

**Rule of Law
Developments**
in the Middle East
and North Africa

**تطورات
سيادة
القانون**

في منطقة الشرق الأوسط
وشمال إفريقيا

— Foreword

Speaking of rule of law developments in the Middle East and North Africa (MENA) region, Tunisia has seen fundamental changes, ever since President Kais Saied suspended the parliament and dismissed the government on 25 July, 2021, uprooting the separation of powers and the democracy the North African country had built since the so-called Arab Spring.

More than two years later, President Saied is still ruling single-handedly by decree. The new parliament, made up of individuals instead of parties, and only elected by a mere 11 percent of the population, is searching for its role. It operates under a new constitution that has been in place for just over a year, that was most likely written by the president himself.

Just a few weeks ago, I was in Tunis. Regularly travelling the region, not only because of our many projects, I wanted to find out for myself how Tunisia fares and how the 2022 Constitution has affected the country. For most international organisations, European ones especially, it has become very strenuous – if not impossible – to get official meetings, in particular with the judiciary. We therefore mainly met with scholars, professors, and civil society, who altogether painted a worrisome picture, especially when it comes to the rule of law.

One of the pressing legal issues we discussed was Decree Law 54, which President Saied signed in September 2022. The decree is meant to be a cybercrime law made to combat crimes related to information and communication systems. Individuals have already been prosecuted under the decree for publishing opinion pieces online. The decree provides for a prison sentence of five years, in addition to a high fine for anyone that publishes “false news, data, rumours” or “false documents” with the aim of violating the rights of others, “harming public security or national defence,” “spreading terror among the population,” or inciting “hate speech.” The sentence is doubled if the target of the publication is a “public official or equivalent.” The decree has been widely criticised for its vague formulation. Its necessity can also be questioned, considering the crimes arguably already fall under a different law (Decree Law 115 of 2011 on the Freedom of Press, Printing and Publishing).

However, this new law itself aligns with a general development in the region. In June 2023, the Council of Arab Ministers of Information approved a unified Arab strategy for dealing with social media platforms. In several countries of the region, such laws are being discussed. While this newsletter does not focus on the Tunisian Decree Law 54, it looks at the new cybercrime law of Jordan, passed just recently in August 2023. The question of

how to deal with hate speech and fake news online and on social media is an important and timely one – the challenge, however, is to find a balance with the freedom of opinion, speech, and press. The laws need to be specific in their definitions and regulations, so that this burden is not left to the authorities, to individual judges, or to prosecutors, who have a big enough responsibility as it is. In a liberal democratic state, per definition, public figures need to accept and entertain criticism (up to a certain degree), and it is commonplace for elected officials to be evaluated and commented on. It is therefore important that these cybercrime laws are not misused to silence the political opposition, media, and public opinion.

Further topics tackled in this newsletter are the International Criminal Court investigation into Darfur, cross-border aid to Syria in light of respective UN resolutions, and the memorandum of understanding signed between Tunisia and the European Commission to fight illegal migration – an understanding where concrete implementation remains to be seen. In September, Tunisia not only informed a group of EU Members of Parliament that they would not be allowed to enter the country one day prior to their arrival, but also formally asked the delegation, coming to visit to further discuss the implementation of said agreement, to postpone their visit. Lastly, we have once again included other developments you might have missed.

On behalf of the KAS, I would like to, once again, first and foremost thank TIMEP, Mai El-Sadany, Micha Tobia, and their team, for making this third edition possible and the many hours of work on it. I'd like to thank Valeska Heldt, leading the project at our office, for spending hours on research, communication, and editing, making it a fantastic team effort. Last but not least, I would also like to thank the many authors for their contributions to this newsletter, filling it with life. I hope the readers will agree, it is an insightful and very interesting read. Thank you all – and enjoy!

Philipp Bremer

*Director of the Konrad-Adenauer-Stiftung Rule of Law Programme
Middle East & North Africa*

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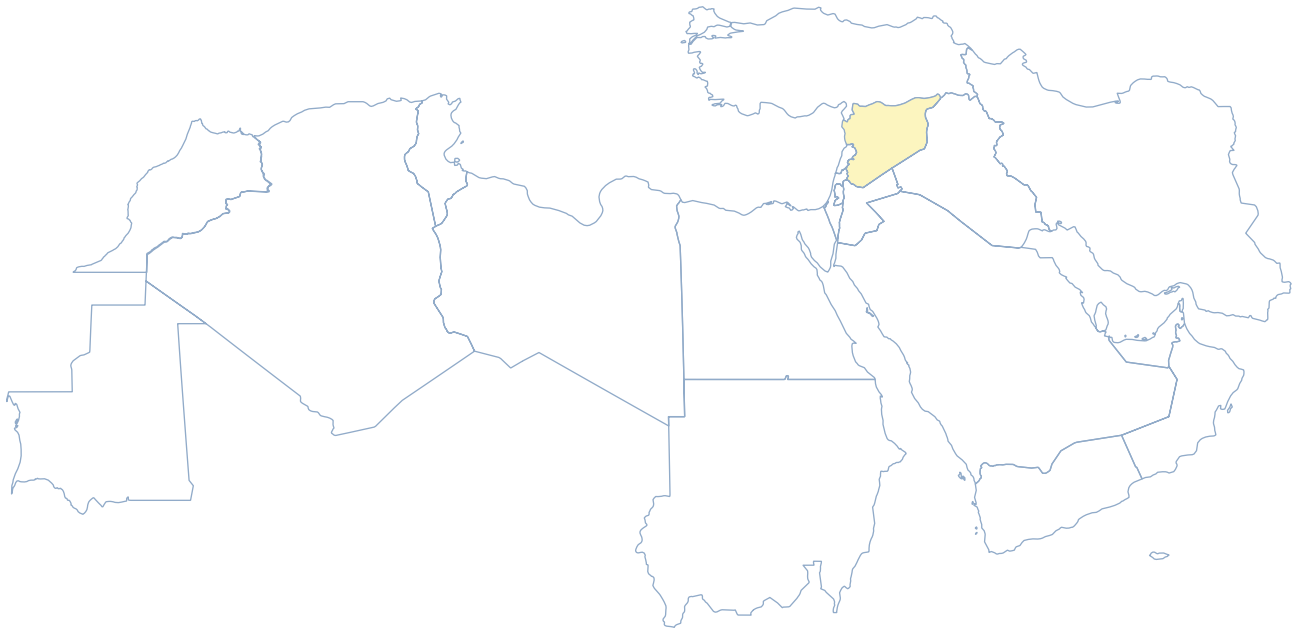
— Executive summary

Across the **Middle East and North Africa (MENA) region**, **rule of law** has been a key thread that has been present through the developments of this third quarter of 2023, from questions around the human rights impacts of a migrant deal signed between Tunisia and the European Union (EU) to debates around whether a newly-announced investigation by the International Criminal Court (ICC) into West Darfur will be capable of delivering justice.

The third issue of **Rule of Law Developments in the Middle East and North Africa** includes four feature pieces that engage with topics of humanitarian aid and access, migration, international justice, and digital rights.

Humanitarian aid and assistance that has been coordinated by the United Nations (UN) into **Syria** thus far has been reliant on a resolution from the UN Security Council as an alternative to Syrian regime approval. With time, however, Russia – as a key ally of the Syrian regime – has whittled away at the resolution, ultimately making this process untenable. In a responsive piece, *Jack Sproson* presents a legal argument offering a third way suggesting that in fact UN-coordinated aid need not require Syrian regime consent or a UNSC resolution. As **Tunisia** has become the first country of departure for migrants seeking to reach the EU, a new deal between the two entities has been signed and covers macro-economic stability, economy and trade, green energy transition, people-to-people contacts, and migration and mobility. *Andreina De Leo* unpacks the new memorandum of understanding, raising important concerns and questions about the content of the deal, its legal nature within EU treaty-making rules, and the human rights implications. With the conflict ongoing in **Sudan**, and no end in sight, *Mohamed Osman* pens a piece that interrogates the role of the ICC in the country, its recent announcement opening an investigation into West Darfur, and what this might mean for justice going forward. His article raises additional questions on unaddressed abuses occurring outside of the scope of the investigation's mandate. In August, **Jordan** became the latest MENA country to pass or update its cybercrime legislation. The law, which has been subject to extensive levels of public debate and scrutiny, has raised concern on its vaguely-constructed provisions and the likelihood that its articles will be used to silence forms of independent expression. In a joint piece, *Afnan Abu Yahia* and *Valeska Heldt* explain key elements of the legislation and related concerns.

The newsletter concludes with a Developments You May Have Missed section that quickly takes readers through some of the top rule of law news headlines from the quarter, ranging from a spike in anti-LGBTQ+ rhetoric and actions in Lebanon allowed to occur with impunity to an unprecedented sentence in Libya's Tripoli holding human traffickers to account for the first time.



SYRIA

The New Cross-Border Predicament in Syria

Jack Sproson

UN-coordinated cross-border aid into Syria has been dependent on a UNSC resolution, and its renewal has been controlled by the whims of the Syrian regime and its ally, Russia. Things do not need to be this way, as there is a legal basis for continued humanitarian access, independent of the UNSC, or regime consent in Syria.

As the Syrian conflict rolls on, humanitarian needs in northwest Syria [continue to intensify](#). But as needs have risen, so too has dissatisfaction with operations to alleviate them. This must be addressed if the future of aid delivery, and that of the [4.1 million people](#) living in the northwest, is to be secured.

In Syria, cross-border humanitarian aid previously took place under a UN Security Council (UNSC) [resolution](#) renewed every 12 months, which established unprecedented emergency international border crossings into opposition-held areas to combat the Syrian regime's [arbitrary denial of humanitarian aid](#). For a time, the resolution successfully supported aid delivery. From 2019, however, Russia began to [veto](#) crossings when political concessions for its regime allies were not granted, reducing what were once four border crossings to one (Bab al-Hawa, across the Turkish border), and what was once a 12-month renewal period to six – too short to reliably plan and resource humanitarian operations.

Then, on 6 February 2023, Turkey and northwest Syria suffered [two massive earthquakes](#), killing thousands of Syrians and [razing](#) routes once used to deliver aid. Syrians relied upon the UN more than ever in the weeks following the earthquake, but its response was [painfully slow](#), and unlike in Turkey, early search and rescue/recovery responses were left to heroic yet under-staffed civilian aid groups. Eventually, the UN Secretary General for Humanitarian Affairs, who had [apologised](#) for the UN's slow

response, negotiated regime consent for [two additional border crossings](#) from Turkey for a period of three months. This conclusion was previously [unthinkable](#) given the regime's prior decade of obstructing, targeting, and arbitrarily denying humanitarian access, but stoked fears that its willingness to consent would damage imperatives to keep the UNSC mandate alive. These fears were confirmed on 10 July, 2023, when Russia [vetoed](#) the last – and undoubtedly primary – UNSC-mandated border crossing at Bab al-Hawa.

On 13 July the regime [consented](#) to use the Bab al-Hawa border crossing for six months. This time, however, it prohibited interactions with key interlocutors and demanded a central role in operational coordination and oversight. This was quickly condemned as [unworkable](#) and thus in [contravention](#) of international humanitarian law, leading the UN to further bargain away some of the regime's most unrealistic demands. Since then, all three crossings have operated on the basis of consent, with varying re-authorisation timetables. This new 'consent model' raises [serious concerns](#) for non-governmental organisations responsible for actually delivering aid, chief among which are the threats to the sustainability of humanitarian operations by allowing the regime to control humanitarian access, refusing consent when its conditions are not met.

To some extent, this situation arises because the UN maintains that either UNSC authorisation or state consent is essential for cross-border aid into Syria. Thus, in the absence of a UNSC resolution, the UN will pursue the latter, even at great cost. But – at least as a matter of law – we did not need to be here, as cross-border aid into Syria is legal without UNSC or regime authorisation.

The legality of cross-border aid in Syria without UNSC or regime authorisation

Non-international armed conflicts between the regime and the opposition are governed by International Humanitarian Law, in particular by the Geneva Conventions of 1949 and their Second Additional Protocol of 1977 (APII). International armed conflicts (between states) are governed by their First Additional Protocol of 1977 (API).

Article 3(2), common to each of the Geneva Conventions (Common Article (CA) 3(2)), [states that](#) “an impartial humanitarian body ... may offer its services to the Parties to the conflict.” No reference is made to who may receive or consent to that offer, but “Parties” is plural, inferring that any party can consent to humanitarian access into areas under its control, notwithstanding the position of the state party. Article 18(2) (APII), however, is narrower, stipulating that [humanitarian relief operations](#) “shall be undertaken subject to the consent of the High Contracting Party concerned.”

Thus, under CA3(2), the state appears external to humanitarian assistance in territories outside its control, while under Article 18(2) APII, it takes a more central role. This much is borne in the language of CA3(2) as a whole; for example, it preliminarily states that non-international armed conflicts take place on the territory of a “High Contracting Party,” whilst provisions of subsequent articles are said to bind “each Party to the conflict.” Read holistically, the CA3's language therefore seems to anticipate the reality of multiple conflict parties, and distinguishes between the “High Contracting Party” (where definitions or prerogatives depend on its involvement) and more broadly formulated “Parties”. Given the latter's use vis-à-vis humanitarian assistance offers, the inference should be that humanitarian aid offers may be made to or accepted by any conflict party, including but not limited to the “High Contracting Party.” Were this not the case, the language specifying or differentiating “High Contracting Party” would

be rendered redundant, contrary to accepted treaty interpretation practice (see [here](#) at p.490, albeit this interprets APII, rather than CA3(2)). In other words, the grammatical interpretation of both provisions does not make state consent a necessary condition for cross-border aid deliveries.

Admittedly, this argument has its critics, with [some](#) suggesting that: “[i]t is difficult to interpret the silence of [CA3(2)] in this manner, particularly in view of the significant infringement of territorial sovereignty of the state party to a [non-international armed conflict] that humanitarian relief operations conducted in its territory without its consent would entail.” This view therefore suggests that reference to APII and broader principles of sovereignty support conclusions that state consent is always required. Admittedly, there will be “a more limited range of grounds for withholding consent where relief is intended for civilians in territory under the effective control of armed opposition groups.”

While potentially of more relevance in other conflicts, these conclusions face two hurdles in the Syrian case. First, despite having ratified each of the Geneva Conventions and API, Syria has not ratified APII, which is the body of law governing conflicts such as the Syrian one. Further, [contrary to CA3](#), there is no consensus that Article 18(2) of APII is binding under customary international law. The regime should therefore not be entitled to rely on APII’s stricter provisions to restrict humanitarian access to territories outside its control, which encompasses all border crossings currently in operation.

Second, cross-border aid in Syria – certainly as delivered by NGOs – without regime consent fulfils neither element necessary for a [‘prohibited intervention’](#) with a state’s sovereignty or territorial integrity. Turkey has always supported the border crossing at Bab al-Hawa, and opposition groups have, in general, accepted aid coming through it. No force has been used against the Syrian state to gain access to territories that it does not control. Furthermore, as cross-border aspects of the UN operations were – and still are – carried out exclusively by NGOs, they do not involve a state entity crossing an international border. NGOs are not subjects of, nor are they bound by, international law; accordingly, while they could be prohibited from crossing borders under domestic laws – which bind them – their doing so does not infringe international norms, such as state sovereignty. Indeed, it is for this reason that the International Court of Justice [has noted that](#) “the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.” In Syria, this conclusion is particularly apt, as it was drawn in circumstances in which humanitarian aid [was delivered at](#), rather than necessarily across, borders. This is precisely what has been happening in Syria for more than a decade, where UN agencies transport cargo to hubs in Turkey for Syrian trucks to collect and deliver across the Syrian border.

Conclusion

Although still looked at with scepticism by some, the conclusions drawn here are increasingly well rehearsed (see [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#)), and have been [repeatedly endorsed](#) by some of the most highly-qualified scholars and practitioners. Indeed, it was on this basis that, as the impending fate of the UNSC mandate became clear, [years of advocacy](#) attempted to get official recognition of the UN’s ability to continue

remotely programmed aid without UNSC or regime consent. Ultimately, it [staunchly maintains](#) that these requirements are necessary, and continues to support the ‘consent model’, which, however effective, is currently forcing it to reconcile the seemingly irreconcilable positions of the regime, and those forced to shoulder the responsibility and risks associated with actually delivering aid within its demands.

And so we find ourselves in a new ‘cross-border predicament’. Of course, many of the legal debates that got us here now occur in the background. Aid will – hopefully – flow, if imperfectly, and the political realities of the regime’s willingness to offer consent will make it increasingly impossible that the UN will adopt principled legal positions outright. Nonetheless, the UN must find a way to allay the major questions which remain for key stakeholders. NGOs and expert humanitarians must be listened to, and their views actioned, if the rapidly increasing distance between them and the UN is to shrink.

Jack Sproson is a British barrister operating a primarily international practice from Guernica 37 Chambers, a boutique specialist international law firm based in London, UK. Among many other things, he is actively engaged in a range of issues arising in the context of the Syrian conflict, with a particular specialism in relation to cross-border humanitarian aid operations.



TUNISIA

— The EU-Tunisia Memorandum of Understanding: A Blueprint for Cooperation on Migration?

Andreina De Leo

On 16 July, 2023, a memorandum of understanding – known as the “migrant deal” – was signed between the EU and Tunisia, at a time when the EU is trying to find ways to limit the arrival of irregular migrants into its territory. The memorandum, however, raises some concerns regarding its content, form, and human rights implications

This past year, Tunisia became the primary country of departure for migrants attempting to reach the European Union via [Italy](#) through the Central Mediterranean route. With a sharp [increase](#) of arrivals in the first few months of 2023, which further accelerated during the [summer](#), cooperation with Tunisia has turned into a key priority in the EU’s efforts to limit migration inflows.

On 16 July, 2023, after [complicated](#) negotiations, Olivér Várhelyi, the EU Commissioner for Neighbourhood and Enlargement, and Mounir Ben Rjiba, Secretary of State to the Minister of Foreign Affairs, Migration and Tunisians Abroad, signed a memorandum of understanding (MoU) on “a strategic and global partnership between the European Union and Tunisia,” published in the form of a [press release](#) on the European Commission’s website. President Ursula von der Leyen labelled the deal as a “[blueprint](#)” for future arrangements, reiterating the commission’s intention to work on similar agreements [with other countries](#). The MoU, however, in terms of its content, form, and the human rights concerns it raises, falls squarely within current trends characterising EU cooperation on migration with third countries.

The content of the agreement

Known as the “[migrant deal](#),” the MoU covers five areas of cooperation: macro-economic stability, economy and trade, green energy transition, people-to-people contacts, and migration and mobility. The EU agreed to [provide](#) €105 million to enhance Tunisia’s border control capabilities while facilitating entry to highly-skilled Tunisians, and €150 million in direct budgetary support to reduce the country’s [soaring inflation](#). It further foresees an extra €900 million in macro-economic support conditioned on Tunisia agreeing to sign an International Monetary Fund [bailout](#). In exchange, Tunisia committed to cooperate on the fight against the smuggling and trafficking of migrants, to carry out search and rescue operations within its maritime borders, and to readmit its own nationals irregularly present in the EU – an [obligation](#) already existent under customary international law. Much to Italy’s [disappointment](#), and unlike what happened in the case of [Turkey](#) in 2016, Tunisia refused to accept the return of non-Tunisian migrants who transited through the country to reach the EU, in line with the position it has occupied since the [onset](#) of the negotiations.

Overall, what was agreed on seems to be [all but new](#), seemingly reiterating [past commitments](#). As for funding, the EU had been providing support to Tunisia to strengthen its border management capabilities since [2015](#). More broadly, and despite its [flaws](#), the MoU embeds the current [carrot-and-stick](#) approach to EU cooperation with third countries, [systematically](#) using other external policies of interest to these nations, such as development assistance, trade and investments, and energy – coupled with promises of ([limited](#)) opportunities for legal mobility – to induce third countries to cooperate on containing migration flows.

The legal nature of the agreement

The MoU embeds the broader trend of [de-constitutionalisation](#) and [informalisation](#) of EU cooperation with third countries, which first appeared in the 2005 “Global Approach to Migration” and the 2011 “[Global Approach to Migration and Mobility](#)”, and substantially grew in the aftermath of the 2015 refugee crisis, with the [EU-Turkey Statement](#) and the “[Joint Way Forward on migration with Afghanistan](#)” being the most prominent examples, in addition to several [Mobility Partnerships](#). The common denominator among these informal arrangements consisted of the use of instruments outside the constitutional framework established for concluding international agreements, notably Article 218 on the [Treaty of the Functioning of the European Union](#) (TFEU), to agree on bilateral commitments that usually consist in the mobilisation of different EU policy areas to deliver on migration containment goals.

Recourse to informal arrangements can have its advantages, as they are capable of adapting quickly to new realities and allow for immediate implementation without requiring parliamentary ratification or authorisation procedures, as [highlighted](#) by the EU Court of Auditors. However, they [might](#) fall short of constitutional guarantees, as they do not follow standard EU treaty-making rules. EU treaties are silent as to how non-binding agreements should be negotiated and concluded, and thus often lack [democratic oversight](#), transparency, and legal certainty. They might also pose issues in terms of judicial review by the Court of Justice of the EU (CJEU), in accordance with [Article 263](#) of the TFEU.

In the [much-debated](#) judgement “[NF](#)”, the General Court – the jurisdiction of first instance of the CJEU – [refused](#) to assess the legality of the 2016 EU-Turkey Statement, which was published as a press release on the website of the European Council. Indeed,

the Court concluded at the time that the deal was one of member states acting in their capacity as heads of state and government, and not as part of the European Council as an EU institution, rendering the deal unattributable to the EU. The [Court](#) did not specifically refer to the legal nature of the agreement, despite all EU institutions stressing that the document was “not intended to produce legally binding effects nor constitute an agreement or a treaty” (para. 27), it being “merely ‘a political arrangement’” (para. 29).

The EU-Tunisia MoU, on the other hand, was signed by the European Commission alone, making it fully attributable to the EU. This means that it could be potentially challenged before the CJEU, if there is reason to believe that the content of the agreement renders it a legally-binding one, infringing on the procedure foreseen by the EU treaties, or if the competencies of the Council and the Parliament, the two other EU institutions usually involved in the conclusion of international agreements, were otherwise breached. In another [case](#), the CJEU indeed found that, while the treaties do not regulate the matter and thus Article 218 on the TFEU does not apply, the Commission should nonetheless seek prior approval of the Council before signing an MoU in the exercise of its competencies, pursuant to [Article 17 \(1\) of the Treaty on the European Union](#) (TEU), due to the Council’s “policy-making” powers provided by [Article 16](#) of the TEU. The Court, however, did not clarify whether the Commission should have likewise involved the European Parliament in light of its power to exercise “political control,” provided by [Article 14 TEU](#). With regard to the MoU with Tunisia, however, neither of the two institutions [seemed](#) to have been involved. Overall, it is apparent that the lack of clarity regarding the procedure to be followed and the actors to be involved when it comes to the conclusion of non-binding agreements by the EU is [problematic](#) from a rule of law perspective.

Concerns over protection of fundamental rights

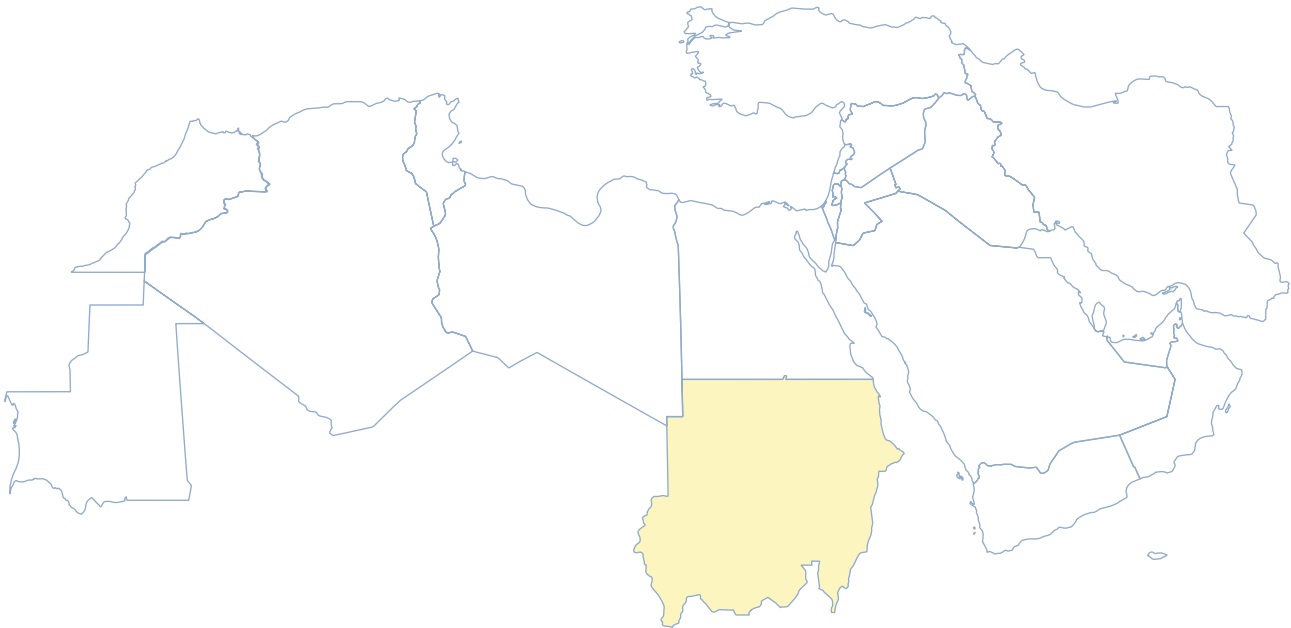
The EU-Tunisia MoU has been harshly criticised by both civil society [organisations](#) and different members of the [European Parliament](#) (MEPs) in light of the Tunisian authorities’ documented [abuses](#) and [hostilities](#) against migrants, amidst a political climate of broader [democratic crisis](#). While [vaguely](#) referring to “respect for human rights,” the MoU does not specify how the Commission intends to ensure compliance with fundamental rights. Concerns over the agreement led the [European Ombudsman](#) – a body of the EU that investigates instances of maladministration by EU institutions – to [ask](#) the EU’s executive arm whether it had conducted a human rights impact assessment before its conclusion, as well as if it intended to monitor its implementation, and if it envisaged the suspension of funding if human rights were not respected. This adds to the growing discontent over the EU’s prioritisation of securing its borders over ensuring the protection of fundamental rights of migrants, through the [externalisation](#) of border controls to third countries with poor human rights records and authoritarian governments, such as Libya, Turkey, Morocco, Egypt, and Sudan, among others.

Looking ahead

In an unprecedented move, Tunisia [denied](#) entry to a group of MEPs who were due to visit the country on official duty on 14 September. While no official explanation was given, the move was [seen](#) as a reaction for speaking out against the agreement. Despite this, and the fact that there is still a lack of clarity as to how compliance with fundamental rights will be guaranteed, the Commission [announced](#) that the first tranche of EU

funding would be released by the end of September. However, Tunisia [declared](#) to have [rejected](#) the money precisely over the EU's excessive focus on migration containment, although Várhelyi [stated](#) that the refusal related to budget support is unrelated to the MoU. These episodes exemplify the [paradox](#) of externalisation, with the EU trying to shield itself from the risk of [instrumentalisation](#) of migration by third countries on one hand, and making itself dependent upon these actors' willingness to contain migratory flows, and thus vulnerable to [forms of repercussion and bad faith tactics](#), on the other. Similar deals, posing similar risks, are currently [envisaged](#) with Egypt and Morocco. Moving forward, the EU should instead make efforts to create partnerships with third countries based on genuine mutually-shared interests, restoring [credibility](#) in its international relations which should be based on support for its founding [values](#): democracy, human rights, and the rule of law.

Andreina De Leo: Early Stage Researcher (ESR) within the [LIMES](#) doctoral programme's project «EU's Shifting Borders - Scrutinizing Externalization of Migration Management and International Protection Responsibilities». She is based at the Department of International and European Law of the Faculty of Law of the University of Maastricht, in the Netherlands. The project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 847596.



SUDAN

New International Criminal Court Probe in Recent Attacks in Sudan's Darfur

Mohamed Osman

The International Criminal Court decided to open an investigation into atrocities that have been committed in West Darfur since conflict in Sudan erupted in April 2023. The investigation is limited to events in Darfur, relying on the existing United Nations Security Council referral of 2005. There is, however, little to suggest that enforcement would be easier or more effective this time around.

On 13 July, International Criminal Court (ICC) Prosecutor Karim Khan [announced](#) his office's latest investigation into recent attacks in Darfur, amidst the context of the ongoing [conflict in Sudan](#) that began on 15 April, 2023. The announcement of a new probe, whilst in its early stages, is a significant step towards accountability – especially amidst a muted international response to abuses taking place in the region since the beginning of this latest episode of conflict. “[Our mandate is] ongoing with respect to crimes within our jurisdiction, the crimes of genocide, crimes against humanity, and war crimes; and any individual who is found to be committing those crimes within our jurisdiction will be investigated,” Khan said.

Darfur has been the site of atrocities that span decades. Conflict broke out in 2003 between Sudan's central government and Darfuri rebel groups, who took up arms in response to their [marginalisation](#) in the country. Omar al-Bashir, Sudan's leader who was deposed in 2019, organised [a campaign](#) that heavily relied on mobilising tribal Arab communities to support his war. Government forces and Arab militias clashed with rebels, but also systematically targeted non-Arab communities, groups from which rebels drew their cadres, and manipulated [historical ethnic divisions](#) in the region. Central to the government's campaign was the mobilisation of the Janjaweed, armed fighters stemming from Arab groups.

The results of these attacks were horrific atrocities that claimed the lives of [nearly 400,000 people](#). This death toll generated regional and international attention, which later motivated the decision of the UN Security Council (UNSC) to refer the case to the ICC in 2005. The referral, based on [Resolution 1593](#) adopted on 31 March, 2005, allowed the ICC to “exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Darfur, Sudan, from 1 July, 2002 onwards.”

Importantly, the decision to refer the situation to the ICC was brought under [Chapter VII](#) of the United Nations Charter, which allows the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.” As a result, the ICC issued arrest [warrants](#) over the years against five individuals, including former President Bashir, for found evidence of crimes against humanity, genocide, and war crimes. On 9 June, 2021, the ICC [announced](#) that former Janjaweed leader Ali Mohamed Ali – known as Kosheib – had surrendered himself to the court. Kosheib’s trial started on 5 April, 2022, where he faced [31 counts](#) of war crimes and crimes against humanity.

When the Rapid Support Forces (RSF) and the Sudanese Armed Forces (SAF) started fighting in Khartoum on 15 April, 2023, attention quickly moved to Darfur, as observers feared the worst given the atrocities committed there two decades prior. West Darfur in particular has been the [epicentre](#) of grave crimes committed by the RSF and Arab militias in their targeting of non-Arab communities, notably crimes against the ethnic Massalit community, one of the main ethnic non-Arab groups in the region. Since the end of April 2023, thousands have reportedly been killed in West Darfur, and attackers have also targeted displaced civilians, setting their [settlements](#) ablaze. Of the nearly [2 million people](#) who have been displaced in Sudan since the conflict started, over 280,000 have been displaced within West Darfur alone according to [the United Nations](#), and about 150,000 have [fled](#) to Chad.

The most recent investigation opened by the ICC follows these troubling reports from West Darfur. In line with the existing UNSC referral limiting the investigation to events in Darfur from April 2023, crimes committed in other cities, like Khartoum, fall out of the ICC’s remit. A recurring challenge for ICC engagement in Sudan has been the issue of cooperation of local authorities. For instance, Bashir flat-out [rejected](#) the ICC’s jurisdiction and arrest warrants issued against him and two of his associates in 2008. Indeed, Article [86](#) of the Rome Statute compels state parties to cooperate in investigating and prosecuting crimes within the jurisdiction of the ICC. Additionally, the UNSC resolution that referred the Darfur case to the court underscores the need for cooperation from domestic actors.

Though Sudan became a signatory to the Rome Statute in 2000 – the treaty that created the ICC – it did not ratify it. The former Sudanese transitional government, which was [established](#) following Bashir’s ouster in 2019, agreed to enhance cooperation with The Hague. A subsequent peace agreement for Darfur signed in 2020 also explicitly provided ground for cooperation with the ICC as part of its justice matrix. In January 2021, ICC prosecutor Khan visited Khartoum and [signed a memorandum of understanding](#) to bolster cooperation with Sudanese authorities. In August 2021, the transitional government [announced](#) it would ratify the Rome Statute, but the military [coup](#) of 25 October, 2021, altered the state’s priorities, and the country has still yet to ratify it.

Progress from Sudan’s side was reportedly slow and inadequate. At that time, the former transitional authorities also contemplated different modalities on cooperation with the ICC on existing cases. On 16 June, 2020, the Sudanese attorney general [reaffirmed](#)

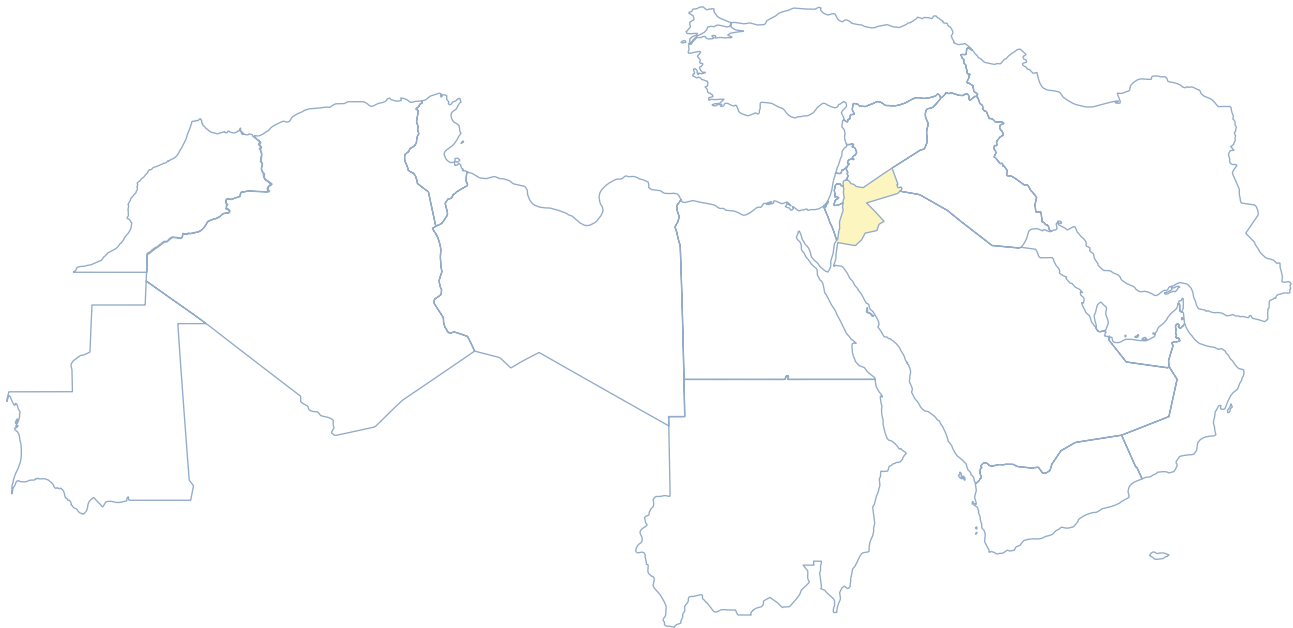
the need for cooperation with the ICC, but also indicated it might be necessary for proceedings to be [held](#) in Sudan. The option provided here, despite subsequent concrete steps failing to be actualised, raised questions on existing challenges for Sudan's national prosecutorial and judicial system to ensure effective proceedings or uphold fair trials. For one, Sudanese laws did not, and still do not, provide command responsibility, a key principle that allows the judiciary to hold commanders liable for crimes committed, and not solely the direct perpetrators who were following orders of their superiors. Many crucial standards were also missing, including on witness protection. Moreover, genocide, war crimes, and crimes against humanity, while included in the [1991 Criminal Act](#) (amended in 2009), have inadequate definitions: for example, the crime of genocide is more [narrowly](#) defined than under international law, and the war crimes of inhumane treatment, sexual violence, denial of fair trial, and sexual slavery, are either absent or incomplete.

Following the [military coup](#) in October 2021, the window of opportunity to progress on justice was squandered. Khan flew again to Khartoum in August 2022, almost a year after the coup took place, and [this time](#) visited Darfur, meeting with displaced communities, and signing a memorandum of understanding to facilitate further cooperation on the Kosheib trial with coup leaders, who reiterated their commitment to cooperate with the prosecutor.

Again, commitments from Sudanese leaders did not result in any real progress. In January 2023, Khan [addressed](#) the UNSC, stating that Sudan is not meeting the minimum requirements for cooperation, and that Sudanese authorities were restricting key access to documents and witnesses, while ignoring requests for assistance and approval.

While the new investigations are still empowered by the existing UNSC referral under Chapter VII, there is little to suggest that enforcement would be easier this time around. There will be a crucial need to have more regional and international support for the efforts of the ICC, including by providing much-needed resources, but also the political support to push for better cooperation for the investigation's potential outcomes. The ICC will be operating again in a hostile environment, this time with the world that once watched Darfur with eagle eyes disappointingly doing very little to address the gravity of the current situation.

Mohamed Osman is a Nonresident Fellow at TIMEP focusing on governance, accountability, and justice in Sudan. He has been a Researcher in Human Rights Watch's Africa Division since 2018.



JORDAN

Jordan's New Cybercrime Law Passes Despite Freedom Concerns

Afnan Abu Yahia and Valeska Heldt

In record time of just under a month, Jordan passed a new cybercrime law in August 2023, reawakening widespread public criticism with regards to its impact on freedom of expression and how the law's provisions could be used by authorities to counter dissenting voices.

In August 2023, King Abdullah II of Jordan [approved](#) a substantial revision to the country's near-decade old legislation on cybercrime, after the lower house of Parliament and Senate [passed](#) the new legislation with minor amendments, despite public opposition. During a parliamentary debate in July, Jordanian Prime Minister Bisher Kahswaneh [maintained](#) that the "government's proposals do not infringe upon the constitutional equilibrium. They establish the balance of rights as stipulated in this legislation.» The cybercrime law would, in fact, uphold the right of expression. Hundreds of Jordanians had previously [taken part](#) in marches in July, denouncing the new law and calling on the King to reject ratification. On the regional level, 14 digital rights organisations had [published](#) a joint statement urging the government to withdraw the proposed bill, expressing concern that it would "further undermine free speech online, threaten internet users' right to anonymity, and introduce new authority to control social media that would pave the way for an alarming surge in online censorship." The [US State Department](#) spokesperson as well as the [UN High Commissioner](#) for Human Rights also criticised the legislation, stating that the law lacked a definition of certain prohibited conduct, and failed to comply with requirements of legality, legitimate aim, necessity, and proportionality of restrictions on the right to freedom of expression.

Cybersecurity in the Arab world

Jordan has been proactive in regulating cybersecurity and cybercrime in the Arab world. Recognising the growing and changing digital landscape, as well as the resulting increasingly sophisticated cyber threats, Jordan's National Cyber Security Strategy 2018–2023 (NCSS) declared cyber security as a "[top priority](#) of National Security Threats." The strategy included "measures against the deployment of 'fake news'" within its scope of cyber security and announced legislative reform "to ensure that an effective balance is maintained between security and privacy." Part of the action plan was also to "[influence](#) and shape international and regional policies related to cyber security."

On behalf of the Council of Arab Ministers of Information, Jordan developed a unified strategy for interaction with social media platforms, which was [unanimously endorsed](#) by the council in June 2023. The strategy is a non-binding preparatory act to frame the work of the "technical team," who will then draft the "Arab Convention" on the topic. Jordan is also slated to lead this "technical team." The strategy – the official text of which has not been published yet – reportedly "underscores the need to [shield platforms](#) and users from hate speech, harmful content, and criminal activities in the digital space."

Shortly after, the Jordanian Parliament was summoned by [a royal decree](#) to convene an extraordinary session on 16 July, 2023, with the task to review the government's cybercrime bill, among other things. Less than a month later, on 12 August, the King approved of the bill, which came into effect in mid-September. The [swift](#) passage of legislation raised concerns about transparency and participation, as neither a broad public debate, nor [dialogue](#) with civil society organisations, had taken place.

This may have been motivated by previous attempts to amend the original 2015 legislation. Indeed, the government had already proposed amendments to the law in 2017, with the announcement at the time sparking widespread criticism, and ultimately leading the government to withdraw the proposed amendments. According to a ministry spokesperson in 2018, the legislation would only be resubmitted after [engaging](#) with civil society representatives and experts. One can only speculate on the reasons why this promise was not kept for the 2023 law. Over the past few years, Jordan has been criticised for increasingly restrictive laws and public policies – Freedom House categorised it as a "[non-free](#)" country in its 2023 evaluation of political rights and civil liberties. Jordan would have surely benefitted from a public engagement with cybersecurity experts and civil society, to demonstrate transparency and good governance.

On the 2023 Cybercrime Law

The new cybercrime law, or [Law \(17\)](#) of 2023, was passed as an amendment to the Information Systems and Cyber Crime [Law No. 27](#) of 2015, which was later repealed as per Article 40 of the new law. The 2023 law consists of 41 articles, compared to the 17 in the 2015 version.

Articles 14–20 in the 2023 law carry a punishment of up to three years imprisonment (Article 17) or a fine of up to 50,000 JOD (approximately \$70,000 in Article 20) for content deemed to "expose public morals" (Article 14), "stir up strife" (Article 17), "insult religion" (Article 17), constitute "character assassination" (Article 16), "calls for or justification of violence" (Article 17), "false news" (Article 15), defamation (Article 20), or hate speech (Article 17).

Such formulations restrict the expression of opinions online and blatantly lack a necessary definition, thereby failing human rights standards. [Article 19](#) of the International Covenant on Civil and Political Rights, to which Jordan is a state party, as well as [Article 15](#) of the Jordanian Constitution, guarantee the freedom of opinion and expression for everyone in speech, writing, or other forms of expression. According to the [UN Human Rights Committee](#), a restricting norm must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.” Even if some of the terms may be used and somewhat be more defined in other laws, without a precise definition of the punishable act in the 2023 law, and with such severe penalties, one potential consequence is that the general public refrains from expressing their opinion, even if this is not intended by the legislator. This is especially problematic in the case of [Article 15](#) of the 2023 law, that criminalises sending or resending “fake news targeting national security and community peace”. If the crime is directed at a state authority, it will be prosecuted “without the need to file a complaint or claim a personal right.” Any critic of public authorities could therefore be automatically charged and convicted if the content is deemed to be fake.

Article 33 in of the 2023 cybercrime law [allows](#) for a public prosecutor or court to make websites, social media platforms, or people in charge of public online accounts “[remove](#), block, stop, disable, register or intercept the data path or [...] content, or prevent access to it, or temporarily ban the user or publisher [...].” The provision effectively allows for the judiciary to block or control social media accounts without clarifying the legal procedure necessary to impose these sanctions. Jordan already [bans](#) around 300 websites, social media platforms, and applications. It recently [blocked](#) the widely popular satirical news website Al-Hudood (“Boundaries” in English), and [banned](#) TikTok in December 2022, after footage of protests was spread on the platform, stating that TikTok “failed to address posts inciting violence and chaos,” according to [Jordanian authorities](#).

Impact on investments and e-commerce

Banning social media platforms is also expected to have an economic impact on [6.61 million Jordanian users](#), accounting for 58.4 percent of the total population. Such platforms are widely used by influencers, small business owners, and journalists for a living. Deliberate internet outages around the world [cost](#) the global economy \$24.67 billion in 2021. Economic experts highlighted that the law does not support the kingdom’s economic ambitions to achieve a modern and advanced business environment, or to attract foreign investments, with Jordan’s unemployment rate currently standing at 22.6 percent of the total population, according to [SMEX](#).

For example, Article 35 of the 2023 law considers the IP address as “a means of proof before the judicial authorities,” even though it is not associated with a person, but with a device. As this hinders the work of technological companies and complicates means to protect the confidentiality of data, Jordan Open Society Association [warned](#) of the law’s negative impact on e-commerce and asked to amend at least six articles (namely, [Articles](#) 2, 3B, 6, 8A, 11, and 12) that harm developing the information technology sector and digital entrepreneurship.

Four activists and journalists were arrested one day after the new bill was approved, though on the basis of the 2015 law. [Ahmed Hasan al-Zoubi](#), a journalist and media owner, received a sentence of a year in prison for allegedly “inciting sectarian and racial

strife and inciting conflict between the sectors of the nation.” In December 2022, during the strike of truck drivers in the Ma’an Governorate protesting the rise in fuel prices, al-Zoubi had [criticised](#) the state handling of the protests in a post on Facebook. The same protests led to the TikTok ban.

An increasingly restrictive environment for online expression and activity can be observed across the Middle East and North Africa. Tunisia’s President Kais Saied issued the highly criticised [Decree-Law 54](#) in 2022; a court in Lebanon [sentenced](#) journalist Dima Sadek to jail for having criticised a political figure on Twitter; and a [new draft cybercrime law](#) has been reintroduced to the parliament in Iraq. Although human rights law generally allows for restrictions of the freedom of expression under specific [circumstances](#), the principle of legality requires the restrictive law to bear clear and precise definitions, as well as proportionate sanctions. So long as these criteria are not met, the laws effectively prevent individuals from freely expressing themselves online, sharing opinions and information, or else they will face severe sanctions. In Jordan, the 2023 law ultimately also tarnishes the country’s vision towards a more [progressive](#) and [equal](#) state.

Afnan Abu Yahia is a Palestinian-Jordanian journalist and researcher, mainly interested in covering civil, political and digital rights issues.

Valeska Heldt is a lawyer by training, currently working as a Research Fellow at the Konrad-Adenauer-Stiftung (KAS) Rule of Law Programme for the Middle East & North Africa based in Beirut, Lebanon.

— Developments You May Have Missed...

- The African Court on Human and Peoples' Rights [has ordered](#) the government of **Tunisia** to allow the country's detained political prisoners access to doctors and to their lawyers; to inform those detained, their family members, and their legal representatives of the reasons for their arrest; and to "provide them with adequate information and facts" in relation to their arrests. The case was filed on behalf of former speaker of the parliament Rached Ghannouchi, opposition figure Said Ferjani, political party leader Ghazi Chaouachi, and former Minister of Justice Nouredine Bhiri.
- In an unprecedented ruling, a Tripoli court [has sentenced](#) one person to life in prison and two others to twenty years for their involvement in a human trafficking network. Observers [have described](#) the judgement as unprecedented, as it is believed to be the first documented time that individuals involved in smuggling networks in the country have faced judicial ruling. Those involved in human trafficking often enjoy the protection of powerful armed groups in **Libya**.
- The trial of a former CEO and former chairman of a Swedish oil firm, once called Lundin Oil, [has begun](#) in Sweden and is set to continue through early 2026. The men are accused of complicity in war crimes in **Sudan** between 1999 and 2003 for asking the government in Khartoum to secure a potential oil field in South Sudan, knowing that doing so would occur by force and in violation of international humanitarian law.
- France announced the beginning of a [trial](#) in May 2024, in which three officials from **Syria** will stand trial for charges including involvement in crimes against humanity and war crimes, for the death of two Syrian-French nationals. The court's jurisdiction is based on the dual nationality of the deceased, so that the principle of universal jurisdiction did not need to be applied.
- In July, **Saudi Arabia's** counterterrorism court [sentenced](#) 54 year old teacher Muhammad al-Ghamdi to death in relation to his exercise of free expression online on X (formerly known as Twitter) and YouTube. Al-Ghamdi was denied access to a lawyer for almost one year and was held in solitary confinement for four months. According to Human Rights Watch, Al-Ghamdi's brother is a high-profile government critic living in exile, and accordingly, the incident [has raised concerns](#) that this targeting may have taken place as part of a larger trend of transnational repression.
- Though **Kuwait** paused executions for five years beginning in 2017, the country [has now executed](#) a dozen people in less than one year, including most recently, five executions in the month of July. One of the executions involves a drug-related offence; and relatedly, Amnesty International notes that international law prohibits the use of the death penalty [in cases of this type](#). The leading civil society organisation also points to a broader trend involving the use of the death penalty in some Gulf countries,

noting: “Saudi Arabia has executed over 50 people so far in 2023, including for drug-related offences. Bahrain resumed executions in 2017 after halting them for over six years and has executed six people since the resumption.”

- As part of the **United Arab Emirates** (UAE)’s efforts to fight corporate crimes and corruption, the country announced [plans](#) to establish federal prosecution entities specialised in prosecuting money laundering and economic crimes.
- The UN Security Council in September voted to renew the mandate of the United Nations Investigative Team to Promote Accountability for Crimes Committed by ISIS ([UNITAD](#)) – based in **Iraq** – only until September 2024, sparking concerns of over 40 organisations working on the Yazidi genocide. [Survivors](#) have repeatedly stressed that UNITAD’s work is crucial for the future prosecution of international crimes, and that there is no plan or strategy in place to move forward without its expertise.
- In September, **Iraq**’s Federal Supreme Court [annulled](#) the law ratifying a 2012 agreement between Iraq and **Kuwait** regulating maritime navigation into the Khor Abdullah waterway, Iraq’s only waterway into the Gulf. According to the court, the deal was improperly ratified by a simple majority, rather than a two-thirds majority. The ruling [raises](#) a number of serious concerns regarding resource management in the region. The dispute is now expected to be taken to the International Tribunal for the Law of the Sea.
- In **Lebanon**, nine MPs presented a [bill](#) to Parliament aiming at abolishing Article 534 of the penal code, which criminalises “relations against nature.” This was seen by some as an [attempt](#) to impose their liberal views in violation of the Constitution. Comments by Hezbollah leader Hassan Nasrallah [have also contributed](#) to a spike in anti-LGBTQ+ rhetoric and actions. In late August, Christian militant group Jnoud al-Rab (‘Soldiers of God’) brutally [attacked](#) an LGBTQ+ friendly bar in Beirut, and in late September, assailants [surrounded demonstrators](#) in the Freedoms March, for “promoting homosexuality.”

Additional Rule of Law Reading from KAS Rule of Law Programme MENA and TIMEP:

- [Torture in Syria on the Docket of the International Court of Justice](#), TIMEP.

Disclaimer: The information and views set out in this publication are those of the authors and do not necessarily reflect the views of the Konrad-Adenauer Stiftung or its Regional Rule of Law Programme Middle East & North Africa.

Newsletter editors:

- Micha Tobia, Editorial Manager at TIMEP.
- Valeska Heldt, Research Fellow at the KAS MENA Rule of Law Programme.

Konrad-Adenauer-Stiftung e.V.

Philipp Bremer, Director

Rule of Law Programme Middle
East & North Africa

European and International
Cooperation

Konrad-Adenauer-Stiftung e.V.
23, Benoît-Barakat-Street
Jabre-Building, 5th floor
Badaro – Beirut
Lebanon

Tel: + 961(1)385094
or + 961(1)395094

Web: <http://www.kas.de/rspno>

**The Tahrir Institute for Middle
East Policy**

1717 K Street NW Ste 900,
Washington, DC 20006

Contact: info@timep.org

Web: <http://www.timep.org>



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