even without proving apostasy.[164] Furthermore, *takfīr* directed at entire groups of people based on their implicit lack of religious belief can act as a driver of conflict, and even lead to crimes against humanity or genocide.[165]

4.1 The Right to Life

Article 6(1) of the ICCPR states that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.[166] In the drafting of the Covenant, it was understood that society owed a duty to the individual to protect their

[159] Temperman, n. 125, 169.
[160] See M Badar and P Florijančič, 'The Cognitive and Linguistic Implications of ISIS Propaganda: Proving the Crime of Direct and Public Incitement to Commit Genocide' in Predrag Dojčinović (ed.) *Propaganda and International Criminal Law: From Cognition to Criminality* (Routledge, 2019) 27, 28-20.
[161] *Ibid*.
[162] Temperman, n.125, 181.
[163] Camden Principles Art. 12(iii), UN Special Rapporteur on Freedom of Expression, *Report on Hate Speech and Incitement*, para. 44(c).
[164] See S Yadav, *Islamists and the State: Legitimacy and Institutions in Yemen and Lebanon* (London: I B Tauris, 2013).
[165] Badar and Florijančič, n. 160, 52.
[166] ICCPR, n. 132, Article 6(1).

right to life.[167] The Human Rights Committee has furthermore established that under Article 2 'the 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'.[168] General Comment No. 36 on the right to life makes it clear that the obligation of States parties to ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.[169] States parties may be in violation of Article 6 even if such threats and situations do not result in loss of life.[170]

The same approach was adopted by the African Commission in its General Comment No. 3 where an interpretation of the right to life was provided: 'The right to life should be interpreted broadly. The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties.'[171] The African Commission added: 'The right to life cannot be enjoyed fully by individuals whose lives are threatened. In the case of death threats this implies that the State must investigate and take all reasonable steps to protect the threatened individuals.'[172] In a few of its communications, the African Commission emphasised that this obligation exists 'even if the State or its agents are not the immediate cause of the violations.'[173]

This gives a clear mandate for the criminalisation of *takfīr* which has led to numerous murders in Muslim-majority states. Moreover, the right to life is not merely the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, but also their entitlement to enjoy a life with dignity.[174]

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[167] M Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987) 199 (Third Committee, 12th Session (1957), A/3764, section 112)
[168] General Comment No. 31, *The Nature of Legal Obligations Imposed on State Parties to the Covenant*, 29 March 2004, CCPR/C/74/CRP.4/Rev/6 (2004), para. 8.
[169] General Comment No. 36 (2018) on Art. 6 of the ICCPR on the Right to Life, CCPR/C/GC/36, 30 October 2018. para. 7.
[170] *Ibid*.
[171] General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights 4-18 November 2015, Banjul, Gambia, para. 41, https://www.achpr.org/legalinstruments/detail?id=10
[172] Ibid., para. 40.
[173] Communication 301/05, *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue officials) v Ethiopia*, 7 November 2011, para 130. Communication 292/04, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, 22 May 2008, para 83.
[174] General Comment No. 36, n. 169, para. 3.

4.2 The Right of Non-Discrimination

The African Commission has described the 'anti-discrimination principle' as contained in Article 2 ACHPR as 'essential to the spirit of the African Charter.'[175] Together with the principle of 'equality' found in Article 3 they mean that citizens should have the right to enjoy, with no distinction whatsoever, the rights guaranteed by the Charter and States have an 'immediate' duty to protect this right from discrimination.[176] In the context of securing the conditions for dignified life, the African Commission has emphasised the particular responsibility of States to protect the right to life of individuals or groups who are frequently targeted or particularly at risk, including on the discriminatory grounds listed in Article 2 and those highlighted in resolutions of the Commission.[177]

The ICCPR further proscribes incitement to discrimination, which can be understood as incitement to: any distinction, exclusion, restriction or preference based on discriminatory grounds which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[178] The 1981 UN Religious Tolerance Declaration defines religious discrimination as 'any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.'[179]

There are serious social and judicial ramifications for those *takfīr* is invoked against; being excommunicated from the religious community can come with formal sanctions.[180] For example, in Egypt, establishing an individual as an apostate negatively impacts on almost all their personal status rights and is 'in a way equal to death.'[181] It renders their marriage null and

[175] Communication 292/04, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, 2 May 2008, para. 78. See also Communication 294/04, *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, 3 April 2009, para. 91.
[176] Murray, n. 142, Article 2 ACHPR, 44-45; Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.
[177] General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), para. 11.
[178] ARTICLE 19, *Incitement Policy Brief*, at 19; UN Special Rapporteur, *Hate Speech*, *ibid*, para. 45(d) contains similar definition.
[179] UNGA, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, resolution 36/55 of 25 November 1981, art 2.
[180] Hartshorn and Yadav, n. 49, 972.
[181] Egyptian Court of Cassation, No. 20, Year 34, 30 Mar. 1966; Case No. 162, Year 26, 16 May 1995.

void, requires their separation from their spouse and precludes them from entering a new marriage.[182] An apostate is also excluded from inheritance, and all blood ties with his or her children are considered non-existent.[183] In the 1990s, several Islamist lawyers filed lawsuits against liberals using the so-called *hisba*, a ruling that allows any Muslim to sue another for beliefs that may harm society.

Roswitha Badry describes how open- and secular-minded intellectuals, university professors as well as journalists, writers, artists, bloggers, and feminists have been the main targets of accusations of apostasy, blasphemy, or unbelief over the past decades in a bid to silence those who dare to speak out against the politically motivated Islamist agenda and who dare to share ideas for a radical transformation of the socio-political system.[184] Badry's work can be characterised as the first step towards integrating the gender perspective into the research on *takfīr*. She argued that the contemporary practice of *takfīr* in the Arab world is not gender-neutral giving examples of three activist Muslim women from Jordan (Tūjan al-Faysal), Egypt (Nawāl al-Sa'dāwī) and Kuwait (Laylā al-'Uthmān) who have all had to face apostasy cases in their respective countries. In addition to the lawsuits against them, they were all exposed to attacks, intimidation and threats. These coercive strategies, in the words of Badry, can be identified as a method of 'psychological terrorism'.[185]

5. Potential Violation of the Principle of Legality by the Criminalisation of *Takfīr* and Incitement to Hatred and Loathing

An important criticism of the Tunisian Counter-Terrorism law has been made in relation to its imprecise definition of terrorism and terrorist-related acts, in potential violation of the principle of legality, that is, the obligation to limit the interventions of criminal justice process to those responding to acts or omissions which have been clearly prescribed in advance by law.[186] Article 19(3)(b) of the ICCPR allows for restrictions on the freedom of expression only when

[182] M Berger, 'Apostasy and Public Policy in Contemporary Egypt', (2003) 25 *Human Rights Quarterly* 720, 723-724.
[183] *Ibid*. This practice no longer exists. In 1996, a new law was introduced to regulate the use of *hisba* with regard to personal status matters. Article 1 of this law made it clear that it is the Public Prosecutor and no one else can initiate such procedures. See Law No. 3 (1996) Governing the Procedures of Actio Popularis in Family Matters.
[184] Badry, n. 8, 354.
[185] *Ibid* 367.
[186] B Broomhall, 'Article 22: Nullum Crimen Sine Lege', in Kai Ambos (ed.) *Rome Statute of the International Criminal Court: Article by Article Commentary*, (4th edn., Beck, hart, Nomos 2021) 1152.

in accordance with this principle, that is when they are *legally precise*.[187] The principle of legality has further been emphasised in the *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*, which state that '[no] one may be condemned for an act or omission which did not constitute a legally punishable offence under national or international law, as defined by *clear* and *precise* provisions in the law'.[188] While properly formulated incitement legislation can protect the goals of equality and freedom from fear, unqualified insult and hate speech laws are susceptible to abuse by governments, resulting in the stifling of unpopular speech.[189]

The International Commission of Jurists (ICJ) specifically highlighted the provisions on *takfīr* and incitement to hatred and loathing as among those which give rise to concerns pertaining to the precision and overbreadth of the Counter-Terrorism legislation. The law does not define the elements that would need to be proven to establish an act of *takfīr*, nor does it provide for a list of acts that might amount to it.[190] Likewise, 'incitement to hatred or loathing' is undefined and vague, raising similar concerns. According to the ICJ, it appears to be considerably broader than the 'advocacy of hatred' provision in Article 20(2) of the ICCPR, which refers instead to 'incitement to discrimination, hostility or violence'. The ICJ further expressed the fear that broadly defined offences such as glorification of and incitement to terrorism could result in the wrongful prosecution of journalists and whistle-blowers.[191]

However, considering the circumstances in which the prohibition of *takfīr* was drafted and the intentions of the drafters, a potential misuse of the legislation for prosecuting journalists and whistle-blowers would be a sign of politically driven persecutions rather than a reflection of an overly broad formulation of the law.[192] As mentioned above, the Special Rapporteur on

[187] Human Rights Committee, General Comment No. 34, Article 19 (Freedom of opinion and expression), 12 September 2011, CCPR/C/GC/34, paras. 11, 22-36, 48.
[188] African Commission on Human and Peoples' Rights: *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa,* adopted during the 56th Ordinary Session in Banjul, Gambia (21 April to 7 May 2015) General Principle K, 15, emphasis added.
[189] See Temperman, n. 125, 4.
[190] International Commission of Jurists, 'Tunisia's Law on Counter-Terrorism in light of international law and standards', 6 August 2015. Available at: https://www.icj.org/wp-content/uploads/2015/08/Tunisia-CT-position-paper-Advocacy-PP-2015-ENG-REV.pdf, 5.
[191] International Commission of Jurists, 'Achieving Justice for Gross Human Rights Violations in Tunisia Baseline Study', ICJ Global Redress and Accountability Initiative, published May 2018 Can be accessed at https://www.icj.org/wp-content/uploads/2018/05/Tunisia-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf, 6.
[192] The ongoing torture and persecution of journalist Julian Assange shows just how easy it is to disregard the rule of law and longstanding protections of freedom of the press even in notoriously democratic states, when powerful political interests drive the prosecution.

Freedom of Religion raised concerns over the lack of elaboration on and the potential interpretations of the phrase 'protector of religion' in relation to the State, however he recognized no such issue in relation to the constitutional prohibition of *takfīr* or incitement to hatred and violence. Furthermore, when deciding on the speech at hand, the Tunisian Courts are bound to also take into Article 31 of the Tunisian Constitution which guarantees that '[f]reedom of opinion, thought, expression, information and publication shall be guaranteed. These freedoms shall not be subject to prior censorship.' Furthermore Ordinance No. 115/2011 dated 2nd November 2015 related to the Freedom of the Press and Publication provides in Article 1 that freedom of expression is guaranteed, and that the ways to exercise it are determined according to the ICCPR provisions and other international instruments which Tunisia has ratified or acceded to. Such explicit reference allows Tunisian judges to rely on international and regional conventions and to adopt international human rights standards when evaluating speech related offences.[193]

It is also important to note that the Tunisian Counter-Terrorism law requires spreading fear or terror as an essential element of any terrorist act. While this has been seen as problematic since fear is a psychological, and evidently subjective, element that cannot be confined to terrorist crimes,[194] it nevertheless presents another hurdle for prosecution to overcome in its obligation to establish that a certain discourse was in fact aimed at terrorizing a population or parts thereof instead of merely expressing an opinion or providing, for example, political commentary or disclosing information in the public interest.

Nevertheless, insofar as similar criminalisation are considered for adoption in other Muslim majority states, the wording of potential legislations criminalizing *takfīr* or incitement of hatred and loathing among religious sects should include a specific reference to incitement to discrimination, hostility, or violence.

[193] Judge E El Milady and Judge K Shalakem, 'Freedom of Expression and Combating Incitement to Hatred in the Tunisian Legislation and Jurisprudence', Supreme Judicial Council, Ministry of Justice and Human Rights, Republic of Tunisia, Report submitted during an expert meeting on judicial decisions related to freedom of thought and expression organised by the Office of the United Nations High Commissioner for Human Rights and the Arab Centre for Legal and Judicial Research (Beirut, 2015), 6-7.
[194] Alzubairi, n. 106, 189.

6. Adjudicating *Takfīr* and Incitement to Hatred and Loathing before the Terrorism Circuit Court– a Reflection of a Just and Balanced Approach

The fact that the criminalisation of *takfīr* has not been exceeding its intended purpose in practice is best reflected in the case law of the Tunisian Terrorism Circuit Court. The judgments there show a proportionate and fair sentencing with regards to the proscribed conduct(s) taking into account the potential impact of the speech, the *mens rea* of the accused in relation to that impact, as well as personal circumstances of the accused. Below are the summaries of three relevant judgments which the authors were able to obtain despite not being in the public domain.

The first case relates to an individual who published comments on Facebook declaring the Tunisian government *kafīr* and the Tunisian State a system run by unbelievers who do not apply Sharia law.[195] He also expressed his desire for ISIS to replace the current rule without an election. The court established that the accused adopted the Salafīst thought and the Salafīst extremist ideology and that he had the free will, capacity and knowledge of the criminality of publicly expressing the comments in question when posting them online. The court further established that the accused possessed the knowledge that his remarks could have incited others to commit terrorist offences. The court therefore found all the material and mental elements of the crime of declaring *takfīr* to had been satisfied. The accused was further found guilty of glorifying and publicly praising a terrorist organisation, its ideology, opinions and aims. He was sentenced to 2 years imprisonment and a fine of 2000 dinar based on Art. 14(8) and Art. 31 of the anti-terrorism law.

Similarly, the second case[196] deals with an individual declaring the government and the ruling system *kafīr* and calling it 'the state of unbelief' on his Facebook account as well as glorifying terrorist organisations. The court took into consideration that the accused committed these acts willingly and with knowledge of their criminality and that what he said could have led to the incitement of others to commit a terrorist act or offence. On this basis it concluded that the elements of an accusation of *takfīr* were satisfied, and the perpetrator was sentenced to 1 year imprisonment and fined 1000 dinar.

[195] Judgment no. 21835, October 2016, Anti-Terrorism Circuit of the Court of First Instance (Criminal Division) (on file with the authors)
[196] Judgment no. 27695, 31 March 2017, Anti-Terrorism Circuit of the Court of First Instance (Criminal Division) (on file with the authors).

Both cases show that the judges considered the presence of knowledge on the part of the perpetrators that their words could incite terrorist attacks as a threshold to be passed before conviction for the crime. They also reveal proportionate sentences considering all relevant criminal behaviour involved and its potential impact. The third case, described below, furthermore reveals merely a suspended punishment as this was considered the more just option in the context at hand. In this and several other judgments, the judges used their discretion, provided to them under the Tunisian Criminal Procedure Code, to apply merely a suspended sentence despite all the elements of the crime under article 14(8) technically being established in the cases before them. For example, in Judgment no. 42104 from December 2019, the 5th Circuit of the Court of First Instance (Criminal Division) found the accused guilty of spreading hatred against the Shi'a population as well as glorifying a terrorist organisation. The individual posted on Facebook the following comments: (a) "I am *Da'eshy* (ISIS member) and it is permissible to kill the secularist before the Magian, the Jews and the Christians."; (b) "O *Rawafid* (Shi'a as the rejectors)[197] we come to you with slaughter".[198] It was established before the Court that the accused had adopted the *Salafī-Jihādīst* thought, that he was glorifying a terrorist organisation and that his statement against the Shi'a constituted an explicit and direct incitement of hatred and loathing among religious sects. The Court sentenced the accused to one year imprisonment for the above two crimes, however, due to his personal and social circumstances, namely his lack of education above primary school, and the fact that he had no previous criminal records, the sentence was suspended.[199]

This shows the flexibility in the application of the law and the tools available to the judges in preventing its overly broad and unfair application, while the acts rightly remain criminal and punishable with imprisonment due to the severe danger posed to the lives of others and society as a whole.

6. Conclusion

In light of SC Resolution 1624 as well as ICCPR Article 20(2), states have an obligation to tackle incitement to terrorist acts as well as advocacy of national, racial or religious hatred

[197] For implications of this expression see Badar and Florijančič, n. 160, 44-45.
[198] Judgment no. 42104, 6 December 2019, Anti-Terrorism Circuit of the Court of First Instance (Criminal Division) (on file with the authors).
[199] *Ibid*.

constituting incitement to discrimination, hostility, or violence. States furthermore have an obligation to protect fundamental human rights of its citizens, including the right to life and physical integrity, the right to security, freedom from fear, freedom from discrimination and the right to dignity. This paper demonstrates the dangers of the spread of religious hate propaganda in the form of *takfīri* ideology and the disastrous consequences of pronouncements of *takfīr*, affecting Muslim societies across the globe. Ranging from severe discrimination to murder in the name of Islam, the impacts on the enjoyment of fundamental human rights of the targeted individuals are severe. Furthermore, when *takfīri* rhetoric targets entire groups of people it threatens their right to dignity as well as their right to security and can even amount to direct and public incitement to genocide against them.

When considering the right approach to tackling the problem, however, other human rights concerns can arise, such as the potential infringement on freedom of expression, the disproportionality of the criminalization or the violation of the principle of legality. This paper has shown that the Tunisian approach through the Constitutional prohibition and Anti-Terrorism Law criminalization does not merit any significant criticism on any of these points, particularly considering the case law which demonstrates a just and balanced consideration of the context and potential impact of the utterances under consideration as well as the circumstances of the accused.

It is important to acknowledge, however, that the real test of a continuously balanced and just approach to the prosecution and adjudication of the crimes discussed in this article is yet to come when the Islamists are once again relegated to the opposition in Tunisia. We may not need to wait long for this to happen as we are currently witnessing a substantial loss of public support and political power by the Islamist Ennahda and a dramatic split within the party.[200]

[200] Following widespread protests against the ruling Ennahda party, the president of Tunisia ousted the government and dissolved the Parliament on July 25th 2021 assuming executive authority. On the 29th of September he named Professor Najla Bouden Romdhane as Prime Minister, a doctor of geology markedly distant from political parties, especially Ennahda.