

**Alternative report by ACAT and Freedom Without Borders  
on torture and cruel, inhuman or degrading  
treatment or punishment in Tunisia**

**Submitted to the Committee against Torture during the review of Tunisia's third  
periodic review  
57<sup>th</sup> session, 18 April - 13 May 2016**

**ACAT.** The *Action des chrétiens pour l'abolition de la torture* (Action by Christians for the Abolition of Torture, or ACAT) is a Paris-based Christian NGO for the defence of human rights that was founded in 1974 and has been recognised as being of public use. Basing its action on international law and acting for the benefit of all, without prejudice to ethnicity, ideology or religion, ACAT-France fights against torture and for the abolition of the death penalty, the protection of victims and in defence of the right to asylum, drawing on a network of almost 39,000 members and donors. In particular, it plays a supervisory role with regard to action taken by responsive institutions such as the police, the gendarmerie, the judicial system or the prison administration system. This role relies on affidavits and in-depth research. In 2015, ACAT-France conducted an inquiry into the use of force by law enforcement. ACAT-France also acts to promote the right to asylum, and has been providing asylum seekers with legal aid since 1998, acting within associations and collectives to fight for this fundamental freedom. Based on the information it collects, ACAT-France leads educational and awareness-building initiatives, and runs campaigns supported by members and sympathisers.

[www.acatfrance.fr](http://www.acatfrance.fr)

**Freedom without Borders (FWB)** is an NGO for the defence of human rights founded in Tunisia in 2014. It fights to defend the fundamental rights of individuals and to promote the rule of law and the supremacy of international law. FWB fights against impunity, torture and other serious violations of human rights by documenting cases in which these rights have been breached, and by providing victims with legal aid. In doing so, the association contributes to promoting a culture of human rights and non-violence.

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## **GLOSSARY**

**ACAT:** Action by Christians for the Abolition of Torture

**AISPP:** International Association for the Support of Political Prisoners

**NCA:** National Constituent Assembly

**CAT:** The United Nations Committee against Torture

**CC:** Criminal Code

**CCP:** Code of Criminal Procedure

**PRD:** Prisons and Rehabilitation Department

**FWB:** Freedom Without Borders

**IVD:** Truth and Dignity Commission

**EJ:** Enforcement Judge

**OCTT:** Organization Against Torture in Tunisia

**CFI:** Court of First Instance

## 1- An inadequate definition of torture (Articles 1 and 4)

### List of issues in relation to the third periodic report of Tunisia § 1 and 2

*Please indicate what measures have been taken to correct the apparent incompatibility of article 23 of the Constitution, which defines torture as a crime that cannot be time-barred, with the provisions of the Code of Criminal Procedure, which prescribes a 15-year time-bar for crimes of torture.*

*Please say whether the State party envisages the retroactive application of article 101bis of the Criminal Code, in accordance with its Constitution, in order to provide a sound legal basis for criminalizing crimes of torture committed before 2011.*

*With regard to paragraphs 16 and 60 of the State party's additional updated report (CAT/C/TUN/3/Add.1), on the new article 101 bis of the Criminal Code, please indicate what measures have been taken to bring the definition of torture in this article into line with the one in the Convention. More particularly, please explain why punishment is no longer listed as one of the purposes for which torture is prohibited. Please also indicate what measures have been taken to remove the solitary reference to racial discrimination from the State party's definition of torture.*

### 1-1 Non-retroactivity of Article 101bis of the Criminal Code

1. Prior to the adoption of Law n°98 of 1999, the crime of torture was not sanctioned in itself, but merely as an act of violence in accordance with Article 101 of the Criminal Code, under which "any civil servant or person treated as such who makes use, or orders the use, of violence inflicted on individuals in the exercising of their duties without due cause, is punishable of five years of imprisonment and a fine of 120 dinars". The use of violence inflicted by a public official was therefore an offence and not a crime<sup>1</sup>. Law n°89 introduced Article 101bis which provides that "a civil servant or person treated as such who subjects a person to torture in the exercising of their duties is punishable by eight years of imprisonment."
2. Yet under criminal law's principle of non-retroactivity<sup>2</sup>, an accused may only be convicted under the law that is applicable at the time at which the crime was committed. There is one exception to this principle: if the law that entered into force after the crime works in their favour. In this case, Article 101bis of the CC that provides for heavier sentences than Article 101 cannot therefore be applied retroactively to violence committed by public officials prior to 1999.
3. Magistrates' refusal to apply Article 101bis of the CC retroactively was demonstrated in the two only cases of torture committed prior to 1999 that resulted in a post-revolution trial. The cases in question were those pertaining to Barraket Essahel (acts committed in 1991, see § 101) and Rached Jaïdane (acts committed in 1993, see § 116). In both cases, the victims were subjected to serious abuse that was undeniably the result of torture as defined by the United Nations. The investigating judges, under the supervision of the trial judges, chose to prosecute the perpetrators under Article

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<sup>1</sup> Under Tunisian law, crimes punishable by five years of imprisonment or less are qualified as offences.

<sup>2</sup> Principle enshrined in Article 1 of the Tunisian Criminal Code: "No individual may be punished under a provision of a later law. If, after the fact, but prior to the final sentencing, a law that is more favourable to the accused enters into force, this law shall be applied. "

101 of the CC, and therefore on the grounds of violent offences and not the crime of torture (Article 101bis).

4. However, in both of these cases, the magistrates could have, under the Criminal Code that was in force at the time of the acts, chosen to assign the acts a heavier legal status in accordance with the requirements of the Convention, which stipulates that crimes of torture be punishable by the appropriate sentences.
5. In both cases, the victims' lawyers requested that the judges prosecute the accused not for offences under Article 101 of the CC, but for crimes under Articles 218 and 219 of that same code, based on the fact that their clients were permanently disabled by over 20%. This was confirmed by the lego-medical appraisals ordered by the investigating magistrates. Article 218 provides that any individual, and therefore not necessarily a public official, who willingly injures, strikes or commits any other violence or assault, is punishable by one year of imprisonment and a fine of 1,000 dinars, and three years of imprisonment and a fine of 3,000 dinars in the event of premeditated violence. Article 219 adds that when the violence in question is followed by mutilation, the loss of the use of a limb, disfigurement, infirmity or permanent disability of 20% or less, the suspect is punishable by five years of imprisonment, and 10 years of imprisonment if the violence in question results in permanent disability of over 20%. In the event of the latter, as the sentence exceeds five years, jurisdiction lies with the court's criminal chamber rather than the correctional chamber.
6. The issue of a victim's disability as an aggravating circumstance is not provided for under Article 101 of the Criminal Code pertaining to violence inflicted by public officials alone. The paradox resides in the fact that Article 101 provides for a heavier sentence than Article 218, on the grounds that the fact of being a public official constitutes an aggravating circumstance. However, the sentence provided for under Article 101 is lighter than that provided for under Article 219, which provides for other aggravating circumstances that are not taken into account in Article 101. **Consequently, thanks to their status as public officials, the perpetrators of the acts of torture prosecuted in the Baraket Essahel and Rached Jaïdane case avoided the heavy sentences provided for under Article 219 - sentences that would have applied had they not been public officials, considering that Rached Jaïdane as well as over 10 other victims in the Barraket Essahel case suffer from severe physical disability of over 20%.** In both cases, the investigating judges rejected application of Articles 218 and 219, on the grounds that because of their status as public officials, Article 101 of the CC had to be applied, despite the fact that this public official status must ultimately be considered as a mitigating circumstance.
7. In addition, the magistrates implicitly rejected another legal qualification that they could have, yet again, used to prosecute the perpetrators for a crime and not merely an offence. This refers to Article 250 of the CC which rules that "any individual, without legal order, who captures, arrests, detains or imprisons a person is punishable by ten years of imprisonment and a fine of twenty thousand dinars". Yet both Rached Jaïdane and the Barraket Essahel victims were arrested without a warrant and detained in secret inside the Ministry of the Interior for several weeks, in

violation of the Code of Criminal Procedure. Article 250 also provides for aggravating circumstances that would apply in both cases. In particular, it provides that: "The sentence shall be twenty years of imprisonment and a fine of twenty thousand dinars if:

a) the capture, arrest, detention and imprisonment was accompanied by violence or threats [...]

The sentence shall be life imprisonment if the capture, arrest, detention and imprisonment lasted over a month or if it resulted in physical disability or illness or if the operation was carried out in order to prepare for, or facilitate the committing of, a crime or offence, or to aid escape or to ensure the impunity of the perpetrators and accomplices of a crime or offence, or as a response to the execution of an order or condition, or to harm the physical safety of the victim(s)."

8. When questioned on the reason why Article 250 of the CC was not applied in the Barraket Essahel case, the director of the military court replied that the victims' lawyers had not requested it be so<sup>3</sup>. Yet while lawyers, like prosecutors, may request that a legal qualification be retained, this power lies first and foremost in the hands of the investigating magistrates and the chair, who are free to qualify the acts as they see fit, under the supervision of the courts of appeal.
9. Ultimately, at least two of the victims in this same case lost their reproductive capacity as a result of the torture they suffered. Under Tunisian law, castration is a crime punishable by 20 years of imprisonment. Once more, this qualification was not retained by the judges.
10. Thus, in the Barraket Essahel and Rached Jaïdane cases, the magistrates knowingly chose to qualify the acts of violent offences, based on Article 101 of the CC, to the exclusion of any other qualification.

### **1-2 The statute of limitation for violence**

11. Use of the qualification of violence carries significant consequences in the sense that the offence of violence expires after three years. Even if the act is re-qualified as a crime in light of aggravating circumstances, acts are extinguished at the end of a 10-year period. In the Barraket Essahel case, the military judicial system chose not to make use of the time limit. The trial followed in the wake of the revolution, garnered significant media attention and was seen by a large section of society and the Tunisian people as a test of the new government's willingness to divorce from the old practices of impunity.
12. When questioned on the statute of limitation's role as a potential obstacle, a number of political and judicial authorities responded that the statute of limitation wouldn't be a hindrance, as it would only be implemented from the end of the revolution on. The authorities also advocated the systematic application of Article 5 of the CCP, which states that "the statute of limitation is suspended by any impediment or obstruction to the exercising of public action excluding that which arises from the willingness of the accused." It remains an undeniable fact that, under the regime of

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<sup>3</sup> Interview with Major Colonel Ali Fatnassi, general prosecutor and director of the military court, May 2014.

the former president Ben Ali, the judicial establishment did not provide the guarantees of independence and reliability required to prosecute the perpetrators of such crimes, which therefore represents an obstruction.

**13. In a turnaround that may unfortunately be symptomatic of a setback in the fight against impunity, the judges chose to retain the statute of limitation in the Rached Jaïdane case, thus avoiding application of Article 5 of the CCP.**

In June 2011, **Rached Jaïdane** complained of the torture and mistreatment he was subjected to when detained in secret at the Ministry of the Interior in 1993 as well as during his 13 years of imprisonment.

The investigating judge closed the inquiry on 16 February 2012 and referred the case back for a decision. The accused, a group that included the former president Ben Ali, the former Minister of the Interior Abdallah Kallel and former heads of the State security forces Ezzedine Jenayeh, Ali Seriaty and Abderrahman Guesmi, were prosecuted for violent offences - with no aggravating circumstance (see § 6) under Article 101 of the CC.

The trial opened in the correctional chamber of the Tunis Court of First Instance on 14 March 2012. After over three years of postponed hearings, the court rendered its decision on 8 April 2015. It sentenced Zine El Abidine Ben Ali to five years in prison and abandoned prosecutions of all of the other accused parties, on the grounds that the time-limits had expired. The court retained the following reasoning: "The former regime, in place from 7 November 1987 to 14 January 2011, did not prohibit individuals from lodging complaints or exercising their right to appeal to the judicial system, and those who were subjected to suffering, torture or assault were permitted to lodge complaints in order to prosecute the suspects, and therefore this is not seen as an obstruction that suspends the statute of limitation for public action, as the limitation period only provides for exceptions to be made in cases defined by the law"<sup>4</sup>.

14. The ruling in this case runs the risk of setting a precedent and thus justifying impunity for crimes committed in the 1990s. The concern is that the decision taken by the judges reflects the political mind-set of the current government, which has already expressed its reticence with regard to the process of transitional justice.

15. With regard to abuse committed after the crime of torture was introduced into the CC in 1999, the duration of the time-limit is 15 years, yet remains reliant on magistrates' willingness to use the qualification of torture as opposed to mere violence.

### **1-3 The criminalisation of torture based on definitions inconsistent with the Convention**

16. In 1999, Tunisian legislature introduced Article 101bis into the Criminal Code, which criminalises torture in itself. In practice, this reform created new difficulties for magistrates in distinguishing between torture and other forms of violence (otherwise described as "mistreatment").

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<sup>4</sup> Ruling of the Tunis Court of First Instance, Case n° 2854/2012, 8 April 2015.

17. Article 101bis defines torture as: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." The crime of torture is only mentioned in the Criminal Code's chapter pertaining to "offences committed by a civil servant or a person treated as such in the exercising of their duties", meaning that in order to be qualified as torture, the crime necessarily requires the involvement of a civil servant or person treated as such.
18. **Article 101bis only partially reiterates the definition of torture as described in the United Nations Convention against Torture.** Only the first two criteria (the inflicting of severe pain or suffering, whether physical or mental, and the intentional nature of it being inflicted) are drawn on. The Tunisian definition of torture is more restricted than the UN's definition in terms of the objectives of the act. In effect, only acts aimed at acquiring information or confessions, punishing, intimidating, or committed "for any reason based on discrimination of any kind" are considered as torture.
19. Significant incertitude hovers over the issue of determining whether or not a crime can be considered as torture if it is committed by a private person, upon the instigation, or with the express or tacit consent, of a public official, as is the case when a prisoner is beaten by his or her fellow detainees upon a warden's instruction, for example. In effect, Article 101bis rules that "a civil servant or a person treated as such who subjects a person to torture in the exercising of their duties is punishable by eight years of imprisonment." This would therefore seem to indicate that the qualification of torture cannot be used in cases where public officials order or consent to, whether expressly or tacitly, the act, without resorting to violence themselves. This restriction does not meet the UN's definition of torture as severe pain or suffering inflicted by a public official or a person treated as such acting in an official capacity, as well as at their instigation or with their consent. With regard to the complicity and attempted torture that contravenes the Convention, both are sanctioned in Articles 59 and 32-33 of the CC which provides that if no mention to the contrary is made, attempted torture and complicity in the crime are punishable as the crime itself.
20. On 22 October 2011, the acting president Fouad Mebaza adopted decree 106 amending Articles 101bis and 103 of the CC. **Under the guise of a move to intensify the criminalisation of torture, this new definition of torture was even further removed from the Convention definition that preceded it.**
21. In its new version, Article 101bis provided that: "The term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession regarding an act that he or a third person has committed or is suspected of having committed". Intimidation and harassment inflicted on an individual or third party for the same purposes are also considered as torture. Pain, suffering,

intimidation or harassment inflicted for any other purpose based on racial discrimination also fall under the definition of torture.

22. The new definition differs from the old definition on a number of points. The term 'mental suffering' is no longer used, with the word 'mental' replaced by 'moral', thus affording judges flexibility in determining the scope of the word. **The list of objectives associated with the act was considerably shortened, thus moving the definition of torture further away from the definition provided in the Convention against Torture.** Effectively, pain and suffering inflicted as punishment are no longer considered as torture. Consequently, this excludes from Article 101bis's scope of application all violence committed in prison, as well as violence inflicted by police officers following an argument with a citizen, for example, in the sense that the objective in this case is not to acquire a confession or information. Furthermore, the expression "for any reason based on discrimination of any kind" has been replaced with a requirement that the discrimination in question be "racial discrimination".

23. **Conversely, the list of acts that may qualify as being considered as "torture" has been lengthened. In addition to severe pain or suffering, whether physical or mental, intimidation and harassment are now included on the list, which extends much further than the acts sanctioned by the Convention against Torture.**

24. In its new version, Article 101bis specifies that "a torturer means a public official or person treated as such who orders, incites, authorises or ignores torture in the exercising of their duties." This still carries a sentence of eight years imprisonment, with the addition of a fine of 10,000 dinars. Article 101-2 lists aggravating circumstances based on the after-effects and whether or not the victim is a minor. Tunisian legislature added a third paragraph providing for clauses for the exemption of penalties or reduced sentences to encourage the reporting of torture as a crime.

25. In principle, the new aforementioned provisions of the Criminal Code will not apply to acts of torture committed prior to their adoption, in accordance with criminal law's principle of non-retroactivity, except in cases where they are to the accused's advantage. It is nevertheless difficult to ascertain whether the new law is more or less favourable to the accused in comparison to the old law. Sentences are heavier and the list of acts that may be qualified as torture has been relaxed with regard to the nature of the act (now including harassment and intimidation). Yet this list has also been restricted with respect to the objectives of the act itself. The provisions of the Criminal Code are indivisible and it is therefore theoretically-speaking not possible to combine the paragraphs of the old and new laws to the benefit of the accused. The Tunisian judicial system could however consider applying the new article while excluding the aggravating circumstances that were not provided for under the previous version. In each case, Tunisian judges will therefore be required to establish whether the new provisions of the Criminal Code are overall more favourable to the accused based on the specifics of the case at hand.

***ACAT-France and FWB invite the Committee to recommend that the State party:***

- ***adopt a text that clarifies the scope of application in time of the old and new versions of Article 101bis of the Criminal Code;***

- *take all necessary measures to ensure that torture crimes committed prior to 1999 are brought to trial for offences punishable by sentences that reflect the gravity of the crime.*
- *ensure that the statute of limitation for crimes that constitute serious breaches of human rights committed during the Ben Ali regime only takes effect from the revolution on.*
- *amend Articles 101bis and 101-3 of the Criminal Code criminalising torture in order to bring them in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

## 2- The reform of police custody: progress and limitations (Article 2)

26. On 16 February 2016, the Assembly of the Representatives of the People adopted bill n°2016-5 that reduced police custody periods, provided for access to a lawyer from the beginning of police custody and reasserted the right to see a doctor. This reform, which has not yet been implemented, introduces some progress that will certainly contribute to preventing acts of torture being committed. However, its positives are severely hindered by exceptions made in cases where individuals are arrested in the context of the fight against terrorism. Furthermore, to date the security forces have avoided their legal obligations in practice on a number of occasions, and nothing guarantees that the same will not be the case with the new law, in the absence of any stringent monitoring of police custody carried out by an independent judicial body.

### List of issues in relation to the third periodic report of Tunisia § 3

*Please specify what measures have been taken to:*

*(a) Expedite the adoption of bill No. 2013-13, which would amend article 13 bis of the Code of Criminal Procedure so as to reduce the duration of police custody to 48 hours.<sup>6</sup> In this regard, please comment on reports that such custody is frequently extended, as well as on the numerous allegations of the police resorting to violence while holding people in custody;*

*(b) Avoid the systematic renewal of periods of custody through “requests for judicial assistance”, especially in cases of persons suspected of terrorism;<sup>7</sup>*

*(c) Ensure that a person whose custody is extended is transferred to a remand prison, not kept in detention in a police station;<sup>8</sup>*

*(d) Ensure that persons who have been arrested are able to challenge the decision to place them in police custody or a decision to extend this.<sup>9</sup> Please say how many such appeals have been registered and what the outcomes have been over the past five years;*

*(e) Guarantee to all persons deprived of their liberty, from the moment they are placed in custody, access to a lawyer of their own choosing or to free legal aid, including during interrogation.<sup>10</sup> Please also say whether there are any plans to amend bill No. 2013-13, which would limit meetings between the lawyer and client to 30 minutes;<sup>11</sup>*

*(f) In order that traces of torture or ill-treatment do not disappear, ensure that persons held in custody are notified promptly that they are entitled to request a medical examination by an independent doctor or a doctor of their own choosing<sup>12</sup> and that medical visits are not delayed in order to allow any traces of torture or ill-treatment to disappear.<sup>13</sup> Also, please say how the State party ensures that such medical visits are carried out promptly, impartially and independently, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), and that the outcomes of the visits are duly communicated to judges, lawyers and the detainee’s family;<sup>14</sup>*

*(g) Strive to put a stop to the alleged use of practices such as humiliation, severe beatings, burning with cigarettes, threats against the individual’s family, sexual abuse and the use of stress positions during periods in custody.*

### 2-1 The reduction of police custody periods mitigated by the exception of anti-terrorism law

27. Law n°2016-5 reduces police custody periods to 48 hours renewable once for crimes, 24 hours renewable once for offences and 24 non-renewable hours for

misdeemeanours and minor offences. No provisions guarantee the effective monitoring of police custody conditions by an independent magistrate.

28. Custody periods are much longer for individuals suspected of terrorism. Judiciary Act n°2015-26 of 7 August 2015 concerning the fight against terrorism and the repression of money laundering effectively provides for a custody period of five days renewable twice – a total of up to 15 days by decision of the public prosecutor. Furthermore, the new law n°2016-5 allows the investigating judge or public prosecutor to delay a detainee's access to their lawyer by 48 hours. Yet it is precisely at this stage of detention that a suspect is more likely to be subjected to torture or mistreatment.

29. **In practice, although the legal police custody periods are indeed complied with to a greater extent than seen prior to the revolution, the lawyers of suspects arrested in the context of the fight against terrorism have reported a handful of cases in which police custody periods have been exceeded by one or two days at the most.** This extension affects persons arrested far from the capital and appears to be due to the time required to transfer the detainees to Tunis, to the premises of the anti-terrorist investigation unit.

**Ezzedine Ben Ali** was arrested by the Medenine police on 27 July 2015 as part of anti-terrorist operations. The next day, he was transferred to the Gorjani anti-terrorist judicial police unit. His custody period only officially began on 29 July. He was brought before an investigating judge six days later. The legal custody period was therefore exceeded by two days, with no justification provided.

30. According to Human Rights Watch, detention centre agents have justified some cases in which custody periods have been exceeded by the fact that this complies with Article 57 of the CCP, which allows the investigating judge to give rogatory commission to the judicial police, allowing the latter to question the suspect as part of the inquiry<sup>5</sup>.

31. This justification is not, however, valid. According to the Tunisian CCP, a suspect in custody must be heard before a judicial body no later than six days after their arrest. If an investigation is opened, the investigating judge can then decide to place the suspect in provisional detention. As soon as the accused is brought before the investigating judge, the custody period ends. The investigating judge can then issue the judicial police with a rogatory commission to remove the suspect from the prison in which they are being kept in provisional detention in order to interrogate them for the purposes of the inquiry. This re-examination as part of an investigation must take place in the presence of the detainee's lawyer. Thus, Article 57 of the CCP in no way justifies extending police custody periods beyond the six-day mark.

## 2-2 The impossibility of challenging custody or the renewal of custody

32. **The Tunisian CCP provides for no recourse in order to challenge being placed in custody or having the custody period renewed.** Yet this recourse would help to

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<sup>5</sup> Human Rights Watch collected affidavits from detainees reporting cases in which the periods were exceeded even further (Human Rights Watch, *Cracks in the System: Conditions of Pre-Charge Detainees in Tunisia*, 2013, p.19).

prevent torture and offer a higher level of compliance with custody rights. Detainees would be permitted to inform judges of any potential breaches in custody procedure.

33. While detainees should be able to contest their placement in custody or the renewal of the latter's period, they should also be immediately informed of the motives for their arrest, as required by Tunisian law. Yet this rule is sometimes not complied with and persons taken into custody can often spend several hours with no knowledge of the reasons for their arrest<sup>6</sup> or are forced to try and deduce the reasons based on the questions asked during police interrogations. Sometimes, they only learn of the official allegations made against them when they are brought before the investigating judge, several days after being taken into custody.

This was the case for **Zyed Debbabi** in particular, a 24-year-old Tunisian man who was arrested on 17 September 2013. The day before, he had been driving his father's car when friends asked him for a lift, to be dropped off a little further on, which he agreed to do. Seeing these young people get into the car, police officers pulled the vehicle over for a check, possibly in the knowledge that some of these young people had records. One of the young men then told Zyed Debbabi that he had a joint on him. Zyed sped up out of panic in order to avoid the police check. The young man threw the joint out of the car and Zyed Debbabi, who was driving extremely fast, crashed into a pole. The young people abandoned the car and ran away.

The next day, Zyed Debbabi and his father went to the Ben Arous police station to sort the situation out. In an unexpected move, the police arrested the young man on the orders of the chief of police, who also signed an arrest report stating that Zyed Debbabi was arrested at his home.

During custody, Zyed Debbabi was tortured in order to force him to sign a confession he was not allowed to read. He thought he was suspected of drug use. It was only when he appeared before the investigating judge on 23 September that he found out that he was in fact being prosecuted for drug use and trafficking, with the second offence carrying a much heavier sentence than the first.

34. **In a number of cases documented over the last few years, charges have been retroactively invented to justify the decidedly arbitrary arrests carried out by police officers.** The latter claim to carry out arrests following flagrant violations.

On 24 August 2013, **Mohamed Anouar Hafedh** drove in front of police officers in his car while listening to music by the rapper Weld el-15, who was sentenced for having criticised the police. Because of this, Mohamed Anouar Hafedh and the friend who was with him were arrested and beaten in the street before being taken to the Bardo police station. The young man was accused of insulting a civil servant and received a three-year suspended sentence based on confessions signed by his friend under duress.

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<sup>6</sup> Human Rights Watch, *op.cit.*, 2013, p.40.

35. In addition to allegations of insulting or assaulting a civil servant, individuals are sometimes accused of drug use to retroactively justify arrests motivated by non-legal reasons.

It was thus that the famous Tunisian blogger **Azyz Ammami** was arrested on 13 May 2014 during standard road traffic controls while in his car with a friend. The police officers seem to have recognised him. One of the officers asked him: "Aren't you that son of a bitch (without stating his name)?", before making him get out of the car for a body search. Azyz Ammami refused to be searched, and so the police officer insulted and slapped him before pushing him towards a small hut in which six other police officers were waiting. The officer asked his colleagues to search Aziz for drugs.

The young man knelt in the police officers' booth with his hands on his head. The officers then began assaulting him in a flurry of kicks and punches to his head and body while insulting him. They searched him and pulled his trousers down in the middle of the street. Finding nothing on him, they insulted and beat him some more.

They drove him to the La Goulette police station and transferred him to the Bouchoucha custody centre. Two days later, both he and his friend were brought before the investigating judge who placed them in provisional detention in Mornaguia prison. They were proclaimed innocent a few days later.

## 2-3 The persistent use of torture and mistreatment

### 2-3-1 The excessive use of force during arrest

36. Police officers are only supposed to use force in restricted cases where the suspect demonstrates intense hostility. **Nevertheless, in practice, they frequently use excessive force and are thus guilty of mistreatment and sometimes even torture during arrest.** This is the case particularly when arresting persons suspected of terrorist activity. According to witness accounts from a number of lawyers and victims, these arrests generally take place in waves, more often than not in the middle of the night. Dozens of agents from the Laaouina or Gorjani anti-terrorism squads erupt into suspects' homes, ransacking the houses, terrorising and sometimes even hitting members of the family.

This was the experience of 25-year-old **Zied Younes** who was arrested in his home on the night of 19 to 20 September 2014 at around 1:30am. According to the young man, agents from the Gorjani anti-terrorism squad threw his mother to the ground and stamped on her whilst he was trying to explain that she suffered from high blood pressure and diabetes. They then held a gun to Zied Younes' temple and ordered him to take them to the home of a suspected accomplice. That night, 24 people were arrested in Sousse, Monastir and Kasserine.

In the night of 8 to 9 April 2014, the anti-terrorism squads carried out an increasingly violent wave of arrests in the town of **Rouhia**, in the governorate of Siliana. At around 3am, agents in ski masks with dogs kicked down the door to the house in which the brothers Fraj and Mahfoudh Hamdi lived and ransacked

the house. The operation terrified the entire family, especially the children. Fraj and Mahfoudh Hamdi were arrested.

That same night, they carried out a wave of arrests that lasted several hours, during which the security agents assaulted passers-by in the street, such as Mounir Sallami, who was forced to kneel before being beaten with truncheons because he had refused to blaspheme. The rubbish collector was also beaten in the street, at work. The agents surrounded a café and fired lead shots, wounding a waiter.

37. In at least one case documented by Tunisian lawyers, the excessive use of force has led to the death of a victim.

On 18 January 2013, **Mehrezia Ben Saad** was killed by a bullet that appears to have been fired by agents of an anti-terrorism squad who had come to arrest her husband. The latter was in his room with his wife and their child. The agents kicked down the door to their home. The husband shouted through the bedroom door that they should leave his wife enough time to get dressed and put on her veil, but the agents nevertheless shot through the bedroom door. Later, they claimed that the husband had shot at them from the bedroom, yet no cartridge or bullet hole corroborated this version of events.

38. Anti-terrorism squads aren't alone in making use of aggressive arrests. Agents from intervention units, among others, have demonstrated unjustified use of violence during arrests on numerous occasions.

On 31 December 2014 at 8:30pm, **Kamel Aouled Dhiab** was arrested by two police officers while urinating behind the Ministry of the Interior. Things escalated and the agents insulted him and beat him in the street before taking him to the police station. Once there, he says that he was forced under threat to sign a confession stating that he had insulted two police officers. During custody, he was able to see a doctor who noted bruising on his right eye.

After two days in custody, Kamel Aouled Dhiab lodged a complaint. An investigation for torture was opened in June 2015 but the investigating judge still hadn't heard the victim. However, the district court issued him with a 100-dinar fine for having insulted an officer.

On 29 December 2013, **Takwa Mestouri** and **Fehri Bouzid** were visited by a friend, Raouf Farhat, who had come to congratulate them on their recent marriage. At around 10pm, according to Takwa Mestouri, over a hundred-odd judicial police officers from Gorjani and intervention units surrounded the house where the couple lived on the first floor. Fehri Bouzid opened the door and the agents immediately sprayed him with tear gas, hit him, and made him exit the house naked. Forty-odd agents entered the apartment and one of them caught Takwa Mestouri by the hair and made her step out onto the balcony in her house clothes. She saw agents posted on the rooftop firing shots. Fehri Bouzid and Raouf Farhat were taken into custody that same night.

In Nabeul on 10 September 2013, a fight broke out between youths from two neighbourhoods. At around 5pm, 24-year-old **Marwan Belhaj Ammar** was on

his way home from work when he was caught up in the fight. Police officers, most of whom were intervention unit officers in ski masks, were chasing the young people and spraying them with tear gas.

Marwan Belhaj Ammar was arrested in the middle of the street by around fifteen agents who beat him with truncheons for a long time before abandoning him by the roadside. A neighbour found him lying in the street and took him to hospital. The young man had an open fracture to his arm which required two surgeries and three months off work.

### 2-3-2 Torture and mistreatment in custody

39. While the use of torture is less frequent than before the revolution, it continues to be frequently used against victims with various different profiles. As under Ben Ali's regime, young practising Muslims who are Salafi and thus suspected of belonging to terrorist groups are the primary victims. **Since the revival of anti-terrorist measures in early 2012, dozens and even hundreds of Tunisians have been tortured in custody.** Numerous minors are also victims. Because of their young age, they are unprotected from this abuse.

**Wassim Ferchichi**<sup>7</sup>, a 15-year-old minor living in Tunis, was arrested on 2 January 2013 in Kasserine where he was hoping to make contacts with a view to joining a jihadist group in the Chaambi mountain. He was taken to the Kasserine national guard where he claims to have suffered all kinds of brutal abuse over the course of two days, until he signed a confession in which he acknowledges his involvement in a terrorist movement. Two days later, the young boy was handed over to the anti-terrorism squad in Laaouina. His parents were not permitted to see him until 6 January, four days after his arrest.

40. Arrests, interrogations and torture carried out as part of the fight against terrorism has been noted among both the police and the national guard, two bodies that fall under the Ministry of the Interior's jurisdiction. Each of these two departments have an intelligence and inquiries directorate that oversees a national inquiry unit for the prevention of terrorist crime, made up of investigators assisted by an anti-terrorism squad (*brigade antiterroriste*, or BAT) that proceeds to arrest and transfer suspects to interrogation centres. The police's anti-terrorist unit is based in the centre of Gorjan and the national guard's unit is located in the centre of Laaouina, both of which are in the Tunis suburbs. The BATs and investigators from Gorjhani and Laaouina often inflict torture on detainees. Many detainees remain locked in the Gorjani or Laaouina interrogation centres for a part of their custody period and are often subjected to torture day and night, most often for several days, until they sign confessions that they are generally unable to even read. Some are transferred to the Bouchoucha custody centre in Tunis for the night. There, they are often mistreated as presumed terrorists and are victims of deplorable detention conditions, as is the case for other detainees in custody, notably as a result of overpopulation and no access to care<sup>8</sup>.

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<sup>7</sup> ACAT-France, "Un mineur victime de torture", Urgent appeal of 4 June 2014, <http://www.acatfrance.fr/action/tunisie-wassim-ferchichi-15-ans-victime-de-torture>.

<sup>8</sup> Human Rights Watch, *op. cit.*, 2013, p. 33.

**Ezzedine Ben Ali** claims to have been tortured by the anti-terrorist judicial police in Gorjani for the duration of his custody which officially began on 29 July 2015. He then told the medical examiner who examined him that he had been beaten with rubber piping, tied up in the 'roast chicken' position, and laid on his stomach in the ventral decubitus position with his head plunged into a bowl of water, among other abuses.

On 6 August, Ezzedine Ben Ali and six other people were arrested and tortured in the same case brought before the investigating judge, who observed evidence of torture and ordered their provisional release. He immediately sent them to the office of the deputy public prosecutor specialising in torture cases. The latter also observed the evidence and gave them a document granting them access to medico-legal appraisal.

When the seven victims left court, they were once again arrested by the Gorjani anti-terrorist unit judicial police officers who were waiting for them in front of the courthouse. The officers claimed they were arresting them for another offence, which was not the case. The detainees thought this new arrest was designed to prevent the medico-legal appraisal.

Thanks to the joint efforts of a number of lawyers, the medico-legal appraisal was finally carried out the next day, which did not prevent the Gorjani officers from placing the seven suspects in custody yet again. The latter were then once more granted provisional release.

Soon after, a torture inquiry was opened. The investigating judge heard the victims but did not convict them. As far as we know, no investigation has been carried out into these events since November 2015.

**41. In addition to specialised anti-terrorist units, regular national guard and police officers also frequently use mistreatment in police stations, going so far as to inflict torture on individuals suspected of common law offences and placed in custody, or used in the street during arrests or maintaining public order.**

**Wajdi and Haythem Ben Alouch**, two brothers suspected of drug use and trafficking, were arrested on the night of 2 March 2014 by agents from the Tunis drug squad. According to their lawyer, in the first night of their custody, the agents undressed the two detainees, beat them with batons and kicked them all over their bodies and faces and threatened to rape them with a baton in a bid to force them to sign confessions.

**42. Since the revolution, many young men, arrested for common law offences, have died in police stations in suspicious circumstances that have still not been brought to light by the justice system<sup>9</sup>.**

On the night of 30 April 2014, **Arafat Ayari** travelled to the Nabeul police station to bring food and drink to a friend who had been arrested for theft. Upon his arrival, he argued with police officers who beat and insulted him before shutting him in a group cell. According to witnesses in detention with him, Arafat Ayari slit his wrists. His fellow detainees called the police. One of the latter, called

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<sup>9</sup> See the case of Walid Denguir in particular (§ 105); Human Rights Watch, *Tunisie : Décès suspects de deux hommes lors de leur détention*, 25 October 2015, <https://www.hrw.org/fr/news/2015/10/25/tunisie-deces-suspects-de-deux-hommes-lors-de-leur-detention>.

Tarek and known for his violent nature, is said to have insulted Arafat Ayari and apparently ordered his fellow detainees to leave him to die. The police officers waited 25 minutes before calling emergency services. Arafat Ayari was dead when he arrived at the hospital.

43. The security forces sometimes use extreme violence in the street or at police stations as part of operations designed to maintain public order, which they inflict on individuals suspected of taking part in demonstrations or fighting in the street.

On 10 September 2013, M.A. was on his way home from work when he walked past a fight that had erupted between youths from two estates. Police officers, most of whom were intervention unit officers in ski masks, were chasing the young people and spraying them with tear gas. Fifteen-odd agents arrested M.A. in the street, beat him with truncheons to the point that they fractured his right arm. Then they abandoned him in a state of half-consciousness in the street.

44. Over the last few years, rappers<sup>10</sup>, bloggers and young activists<sup>11</sup>, who are considered as showing hostile behaviour towards the Ministry of the Interior, have been assaulted by agents of the security forces.

45. Finally, a number of people have been tortured merely because they had a disagreement with a State agent or an associated person<sup>12</sup>.

**Mourad Limem** had a road traffic accident on 30 July 2012. A few days later he was called in to the traffic police station at Moncef Bey as the victim of the accident. Inside the station, Mourad Limem was verbally and then physically assaulted by plain-clothed police officers in the presence of the perpetrator, who emerged as being a friend of the head of the station. He tried to escape but the officers arrested him. He continued to be beaten in the police colonel's office. The victim was then placed in custody for assaulting a police officer.

### 2-3-3 Torture and mistreatment in prison

46. Despite being less frequent than before the revolution, prison wardens inflict mistreatment and sometimes torture on prisoners to assert their authority or punish behaviour deemed disobedient.

**Mahrane Mathlouthi** is serving a five-year sentence for a common law crime. In the Mornaguia prison, he intervened to prevent prisoners from raping one of his

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<sup>10</sup> Human Rights Watch, *Tunisie : des chanteurs de rap condamnés à des peines de prison*, 5 September 2013, <http://www.hrw.org/fr/news/2013/09/05/tunisie-des-chanteurs-de-rap-condamnes-des-peines-de-prison>.

<sup>11</sup> Observatory for the Protection of Human Rights Defenders, *Plusieurs défenseurs des droits humains agressés par les forces de l'ordre et victimes de poursuites abusives*, Press release of 1 October 2014, <http://www.omct-tunisie.org/communiqués/communiqué-de-presse-observatoire-tunisie-plusieurs-defenseurs-des-droits-humains-agresses-par-les-forces-de-lordre-et-victimes-de-poursuites-abusives/>

<sup>12</sup> Amal Amraoui *Violence policière : l'impunité encore et toujours*, 29 October 2015, <http://nawaat.org/portail/2015/10/29/violence-policiere-limpunite-encore-et-toujours/>, "Le calvaire de Yacine, agressé par un policier à Hammamet", *Kapitalis*, 15 August 2014, <http://www.kapitalis.com/societe/24048-le-calvaire-de-yacine-agresse-par-un-policier-a-hammamet.html>.

friends. The wardens intervened, slapping and hitting the detainees with truncheons and kicking them. He and his friend spent eight days in solitary confinement. In early May 2014, along with a number of other detainees, he was transferred to the Mahdia prison where they were all beaten by the wardens upon their arrival.

In October 2014, **Ridha Kassa** claims to have been beaten by the wardens and the deputy director of the Mornaguia prison. He was punched in the eye and placed in solitary confinement for nine days. The head of solitary confinement confided in Ridha Kassa that the deputy director had asked that he be kept in solitary confinement until the bruising around his eye disappeared. He nevertheless saw the doctor at Mornaguia who noted that he had lost 30% of his vision in his right eye. According to the victim, the doctor recorded this in his report, but neither he nor the lawyer were provided with a copy.

That same month, **Sayf Eddine Chakroun**, who had been detained in Mornaguia under anti-terrorism law, was assaulted by wardens. The latter tied him up with a rope and subjected him to *falaka* torture. They also shaved half of his head and half of his beard, and mocked him before shaving off the rest.

#### 2-4 Access to a lawyer that remains impeded both in law and in practice

47. Law n°2016-5 will afford suspects the right to a lawyer during custody. When the law enters into force, this request may be made either by the detainee or their family. Lawyers will be granted a private meeting with their client for 30 minutes and will be permitted to attend interrogations and cross-examinations. There are two exceptions to this law: when the suspect explicitly rejects their right to the assistance of a lawyer or when the latter does not attend at the time they are summoned to attend.
48. While waiting for the new law to enter into force, the law that currently applies does not guarantee a detainee access to a lawyer during custody, except when interrogated upon rogatory commission by an investigating judge. In practice, outside an investigation, lawyers are sometimes permitted to see their client in custody for a very brief period of time if the lawyer is informed of the arrest and if the lawyer has sufficiently good relations with the judicial police officers that they grant him or her access<sup>13</sup>. However, this is rare.
49. **If the suspect is a minor when arrested, they must be assisted by a member of their family or legal guardian during the interrogation and cannot reject this right.** Yet this obligation is not always respected.

**S.F.**, a 17-year-old girl, was arrested at her home on 22 December 2015 as part of anti-terrorism operations. Agents took her away without authorising her parents to accompany her. They kept her in custody for 15 days during which they insulted and intimidated her to force her into admitting that she had contact with her two brothers who had gone to fight in Syria.

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<sup>13</sup> Observation network of the Tunisian transitional justice system (Réseau d'observation de la justice tunisienne en transition, ROJ), *3<sup>e</sup> report: fair trials*, 2014, p. 39.

**Ayman Saadi** was arrested by the Monastir judicial police on 30 October 2013 at the age of 17. Suspected of having plotted an attack on the grave of Habib Bourguiba, he was placed in custody. His family were informed of his arrest that same day, but Ayman Saadi was interrogated without his father present.

On 1 November, agents called his father in to the police station to question him and forced him to add his signature to reports in order to pretend that he had been present during the interrogations of his under-age son, as required by law.

**Wassim Ferchichi** (see § 39), aged 15, was arrested on 2 January 2013 in Kasserine. Two days later, the young boy was handed over to the anti-terrorism squad in Laaouina. His parents were not permitted to see him until 6 January, four days after his arrest. The police agents in Laaouina ordered Wassim Ferchichi's father to sign reports dated 4 January in order to pretend that he had been present during the interrogations of his son, as required by law. On 8 January, the boy was brought before an investigating judge who ruled that he be placed in provisional detention in a minors' centre on 8 January. It was only when he appeared before the investigating magistrate that he was allowed to see a lawyer for the first time.

50. When an interrogation is carried out by the judicial police following a rogatory commission from an investigating judge, the suspect has the right to be assisted by a lawyer (Article 57.2 of the CCP). If the suspect has no lawyer, the judge is required to contact the Bar who will then appoint legal counsel.

**51. In practice, this right to the assistance of a lawyer is very frequently breached.**

In effect, the judicial police often neglects to inform the suspect's lawyer. When the latter is informed of their client's arrest – generally by the family - or of their removal from prison for interrogation, the lawyer is forced to call the police stations in which their client is likely to be detained. If the arrest was made as part of an anti-terrorism operation, the lawyers will call the Laaouina and Gorjani centres to see in which the suspect is being detained. The lawyer will then ask the police officers if their client is in custody as part of a preliminary investigation or as part of an investigation, and in the event of the latter, they will then ask for the name of the investigating judge handling the case. Next, the lawyer will go to the courthouse to provide the investigating judge with a lawyer's briefing. Finally, the magistrate will call the police officers to ask them to wait until the lawyer arrives before proceeding with the interrogation. Very often, the judicial police proceed to interrogate despite this, claiming that the suspect refuses legal counsel.

In April 2014, **Ayman Rebhi**, accused of having helped transport suspected terrorists to the mountains, was arrested and placed in provisional detention at the Mornaguia prison. Soon after, he was taken out of prison to be interrogated as part of an investigation led by the anti-terrorism judicial police of Laaouina, without his lawyer, Mr Anouar Ouled Ali, being informed of the fact. The latter found out that his client was being interrogated. Upon arriving in Laaouina, the police officers told him they had been unable to inform him of the interrogation because they didn't have his number, despite the fact that Mr Ouled Ali has been representing many of the people arrested as part of anti-terrorism operations for a number of years now and that he is well-known to the police. Later on,

Ayman Rebhi told his lawyer that the police officers had interrogated him prior to his arrival, threatening him with torture.

In early November 2014, **Khaled Chouchène** was arrested by the anti-terrorism squad in Gorjani, who proceeded to interrogate him without having been authorised to do so by a rogatory commission from an investigating judge. The magistrate had only ordered his arrest, not his interrogation. Furthermore, Khaled Chouchène states that he was not informed of his right to be assisted by a lawyer, in contrast to the interrogation report drawn up by the anti-terrorism judicial police in Gorjani which states that he had received the information but refused legal counsel.

52. The concern here is that the violations seen in the right to the assistance of a lawyer in the context of on-going investigations will be perpetuated after the enforcement of the new law guaranteeing suspects access to a lawyer during custody ordered by the public prosecutor. **The two exceptions to this law, when the suspect explicitly rejects their right to the assistance of a lawyer or when the latter does not attend at the time they are summoned to attend, run the risk of leading to abuses in practice.** Law n°2016-5 has however introduced a significant safeguard in that it renders invalid all acts carried out in custody if the latter does not occur in strict compliance with the CCP.
53. It should be reminded that in cases of terrorism, the public prosecutor or investigating judge can delay a suspect's access to their lawyer by 48 hours. While a number of abuses are inflicted on persons arrested for common law offences by the police, terrorism suspects feature among the primary victims of torture. Abuses are often inflicted in custody, and particularly at the start of the custody period. In this context, derogations to a detainee's right to immediate access to their lawyer severely harm the protective virtues of the reform.

## 2-5 Insufficient medical examinations

54. Article 13bis of the CCP requires judicial police officers to notify suspects in custody of their right to a medical examination. This right is reiterated in Law n°2016-5. Witness accounts from lawyers and former detainees in custody demonstrate that this obligation is increasingly being respected. Medical examinations are normally carried out at the closest hospital by doctors working for the Ministry of Health. However, sometimes detainees are examined by doctors attached to the Ministry of the Interior working on police or custody centre premises<sup>14</sup>.
55. The medical examination does not demonstrate the expected results in terms of torture prevention because the fact that the detainee will be brought before a doctor does not seem to prevent police officers from using violence. Because the examination takes place in the presence of police officers, the accused is generally unable to communicate what they have been subjected to out of fear of punishment once back on police premises.

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<sup>14</sup> This is the case for doctors working in the Bouchoucha custody centre as well as doctors working at the Laouina clinic located on the same site as various different national guard squads. A number of detainees arrested by the anti-terrorism squad have been taken to see a doctor from the clinic whilst in custody.

**Seif Eddine Trabelsi** underwent a lego-medical appraisal in custody at the anti-terrorism judicial police unit in Gorjani. He told the doctor he had been tortured, and as a result, he was tortured again by the same officers.

56. Whether or not the victim dares to speak up about their torture, the doctor can nevertheless make a note of any marks and may potentially mention whether or not they are symptomatic of the use of violence. Doctors are doing so increasingly often, yet still do not inform upper management or the public prosecutor of the marks they see on the patient's body. In addition, it is regrettable that doctors do not always record the estimated date of the violence in question, which would allow the investigating judge to determine how likely it is that the marks occurred in custody. Furthermore, **medical notes are brief as they are written in a rush in the presence of police officers, and are therefore not a true documentation of torture or mistreatment.** The notes may however constitute evidence if no other medical examinations are made in the days following the torture. It would however be preferable if the examining doctors for suspects in custody were to document their patient's state in greater detail.

57. In addition, lawyers often have difficulty accessing medical examinations of their clients in custody when the examinations take place. In most cases, when the judicial police submit the investigation reports to the investigating judge, they do not attach the medical certificates. The reports only mention the fact that a detainee has seen a doctor and bear a doctor's stamp, with no further details provided. A copy of this first version of the reports is sent to the lawyers. Normally, a certificate must then be provided to the investigating judge, but sometimes the certificate is not submitted if the judge does not request it.

**Mohamed Naceur Ferchichi** was arrested by the anti-terrorism squad in Gorjani on 30 October 2014. He claims to have been very violently tortured in custody. He said he was punched, kicked and beaten with truncheons and rubber piping on the back. He was also subjected to *falaka* torture and attempted drowning on ten different occasions, electrocuted across his entire body, burned with cigarettes and subjected to sexual abuse. To explain the marks of torture, the report drawn up by the police stated that Mohamed Naceur Ferchichi had fallen over when trying to escape, but this wasn't enough to explain all of the scars left by the abuse. On 3 November 2014, on the fourth day of custody, he was taken to the Habib Thameur hospital to be examined by a doctor. The latter recorded the marks on his body, specifying that they were "cutaneous marks of violence and/or trauma, with most lesions five to seven days old". The certificate was not immediately submitted by the police to the investigating judge, who, having noticed the marks of torture on Mohamed Naceur Ferchichi's body during his interrogation on 6 November, demanded that he be immediately given a lego-medical appraisal at the Mornaguia prison. The anti-terrorism judicial police only submitted a copy of the custodial medical examination upon the investigating judge's request.

58. In some cases, police officers only send detainees in custody to hospital when the detainees have been beaten to the point that officers fear the damage is irreversible.

After having been placed in custody at the Kasserine police station on 2 September 2013 for suspected involvement in a fire in which stolen goods were burnt in premises belonging to an Ennahda activist, **Sidqî Halimi** (see § 86) says he was beaten badly, notably on the head. Two days later he lost consciousness and the police officers took him to the hospital in Kasserine to be scanned, as they were worried he would start haemorrhaging. He stayed in the hospital for an hour, along with four officers, and was taken back to the police station with no medical certificate.

**Zyed Younes**, a 25-year-old student, was arrested on 20 September 2014 in a wave of arrests carried out by the Gorjani anti-terrorism squad (see § 36). Like many young men arrested in the same way, he says he was tortured in custody, first at a police station in Kasserine where he was detained for the first night, and then in Gorjani. He was undressed, put in the 'roast chicken' position and punched, kicked and beaten with an iron bar and piping. He was deprived of sleep and food and electrocuted. He was taken to the Habib Thameur hospital on the fifth day of his detention after having signed a forced confession. The doctor asked him if he had any marks of torture and recorded them in the medical file. Then Zyed Younes was taken back to Gorjani for the night before appearing before the investigating judge the next day, along with 22 fellow detainees. The custodial medical file was never submitted to the investigating judge. When the detainee's lawyer requested that the magistrate acquire a copy, the latter replied that he didn't want to make the request himself and asked the lawyer to present him with a written request.

59. When detainees are transferred to a custody centre after interrogation at the police station, medical care is not provided as it should be. As noted by Human Rights Watch during its visits of the custody centres, only the Bouchoucha centre has medical staff – just one doctor and two nurses – who are only on duty from 8:30am to 5:30pm, while generally-speaking detainees in custody are interrogated at the police station during the day and are only taken to Bouchoucha for the night<sup>15</sup>. In the event of night-time medical assistance, the Bouchoucha agents, like those in all other custody centre, are reliant on the nearest hospital. **Custody centre agents only refer detainees to a doctor when they show obvious physical signs, presumably to cover their tracks in the event of a complaint.** Detainees are then examined by one of the centre's doctors as soon as they arrive or at the hospital if the centre has no medical staff on duty. Sometimes, agents do not send detainees who bear the signs of violence to a doctor, but they nevertheless record the signs in a document the detainee cannot access.

The **Haythem and Wajdi Ben Allouch** brothers were arrested in their home on 2 March 2014 by the Tunis drug squad. They claim they were tortured on the squad's premises on their first night of custody, and this until they signed confessions. They deny having been informed of their right to see a doctor. Upon their arrival in Bouchoucha, Haythem Ben Allouch's eye was swollen. The centre agent who met them questioned the suspect on his eye and recorded this sign in a document, without referring the brothers to a doctor.

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<sup>15</sup> Human Rights Watch, *Cracks in the System: Conditions of Pre-Charge Detainees in Tunisia*, 2013, p. 33.

60. An infrequent and restricted system of checks for custody conditions and suspects' health was set up after the revolution via the High Committee on Human Rights and Fundamental Freedoms<sup>16</sup>. When a complaint or alert, particularly concerning a person in custody, is submitted or flagged to the representatives of this Committee, they may visit the premises on which the alleged victim is being detained without prior notice or warning. These checks are, however, restricted in the sense that committee members are few in number, unavailable and do not necessarily have the skills in the medical documentation of abuse. In addition, they do not have the power to publicly denounce what they have witnessed, nor can they serve as a witness for a judge in the context of an investigation into torture. Visits by the detention committee are designed to protect the victim from fresh attacks and to provide information for the annual report committee submitted to the President of the Republic.

***ACAT-France and FWB invite the Committee to recommend that the State party:***

- ***ensure that the legal duration of custody is complied with and that renewal of custody periods is exceptional and motivated by the public prosecutor alone;***
- ***entrust an independent judicial body with overseeing motives and renewals for and of custody, as well as custody conditions, and set up a system by which the detainee may appeal to this body;***
- ***remove custodial detainees' ability to reject the assistance of a lawyer in order to prevent judicial police officers from pressuring detainees to give up this right;***
- ***amend Article 12bis of the Code of Criminal Procedure to require that doctors directly transmit the custody medical examination report to the public prosecutor or investigating judge responsible for handling the case in the context of the custody;***
- ***ensure that custody medical examinations are only carried out by doctors overseen by the Ministry of Health;***
- ***set up a doctor's surgery in each Court of First Instance, comprised of doctors trained in documenting torture in line with the Istanbul Protocol. Should the suspect be placed in provisional detention after custody, they would be permitted to receive a medical examination at this surgery, upon request, before being transferred to prison, irrespective of the day and time of the transfer.***

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<sup>16</sup> The High Committee on Human Rights and Fundamental Freedoms is a national institution tasked with promoting human rights and ensuring they are complied with.

### 3- A poor track record in the fight against impunity (Articles 12 and 13)

#### **List of issues in relation to the third periodic report of Tunisia § 28**

*With regard to paragraphs 117, 213, 214 and 281 of the State party's additional report, please provide comprehensive data for the past five years, broken down by type of offence and investigating authority, on: (a) the number of complaints received by prosecutors or other competent authorities, or the number of investigation reports filed, involving such offences as attempts to commit acts of torture or ill-treatment, or the commission of such acts, and complicity or participation in such acts by law enforcement officials or with the consent or acquiescence of those officials; (b) the number of these complaints that have led to a criminal or disciplinary investigation; (c) the number that have been dismissed; (d) the number that have led to prosecutions; (e) the number that have led to convictions; and (f) the criminal and disciplinary sanctions that have been imposed, specifying the length of prison sentences.*

*Please also indicate: for each year, the number of investigations into cases of torture and ill-treatment that led to ex officio prosecutions, including in places of detention where allegations of torture have been especially numerous, such as the police headquarters in Al-Gorjani and Kasserine, the detention centre in Bouchoucha and the Mornaguia and Borj al-Rumi prisons; please indicate also the number of cases of torture or ill-treatment reported by physicians after clinical examinations of detainees and the follow-up to their reports.*

61. The process involved in establishing punishment and reparations for the crime of torture is often littered with insurmountable obstacles. Some of these obstacles stem from the magistrates' lack of diligence, others from their unfairness. Some result from a backlogged justice system, while others are engendered by obstructions created by the security forces' agents who refuse to collaborate in inquiries and sometimes threaten victims and witnesses. The overarching result is that to date, no complaint has resulted in a satisfactory trial based on a diligent investigation. A few rare and promising investigations are still ongoing but are held back by how long they have been under-way. In the vast majority of cases, even when the victim has a chance of seeing an investigation opened, the latter only materialises in the form of one or two attempts before being de facto closed.
62. From the act of lodging the complaint to the perpetrators being prosecuted, ACAT and FWB have identified a number of major obstacles that stand in the way of seeing justice done.

#### **3-1 Obstacles to opening an investigation**

##### **3.1.1 Restricted access to the outside world during and at the end of custody**

63. As previously specified, detainees in custody are only granted a lawyer's assistance when they are detained upon request by an investigating judge as part of an ongoing investigation. In practice, this right is often flouted (see § 47-53). In the absence of a lawyer during custody, the detainee has little opportunity to report the abuses they have suffered or are suffering.

64. Under Article 13bis of the Tunisian Code of Criminal Procedure, the only outside contact the detainee enjoys is with a doctor. Even then, the effectiveness of this contact is in practice restricted by the fact that the medical record written up during custody is often brief, the doctor does not go so far as to flag up the marks observed to management or the public prosecutor, and, finally, the lawyers have difficulty in accessing reports for the medical examination (see § 54-60).
65. **For the time being then, until Law n°2016-5 is brought into force, the first opportunity a victim has to effectively report the abuses they have suffered is when they are brought before a magistrate following custody** Even then, the victim's lawyer must be pugnacious enough to insist that these allegations be recorded in the hearing report.
66. Accused persons heard by the public prosecutor have no right to the assistance of a lawyer. If, however, they are brought before an investigating judge, Article 69 of the CCP guarantees them the right to receive legal counsel. If, at the first hearing before the investigating magistrate, the detainee has no lawyer, the cross-examination is postponed to a later date. This right may be discarded by the judge, who may then proceed to cross-examine the victim immediately, as long as a witness is at risk of death, if evidence is soon to become extinct, or if the judge travels on-site in cases of obvious offences. In most of the cases documented by the human rights' defence organisation or reported by defence lawyers, the accused effectively enjoy the assistance of a lawyer during their hearing before the investigating judge or see their cross-examination postponed where there is no lawyer. In many cases, however, investigating judges have contravened Article 69 of the CCP.

**Hamdi Ben Ali**, a shop owner in Sousse, was arrested by the judicial police of Sousse on 2 May 2014 after having travelled to Syria. Placed in custody in Sousse and then moved to the Gorjani anti-terrorism judicial police premises where he claims to have been tortured, he was brought before an investigating judge on 8 May, where he was interrogated without being informed of his right to a lawyer. Terrified that he would be tortured again, Hamdi Ben Ali agreed to answer the questions.

On 26 July 2014, **Seifeddine Raies** was brought before the Tunis Court of First Instance's investigating judge at the end of his custody. He later told his counsel that when he asked that his lawyers be informed of his detention, the magistrate refused, saying: "I'll be your lawyer".

67. The Observation Network of Tunisian Justice (*Réseau d'Observation de la Justice*, or ROJ) also noted that in three criminal cases at investigation level, the judge neglected to appoint legal counsel and thus proceeded to interrogate the suspect without counsel, in violation of the law<sup>17</sup>.

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<sup>17</sup> ROJ, *op. cit.*, pp.28-29.

### 3.1.2 Magistrates' unwillingness to report torture

#### **List of issues in relation to the third periodic report of Tunisia § 31**

*With regard to paragraphs 276 and 277 of the State party's additional report, please comment on allegations that when a person first appears before a judge, the latter sometimes takes no action even though he or she observes visible signs of torture on the victim's body<sup>56</sup>.*

68. Since the revolution, an increasing number of investigating judges are agreeing to record allegations of torture inflicted on detainees in custody in their reports. However, sometimes the accused's lawyer is required to insist or even threaten the judge of publicly shaming them or reporting them to their superiors. Lawyers with an awareness of human rights now automatically demand that allegations of abuse be documented, yet a great many of their colleagues don't even think of it, or don't yet dare to make such a request, in a bid to avoid the anger of a magistrate.

The lawyers representing **Zyed Younes** (see § 36) were thus able to acquire consent from the investigating magistrate who was hearing their client to record the signs and allegations of torture inflicted on Zyed Younes, but the magistrate refused to order a lego-medical appraisal.

In the case of **Sami Essid**, the investigating judge was even more tentative. This young man was another to be suspected of terrorist activity, and was arrested on 20 August 2014 and taken to the Laaouina anti-terrorism judicial police premises. He claims to have been tortured there for the first three days of his custody. On the sixth day, he was brought before the Tunis Court of First Instance's investigating judge who, thanks to the lawyers' perseverance, finally accepted to record the accused's allegations of torture but refused to record the marks left by beatings in the report, on the grounds that he wasn't a doctor.

69. **Despite the fact that, upon the insistence of lawyers, investigating judges are increasingly agreeing to record allegations and any potential signs of torture, they very rarely submit these allegations to the public prosecutor, as required by Articles 13 and 14 of the CCP.** As an officer of the judicial police, an investigating judge must submit their opinion to the public prosecutor of the Republic with respect to any offence they become aware of in the exercising of their duties, and must also submit all information and reports pertaining to the offence (Article 13). Furthermore, they may record any offence committed in their presence in the exercising of their responsibilities, or offences revealed in standard feedback (Article 14). In practice, investigating judges who are made aware of allegations of torture advise the victim, in the best of cases, to lodge a complaint with the public prosecutor themselves, to ensure that an investigation is opened. Investigating magistrates often refuse to order a lego-medical appraisal, even when the allegations of torture may affect the validity of the reports submitted by the judicial police, which is most often the case. They believe this duty falls to the investigating magistrate tasked with investigating into torture.

In the case of **Ayman Saadi**, who was arrested on 30 October 2013 when he was a minor, the investigating judge who heard his case after custody ordered no lego-medical appraisal, despite the obvious signs of beating to his eye and upper back, and despite the request made by the young man's lawyer. The latter filed a complaint for torture the following week, but it was only after applying heavy pressure to the Tunis Court of Appeal general attorney that the lawyer was granted an order for a lego-medical appraisal.

70. **When magistrates do agree to order lego-medical appraisals, the latter are not carried out until several weeks later, and sometimes even months later**, because the appraisal request is sent to the prison director who waits weeks before putting it into action.

**Selim Arouri** was arrested for the use and trafficking of cannabis on 29 June 2013. He claims to have been tortured in custody at the Ouardiyya drug squad premises. He was beaten with truncheons which caused injuries, particularly a double fracture to his left hand. His lawyer filed a complaint of torture with the CFI of Tunis 2, on 8 July 2013. Selim Arouri was only heard by the investigating judge on 17 December. According to his lawyer, the lego-medical appraisal ordered as part of the investigation was only carried out in July 2014, over a year after the events.

### 3.1.3 Access to an ineffective complaints' system in prison

71. When a detainee is placed in provisional detention and when they have been unable to report the abuses suffered in custody to the investigating judge or public prosecutor, a number of options for filing a complaint are available. Upon arriving in prison, the detainee is given a compulsory medical examination which should be an opportunity to record the signs of abuses inflicted in custody. If the abuse was committed in prison, the detainee also theoretically has the right to file a complaint, but this right is considerably compromised by the fact that the victim is still in the hands of their tormentors.

### Insufficient recording of the signs of abuse during the incoming prison medical examination

#### List of issues in relation to the third periodic report of Tunisia § 28

*Please indicate also the number of cases of torture or ill-treatment reported by physicians after clinical examinations of detainees and the follow-up to their reports.*

72. According to Article 13 relating to prison organisation of 14 May 2011, "upon incarceration, the detainee is given a medical examination carried out by the prison doctor". **In practice, this medical examination is sometimes delayed and is more often than not cursory.** This can be explained by a number of reasons linked to a shortage of medical staff, as well as their lack of experience in medical torture and mistreatment documentation. Prison doctors are not trained to detect trauma injuries and therefore do not know how to write up a satisfactory report. They generally do not ask the detainee if they have suffered violence in custody, nor do they think to inform the detainee of their right to lodge a complaint if they do notice signs of

torture or mistreatment. Yet prison directors are in favour of these doctors documenting trauma injuries seen in detainees upon arriving in prison in greater detail. It would be a way of relieving them of the responsibility for violence committed by the police.

73. Prison medicine suffers from serious staff shortages that harmfully impact on the documenting of torture. Mornaguia, the country's biggest prison, only has eight or nine doctors who carry out the incoming medical examinations for around a hundred new detainees every day<sup>18</sup>. This means that even if a doctor is in favour of recording the signs of abuse, they have very little time in which to do so. According to the governor of the Prison and Rehabilitation Department (*directeur des prisons et de la réhabilitation*, or PRD)<sup>19</sup>, a third of prisons have no full-time doctors, merely contractors who intervene occasionally. This sometimes means that supervisors are required to distribute medication and carry out injections themselves, along with providing other care, which poses a serious issue of responsibility should an error occur. The director acknowledges that because of a lack of doctors, incoming prison medical examinations are sometimes carried out two or three days late.
74. In addition, detainees do not have access to their prison medical files, and not even the incoming medical examination reports. They therefore have no way of knowing if the doctor has in fact recorded the signs and allegations of torture. Detainees who file complaints for violence committed in custody or even prison are therefore unable to provide medical certificates to support their claims and must wait for the prosecutor or investigating judge to order a lego-medical appraisal and for a copy of the prison medical file to be sent. **In practice, the prison medical file, when submitted to a judge, is generally insufficient evidence, because either the prison doctor does not record the signs of abuse, or does so briefly, meaning that the documents are insufficient to seriously support the victim's allegations.** Insufficient medical checks in prison can occasionally be made up for by associations with access to detention centres.

After having been brutally beaten in the street and then in the Goulette police station, in May 2014 **Azyz Ammami** was imprisoned in Mornaguia. Once there, representatives from the International Association for the Support of Political Prisoners (AISPP) visited him, joined by a doctor who has able to write up a medical record that was submitted to support the lawyer's appeal on behalf of the victim.

75. However, not all associations are equipped with members who are experts in trauma injuries, and nor are they responsible for providing medical certification. Consequently, the support they are able to offer victims of torture in prison does not replace lego-medical appraisal and medical assistance, both of which can only be provided by the prison administration, as well as by a medical examiner as part of an inquiry into torture.
76. A bill is currently being drafted with a view to transferring prison medical services from under the Ministry of Justice's authority via the Prisons and Rehabilitation

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<sup>18</sup> Interview with Dr Ahmed Benasr, legal doctor, May 2014.

<sup>19</sup> Interview with Col Major Saber Hafifi, governor of prisons and rehabilitation, May 2014.

Department to the Ministry of Health's authority. This bill has been developed by the Tunisian government alongside the CICR, and is currently being trialled in the Borj el-Amri, Mornaguia, Messaadine and Harboub prisons. It would appear, however, that transferring this responsibility will not increase the number of medical staff, because the latter are unwilling to work in prisons, and this will remain the case unless the Ministry of Health provides incentives.

### Obstacles to lodging a complaint in prison

77. There are two different cases to be examined here: when abuse is inflicted in custody and when abuse is inflicted in prison. Theoretically, the procedures for lodging complaints available to a detainee are the same in both scenarios, Victims can lodge a complaint with the Ministry of Justice, either through their lawyer or their family. They can also report the crime to the director of their prison or the enforcement judge so that they may appeal to the prosecutor.
78. According to the PRD, if a detainee bears the signs of physical harm, the head of the establishment is to call on the prosecutor, either upon the detainee's request or that of their family, or upon their own initiative. Over and above the fact that this would see justice done, it is also the best method prison management can use to ensure they cannot be held responsible for violence at a later date. The PRD has noted, in addition, that a director of a penal institution may sometimes refuse to accept detainees who bear the signs of abuse. It mentions in particular a case that dates back to early May 2014, in which the director of the Monastir prison refused to admit to the establishment a detainee who bore the signs of beatings and respiratory failure<sup>20</sup>. In another case, the director of the Grombalia prison admitted a detainee who died soon after the torture he was subjected to in custody. **Neither ACAT nor FWB are aware of any cases in which a prison director or enforcement judge have called on a prosecutor of their own volition to report abuse inflicted on a detainee during custody.** Consequently, practical experience shows that to have any chance of a judicial investigation being opened, victims must use the traditional complaints procedure by filing a complaint with the prosecutor through their family, or preferably with the help of a lawyer.
79. If the victim claims to have been tortured in prison, the complaints system is more complicated. Theoretically, detainees may file complaints with the judicial authorities, as mentioned previously, as well as with the prison director who will then call on the penal services general inspector in order to open an investigation and to suggest disciplinary sanction to be taken by the PRD. Failing this, detainees may send a letter to the PRD directly, or through their family or lawyer. In practice, all of these systems used for filing complaints of torture inflicted in prison are hindered by several obstacles. Firstly, lodging a complaint with the prison director is often in vain, as the latter is more inclined to protect their team, rather than see justice done by a detainee. In addition, appealing to an enforcement judge (EJ) is rarely more reliable. This is because judges are generally overworked in their capacity as both trial judges and enforcement judges. This is why EJs generally only handle requests for conditional release or petitions for mercy as well as a few grievances relating to

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<sup>20</sup> *Ibid.*

prison life. As well as this, these magistrates often maintain close ties with prison management and wardens, with whom they enjoy good relations, which casts serious doubt over their independence, impartiality and integrity when called upon in cases of torture inflicted in prison.

80. Victims in detention can file complaints with the prosecutor via their lawyer, if indeed they are allowed to meet with the latter. If the victim is in preventative detention, their lawyer must seek visitation rights for their client from the investigating judge responsible for the case. If, however, the investigation is closed and the order to close it is appealed, a lawyer is not permitted to meet with their client in the two- to three-week period between the appeal being lodged and the hearing before the Court of Appeal's Indictments Division. During this period, the investigating judge is no longer in possession of the file and the Court of Appeal has not yet received it, meaning that the lawyer has no authority to whom they may address a request for permission to meet with their client, despite the fact that the client in question is likely to be in need of their services during this interval.

In October 2014, **Ridha Kassa** claims to have been beaten by the wardens and the deputy director of the Mornaguia prison (see § 46). He was then placed in solitary confinement. His family complained to the prison administration. His lawyer was unable to meet with him during this period because his file was being transferred from the investigating judge's office to the Court of Appeal's Indictment Division. He was released in late 2014.

81. If a victim is proven guilty, access to their lawyer is restricted. The victim must then request permission to meet with their legal counsel from the Prisons and Rehabilitation Department. Access to a lawyer is therefore not a right in this case, and this access is not facilitated by the administration if the request arises as a result of torture or mistreatment inflicted on the detainee in prison. Furthermore, under Article 17.6 of the law of 2001 relating to prison organisation, if a visit is granted, it must take place under a warden's supervision, in violation of the fundamental principle of confidentiality in exchanges between a lawyer and their client.
82. **In all cases, detainees who claim to have been subjected to abuse in prison run the risk of facing reprisal from wardens, whether they report the crime to the prison director, the PRD, the EJ, or the public prosecutor through their lawyer.** Detainees who lodge complaints must in theory be transferred to another prison for protective reasons. However, this transferral does not necessarily protect them from retaliatory measures, in light of the solidarity that characterises the prison administration system. Furthermore, this measure often has the effect of distancing detainees from their families, thus making visits more difficult - a fact which can influence their decision to file a complaint.

### **3.1.4 Access to the complaints system after a victim's release**

83. Tunisian law guarantees the right for all victims of torture or mistreatment on Tunisian soil to lodge complaints either directly, via their families or via their lawyer, with the police, the national guard or the prosecutor of the Republic. The complaint may be lodged against X or name the alleged perpetrator(s). The prosecutor tasked

with handling the case is then required to carry out a preliminary investigation, to briefly question the accused, to collect statements and to write up a report (Article 26 of the CCP). The prosecutor is required to inform the investigating judge of the crimes for which he is being appealed to, so that the latter may open a judicial inquiry and investigate the case (Article 28 of the CCP).

84. However, in reality, victims who lodge complaints are faced with a number of dissuasive obstacles: the retaliatory measures they may face, the patent inaction of magistrates who still neglect to open investigations all too often, and the allocation of responsibilities among the civil and military justice systems that still remain too vague when it comes to crimes committed by the security forces.

### Retaliatory measures taken against victims who lodge complaints

#### **List of issues in relation to the third periodic report of Tunisia § 33**

*33. With regard to paragraphs 234-241 and 285 of the State party's additional report, please indicate what specific measures are being considered to address the deficiencies mentioned in paragraph 241 as regards the investigation of complaints, in particular:*

*b) To protect complainants and witnesses from possible retaliation, taking into account the Committee's previous recommendations and reports of retaliation against complainants<sup>61</sup>. Please also indicate the number of protective measures taken for victims of torture in relation to the number of requests for protection over the past five years;*

85. By lodging a complaint with the police or the national guard, victims run the risk of being ignored, suffering measures designed to intimidate, or even being subjected to mistreatment and torture yet again, for having dared to implicate "colleagues". If a victim lodges a complaint with the prosecutor, they run the risk of suffering retaliatory measures once more from police officers who have been implicated, or their colleagues.
86. Out of the 11 victims supported by ACAT and TRIAL as part of their legal aid project for victims of torture in Tunisia<sup>21</sup>, seven were repeatedly singled out in a bid to convince them to drop the complaint or remove one of the accused from their allegations. Two of them were contacted in different circumstances by intermediaries of an accused who was seeking to convince them to forgive them, without threats. A third received anonymous calls from strangers, threatening them with renewed imprisonment. **Other victims assisted by the two organisations received death threats or were subjected to police or judicial harassment.**

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<sup>21</sup> Between November 2012 and December 2014, ACAT and TRIAL set up a support project for individuals who had been the victims of torture in Tunisia. The project kicked off in November 2012 with the training of twenty-odd Tunisian lawyers in documenting cases of torture, the submission of complaints via international mechanisms and international criminal justice. At the end of the training, ACAT and TRIAL hired several of the newly-trained lawyers to work on 11 complaint cases concerning Tunisian and foreign national victims of torture in Tunisia. For each case, ACAT and TRIAL hired one or two Tunisian lawyers (and one French lawyer for the complaint lodged in France), with whom they worked step-by-step to build up a complaint file: the recording of the victim's detailed account of events, identifying the perpetrators and accomplices of the torture, witness debriefing, gathering evidence, drawing up a legal argument under national and international law, appealing to the special rapporteurs throughout the national procedure, appealing to the CAT once all other methods of recourse had been exhausted.

**Sidqî Halimi** has frequently been harassed by police officers in his town, Kasserine, since he first lodged a complaint for torture against a number of police officers and soldiers following his first arrest in March 2011. On that fateful day, he travelled to the Kasserine military barracks, knowing he was wanted by the police for his involvement in a fire in the town's police station. He was only released from the barracks after six days of torture, following an order for provisional release issued by an investigating judge. Soon after his release, Siqî Halimi lodged a complaint for torture, which resulted in him being arrested a second time, again for the fire at the police station. He was released two months later due to a lack of evidence. Since then, the young man has continued to publicly denounce the acts he suffered. In retaliation, he is frequently arrested by Kasserine police officers who, as in the Azyz Ammami case (see § 35), fabricate allegations to justify his being kept in custody and potentially being placed in provisional detention.

In September 2013, for example, Siqî Halimi was summoned to the Kasserine police station for his alleged involvement in a fire in which stolen goods were burnt in premises belonging to an Ennahda militant. This new charge coincided with the young man having lodged a new complaint a few days earlier concerning the torture he was subjected to in March 2011, which was written and lodged with ACAT's help.

As soon as he arrived at the police station on 2 September 2013, Sidqî Halimi was questioned and beaten by the chief of police. His two brothers arrived at the station to bring him some food, and were in turn beaten and arrested, purportedly because they had attempted to help him escape. They were placed in custody for three days.

On the second day of their custody, Sidqî Halimi and his brothers were forced to provide urine samples. The police hoped to be able to prosecute them for drug use. Before the results of the test arrived, which were negative, the three detainees were brought before an investigating judge and placed in provisional detention, one for drug use and for the fire, and the two others for drug use and for having attempted to help their brother escape. The charge of drug use was dropped for all three, and Sidqî Halimi's brothers were also acquitted for the attempted escape.

The police officers who tortured **Zyed Debbabi** after his arrest on 17 September 2013 were trialled by the judicial police as part of the torture investigation in November 2013 and were transferred whilst the truth of the victim's allegations was still pending. At the same time, the victim's sister, who was heavily involved in defending her brother, received death threats, to the extent that she was allocated a bodyguard by the Ministry of the Interior for several weeks.

Police and judicial harassment pushed **F.R.**, one of the victims defended by ACAT and TRIAL, to abandon pursuing the complaint of torture he lodged in June 2013 regarding the many abuses he suffered in the Ministry of the Interior and in prison, between his arrest as part of anti-terrorism measures on 5 April 2007 and his release on 14 January 2011.

In the month following the submission of his complaint, police officers in his neighbourhood implicated him in a new case. A fight broke out between two groups in one of his neighbourhood's mosques in July 2013, apparently due to

theological differences. F.R. was not at the mosque that day, but knows some of the people who were involved in the fight. Ten people from the same group were arrested after the incident. Among them, the individuals who know F.R. assured police officers that he was not at the mosque that day. Nevertheless, the police officers still implicated him in the case and summoned him to court. Fearing renewed reprisals from the state police, F.R. did not appear before court and was sentenced in absentia to four months in prison for having used violence and for having damaged a property.

He appealed against his conviction. Although the appeal was pending, he was arrested on 24 March 2014. Six police cars arrived at his shop located close to his home. Plain-clothed policemen immediately took him in, with no arrest warrant and without even allowing him to lock up his shop. His lawyer arrived at the courthouse the next day to assist her client and obtained his immediate release, on the basis that he had been detained with no grounds.

To escape the harassment, he left Tunis with his family, and moved to Kairouan. In early 2015, the police ordered his landlord to evict him, as he was a terrorist. In mid-February, officers seized his seven-year-old son at the school gates. They made him get into a police car and kept him there for an hour, which was a deeply traumatic experience. His pregnant wife was interrogated at the police station, without having been legally called in. Their home was searched without a warrant. On 28 February, F.R. was arrested by an anti-terrorism squad on his way to Tunis to meet with his lawyer in order to lodge a complaint against the intimidation inflicted on his family. He was detained and prosecuted under anti-terrorism law.

In addition, F.R. still has no identity card, which was confiscated upon his arrest in 2007, or passport, which was confiscated in 2002. On 23 May 2012, he submitted an official request to his local police station in order to have his passport and identity card returned. Despite repeated follow-up contact made, his request remains unanswered.

For all of these reasons, he no longer has any faith or trust in the Tunisian justice system's ability to ensure justice is done for the violations he has suffered, and therefore no longer wishes to pursue his complaint of torture out of fear that the harassment he suffers may intensify.

### **A lack of investigations opened**

87. Some of the complaints lodged by the victims or their lawyers with the court are not registered and therefore receive no case file number.

In one case handled by ACAT in Gafsa, the prosecutor refused to register the complaint for several months. In May 2013, Mr Lotfi Ezzedine, the lawyer appointed by ACAT and TRIAL to represent **Moudhafer Labidi**, who was arrested and tortured in 2008 as part of the Gafsa coal mining case, lodged a complaint on his client's behalf. He went to see the Gafsa CFI's prosecutor directly, who agreed to sign a waiver but refused to allocate the complaint a registry number. The prosecutor claimed that this did not fall under his remit, but that of the transitional justice system, in reference to the Truth and Dignity Commission (IVD), founded in 2013 to shed light on torture practices under the Bourguiba and Ben Ali regimes. Yet the IVD is a mechanism with no judicial

power that is not designed to serve as a substitute for the justice system. It wasn't until October 2014, following an urgent appeal made by ACAT, that the complaint of torture was finally registered.

88. In too many cases, victims or their legal counsel submit their complaints not to the prosecutor of the Republic, but to the Ministry of Justice or the Ministry of the Interior. Yet the ministers who receive these complaints or letters of allegations do not consistently pass them on to the prosecutor, meaning that they do not always lead to an inquiry. **In just as many cases, complaints lodged with the prosecutor are registered but are not followed up despite lawyers' insistence and despite even the attention from the media that they sometimes garner.**

**Wassim Ferchichi** was 15 when he was arrested by officers of the Kasserine national guard on 2 January 2013. After his arrest, he was taken to the Kasserine national guard station where he was tortured until being handed over to the Laaouina anti-terrorism judicial police on 4 February, at which point he was forced to sign a confession. On 8 January, after six days in custody, Wassim Ferchichi was brought before the investigating judge, who had him detained.

Four months later, Mr Hafedh Ghadoun was appointed by the family to represent the young man. On 29 April 2013, he visited his client in detention, who described what he had been subjected to by the national guard in Kasserine. Three days later, he lodged a complaint of torture with the deputy public prosecutor of Tunis specialising in cases of torture. The latter forwarded the complaint to the prosecutor in Kasserine, where the torture was inflicted, and to date, no inquiry has taken place.

89. On a number of occasions since the revolution, the government has decided to set up an inquiry commission to establish the truth in relation to acts of torture that have received media attention, or have been fervently deplored by society. Designed to safeguard independent and swift inquiries, these commissions are nevertheless not always synonymous with justice for the victims.

In light of the fierce protests that followed the repression of the **9 April 2012 demonstration**, a group of 20 lawyers was set up by the Tunisian Human Rights League in order to lodge 30 complaints of torture against agents working for the security forces. In parallel to this, an investigation committee comprised of 22 members was set up by the National Constituent Assembly (NCA) and was meant to submit a full report on the repression that occurred on 9 April in the 45 ensuing days.

Four years later, the file in question is still in the hands of the NCA's Committee on Liberties. To date, the final report has not been submitted and no judicial inquiry opened.

### **Blurred lines between the civil and military legal systems**

90. In Tunisia, two types of jurisdictions may be called on to rule on crimes of torture: civil law courts and military courts. The military legal system was significantly reformed after the revolution through two statutory decrees of 22 July 2011 and 29

July 2011 which for the most part brought the organisation and procedures of the military courts in line with those of the civil courts. Among other significant changes, the statutory decrees notably created a military court of appeal and allowed victims to join the case as a victim. According to Article 5 of the Military Justice Code, 'the military jurisdictions can try offences that the military courts can be called on to try by virtue of special statutory regulations. The scope of the military judicial systems jurisdiction goes well beyond the conflicts involving military personnel. In fact, Article 22 of Act no. 82-70 of 6 August 1982 concerning the general status of the internal security forces gives jurisdiction to military courts for 'cases in which officers from the internal security forces are involved in acts which occurred in the course of performing their duty, when the incriminated acts concern their powers in the areas of the State's internal or external security or maintaining order in the street.'<sup>22</sup> By virtue of this article, a considerable if not the majority of acts of torture committed by officers from the interior security forces can fall within the jurisdiction of the military courts, if it can be established that these acts were for example committed against persons suspected of threatening state security or when controlling a demonstration.

91. After the revolution, the military judicial system was very active in tackling the serious crimes committed by State officials. It was therefore responsible for judging the Barraket Essahel case (see § 101), as well as the different trials of the revolutionary martyrs which did not involve military personnel, either as defendants or victims. It nevertheless seems to want to restrict its scope in favour of the civil judicial system. **The new interpretation of Article 22 of the 1982 Act involves limiting the jurisdiction of the military courts to cases where agents of the internal security forces are involved in acts which occurred in the course of performing their duty, when the incriminated acts concern maintaining order in the street.**<sup>23</sup> Therefore, the acts committed by public officials as part of internal or external State security protection operations do not appear to fall within the jurisdiction of the military courts. Nevertheless, torture victims and their lawyers are not always aware of this new policy, since they continue to take their complaints before the military judicial system when the crime was committed by officers of the security forces as part of internal or external State defence, which also covers a large number of offences. Many cases illustrate the legal grey area due to different interpretations adopted by different magistrates.

**Sidqî Halimi** has already filed two complaints concerning the torture he was subjected to at the Kasserine military barracks after his arrest on 4 March 2011. On that day, the young man went to the army barracks, knowing that he was being sought as part of the investigation into the fire at the Kasserine police station on 25 February 2011. The police had temporarily moved their headquarters to these barracks. Sidqî Halimi, who was arrested as soon as he arrived, stated that he was tortured for seven days by both military personnel and police officers. According to him, he was beaten several times, notably on the feet and with a stick until he lost consciousness several times. He suffered sexual abuse, had his head pushed into salty water and received blows to the

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<sup>22</sup> Act No. 82-70 of 6 August 1982 concerning the general status of the internal security forces.

<sup>23</sup> Interview with the C<sup>e</sup>Major Ali Fatnassi, Attorney General, Director of the military judicial system, May 2014.

testicles. The aim was to get him to sign a confession denouncing alleged accomplices, something that Sidqî Halimi refused to do.

On 10 March 2011, he was brought before the investigating judge of the court of first instance in Kasserine and mentioned the torture he had been subjected to. Even though his clothes had been torn and he still showed signs of the beating, the examining magistrate did not mention the physical abuse inflicted in the record. He nevertheless ordered the release of Sidqî Halimi, who then went to Tunis to file a complaint for torture and publicly denounce what he had just suffered. This led to him being arrested again on 29 March 2011 and imprisoned for a month and 21 days in the Kasserine prison, before once again being freed by the examining magistrate for lack of evidence.

Since the first complaint for torture was ineffective, ACAT and TRIAL took on the case and carried out an investigation in order to file a new detailed complaint for torture, corroborated by witness statements. The complaint was filed in June 2013 before the military court, partly because the Military Justice Code provides for the jurisdiction of the military courts if a member of the military is involved in the case and also due to Article 22 of the Act of 6 August 1982.

One and a half years after filing the complaint the military judiciary has yet to begin an investigation. When questioned about the Kef military court's lack of action, the substitute public prosecutor of the Tunis court of first instance specialised in torture complaints, told the victim that his complaint fell within the jurisdiction of the civil rather than the military judicial system. However, the military court has not waived its jurisdiction in favour of the civil judicial system. During this time, Sidqî Halimi continues to be subjected to retaliatory measures meted out by the police to punish him for daring to denounce his abuse.

**Ali Qalii** was serving a custodial sentence in the Borj el Amri prison, when the revolution began. After Ben Ali left on 14 January, the prison authorities opened the prison gates and ordered the prisoners to leave. Ali Qalii was arrested by the military along with the other inmates and taken back to the prison where they were beaten up by the guards. A guard and a senior lieutenant from the prison, beat, punched and kicked Ali Qalii once he was on the ground. When he was pardoned a few weeks later, along with the other political prisoners, he filed a complaint for torture before the civil judicial system. One of his attackers was convicted at the trial. On appeal, the Court declared that it did not have the jurisdiction and referred the case to the military court under Article 22 of the Act of 1982.

### Limitation period

92. The statutory decree 106 of 22 October 2011 extended the limitation period for crimes of torture which is now set at fifteen years instead of ten years (Article 5 paragraph 4 of the CCP). However, since this last reform was without doubt unfavourable to the accused, it is only applied for crimes of torture committed after this statutory decree came into force.
93. After the revolution, the judicial authorities stated their intention only to start the statute of limitations from the revolution, based on Article 5 of the CCP, based on the fact that Ben Ali's repressive regime constituted a clear obstacle for judicial action in

cases of torture. However, in 2015, by deciding to use the limitation period to cancel the proceedings against the torturers of Rached Jaïdane, the judiciary made a dangerous U-turn. **The limitation period is in danger of becoming a major obstacle for victims to seek justice (see § 13).** This not only concerns people tortured before 1999 but also those tortured afterwards, if the magistrates choose to use this term for violent physical abuse.

**ACAT-France and FWB invite the Committee to recommend that the State party:**

- ***Force the examining magistrates, who are informed of allegations of torture or ill-treatment to immediately and systematically denounce this offence to the state prosecutor, by virtue of Articles 13 and 14 of the CCP;***
- ***order the state prosecutors to urgently process complaints for torture filed by inmates who risk being kept in detention and sentenced based on forced confessions;***
- ***ensure that an investigation is promptly opened for any complaint for torture or ill-treatment;***
- ***Take any measure - including criminal and disciplinary sanctions - to protect the victims who file complains from retaliatory measures, be this physical or moral violence or harassment by the police or the judiciary;***
- ***Amend Article 22 of Act No. 82-70 of 6 August 1982 concerning the general status of the internal security forces, as well as the Military Justice Code, so that only civil courts have jurisdiction for crimes of torture and ill-treatment;***

### **3-2 The investigation: a long drawn-out process**

#### **3.2.1 The excessive length of investigations**

94. The investigation for torture - whether it is first conducted by the Prosecutor or directly by the examining magistrate - generally begins by a hearing with the victim. Then comes the medico-legal expert appraisal, if it has not already been ordered as soon as the victim has alleged to have been tortured. After this the magistrate questions the witnesses and next tries to identify the alleged torturers and examine them.

95. **When the investigation at last begins, it is often very late, which gives time for any signs of beating to fade.** This of course is the case for all victims tortured under Ben Ali's regimes who filed a complaint after the revolution, some for the second time. But it is also frequently the case for complaints filed for recent cases of physical abuse or ill-treatment. The prosecutor or the examining magistrate hearing the case delays hearing the victim and ordering a medical examination. During this time, the marks disappear, witnesses are sometimes impossible to find, forget what they have seen or are intimidated and the perpetrators therefore have ample opportunity to cover up their tracks.

**Ameur Belaazi**, placed in pre-trial detention on 7 September 2013 on a count of terrorism, was released from Mornaguia prison a week later on 13 September, by the Laaouina anti-terrorist squad, only to be interrogated as a witness in another case. He talks of being tortured for three days, from 8 am to midnight,

only returning to prison to spend the night. He says that he was stripped naked then hung in the 'roast chicken' position, and was hit several times with an electric stick on the soles of his feet and then suffered burns to his testicles. One of his torturers allegedly put a gun to his anus and threatened to kill him and rape his mother, then pulled out handfuls of his hair.

His lawyer filed a complaint for torture on 27 September 2013. The substitute prosecutor in charge of torture cases at the time, only questioned him on 22 October. He noted marks of physical abuse in the record, but only ordered a medical report on 11 December 2013, after the victim's lawyer had chased him up. Not only was this examination requested much too late, but even worse, was never carried out, since Ameer Belaazi was repeatedly moved from one prison to another, to block the investigation's progress. This led the young man to make two suicide attempts and be hospitalised for a week in the psychiatric hospital, but without ever being sent to a general hospital for a medical examination.

On 22 February 2016, he was finally questioned by an examining magistrate for his complaint for torture, but he decided to drop his case.

**Yacine Dhaoui** was arrested by the counter terrorism squad in Laaouina on 9 December 2013. He alleges that he was beaten while in custody, then brought before the examining magistrate no. 27 on 13 December who ordered his provisional release.

That same day, Yacine Dhaoui went to see the prosecutor to file a complaint. However, this prosecutor did not order a medical examination. He ordered an investigation to be opened on 16 December 2013, but it was only on 12 April 2014 that the examining magistrate interviewed the victim for the first time.

96. A prosecutor handling the torture complaint can choose either to conduct the preliminary investigation himself or refer it directly to the examining magistrate. For the victim, this choice has serious consequences. In fact, as long as the case is at the preliminary investigation stage, conducted by the prosecutor, the victim cannot join the case as a victim. Consequently, his lawyer cannot get information about the investigative work done by the Prosecutor or the police to get to the truth of the acts alleged by his client. The lawyer is also not able to ask the prosecutor or police officers to examine specific witnesses, suspects or find any evidence. **Consequently, for the entire duration of the initial investigation, the victim is passive, and has no way of ascertaining if the investigation is being conducted seriously and diligently. Initial investigations are often spun out over time and victims often feel that their cases have been shelved and they have no way of kick starting the process.**

97. Furthermore, ACAT and FWB have found that in terms of torture and ill-treatment, the prosecutors, unlike the examining magistrates, tend to get the police to conduct the investigation and therefore do not always examine the victims or witnesses themselves. We can therefore imagine the discomfort felt by a large number of victims who have alleged that they have been tortured by police officers and are forced by a magistrate whom they have not even met, to trust in other police officers to deliver justice. This process takes no account of the trauma suffered by these victims many of whom find it very painful to once again being interviewed at a police station, without a lawyer present, by policemen who often have no training in

examining victims of violence and even less victims of police violence. The trauma experienced by men or women who have suffered violence at the hands of the State is highly specific and should normally be taken into account as part of the investigation; otherwise the risk is that the investigation will fail due to the victim's total lack of trust in the police system.

It was this trauma and the lack of implied trust in the police, which dissuaded **F.R** from attending the police summons to be questioned about the complaint that he had filed for torture in June 2013, with the support of the ACAT and TRIAL.

Suspected of belonging to a terrorist movement, F.R was arrested in 2007 by a group of 50 civil and armed officers. After being assaulted during his arrest, he was then taken to the Ministry of the Interior's State security building. After a short interview with the Minister of the Interior, he was interrogated and subjected to atrocious acts of torture for 17 days. He was then sentenced to a harsh prison sentence based on the counter terrorism Act at the end of several trials concerning these crimes. While in prison, he was again tortured on several occasions, including the week before he was freed, on 14 January 2011. He still bears deep physical and psychological scars.

Since he was released, F.R has been subject to continual police harassment, which seems to have got worse after he filed a complaint for torture in June 2013. In fact, the following month, the police in his neighbourhood were implicated in a fight that broke out in a mosque, when F.R was not even present in the building on that day. Fearing that this was an excuse for new retaliation from the political police against him, F.R did not go to the hearing that was held at the court in September 2013, and was sentenced in absentia to four months in prison for having assaulting another person and damaging a property.

At the same time, he was summoned by the police to be examined as a victim with respect to his complaint for torture filed in June 2013. He agreed to go to the court to meet the prosecutor in charge of the investigation. However, in the face of police harassment that he was subject to, he refused to go to the police station in Laaouina for fear of being arrested.

98. **Too often, the investigation stops before the crucial stage of questioning the alleged torturers.** It is not officially closed, but as no new lines of enquiry are followed up, the investigation is abandoned *de facto*, for an unidentified reason reflecting a lack willingness to deliver justice to the victim.

On 25 November 2012, in the middle of the night, **Mohamed Touati** witnessed an attempted burglary near his home. As he chased after the burglar, he ran into a group of police officers who confused him with the culprit and arrested him. According to him, an officer beat him with kicks and a truncheon in the police car as he was being taken to the police station in Ariana. When he came before the examining magistrate, on 30 November 2013, his lawyer, Mr Rima Louati, noticed marks on his client's body and asked the examining magistrate to mention them in the official record. The examining magistrate refused and charged Mohamed Touati with unlawful possession of a knife, a crime for which the accused was ordered to pay a fine of 100 dinars. He has been hospitalised

since this assault, due to an infection which developed due to the truncheon blows to his knee.

His lawyer filed a complaint for torture on 19 December 2012. The prosecutor in Ariana opened a preliminary investigation, but according to lawyer, he only examined the victim one year later and to date has not questioned any witnesses or defendants.

The case of **Taoufik Elaïba** is also symptomatic of the slowness of the judicial system. This 50-year-old man who holds dual Canadian-Tunisian nationality was arrested on 1 September 2009 at home by officers from the national guard and taken to the station at Laaouina. He was tortured and held in inhumane conditions for the entire time that he was in custody. Under torture, he ended up signing a confession, which was used to place him in pre-trial detention for trafficking cars. He nevertheless reported the abuse to the examining magistrate before whom he was brought after 11 days in custody.

On 26 September 2009, Taoufik Elaïba's lawyer filed a complaint for the torture suffered by his client, but this complaint was not followed up. On 31 October 2011, despite the complaint and the many letters sent to various authorities by Taoufik Elaïba's lawyer and family, Taoufik Elaïba was sentenced to 22 years in prison, notably based on his forced confession.

On 22 December 2011, Taoufik Elaïba's current lawyer, Mr Lilia Mestiri, filed a new complaint for torture requesting that an investigation be carried out, that his client undergo a medical examination and his confession not be used by the appeal court judge. In spite of these demands, on 10 May 2012, the Tunis Appeal Court confirmed the initial court of first instance judgment, and simply reduced the sentence.

After a new complaint was filed, it was only in May 2012, in other words 32 months after the first complaint was filed, that an investigation for torture was finally conducted. Between May and June 2012, the examining magistrate interviewed the victim and a few of the witnesses to the arrest, without ordering any medical expert appraisal or interviewing custody witnesses or more importantly, the officers suspected of torturing him. Since July 2012, no further action has been taken and therefore *de facto* the investigation has been abandoned.

- 99. In other cases, the examining magistrates have shown themselves to be more diligent, carrying out a significant number of investigative actions required to get to the truth. However, the cases are still not brought before a trial court, and victims are not given any reason for this.**

**Thirteen students from Kairouan**, members of the General Union of Tunisian students (UGET) [*Union générale des étudiants tunisiens*] were arrested by the Kairouan police on 9 January 2011. They allege that they were tortured at the police station in their town, and were then handed over to a counter terrorism squad, which took them to the Interior Ministry. There, they were once again tortured and accused of wanting to overthrow the regime.

After the revolution, two of the victims filed complaints against persons unknown to the National Commission charged with investigating the excesses and abuses committed during the revolution. On 2 July 2011, the Commission

sent a letter to the State prosecutor requesting that an investigation be conducted. On 15 July 2011, the prosecutor opened a preliminary investigation, then the case was at a standstill for months, and it was not until 24 April 2012 that an investigation for torture and complicity in torture was opened. The magistrate interviewed the 13 victims, along with eight witnesses and organised face to face hearings between the victims and the officers identified as working in Kairouan and the Interior Ministry at the time of the alleged crimes. During the hearings, five officers were identified by the victims as having committed torture or been present during the acts of torture.

Since 10 June 2013, no further investigations have been conducted by the magistrate who has nevertheless not decided to close the investigation or refer the case to a criminal court. In September 2013, the victims held a 'sit-in' and a hunger strike to protest against dropping the investigation. More than a year later, a new examining magistrate was appointed. This new magistrate has made no additional enquiries and the investigation is still open.

100. In the case of Taoufik Elaïba, as with that of Mohamed Touati and the UGET students, it is difficult to determine why these investigations were subject to extremely slow judicial procedures. According to the magistrates, it is due to the heavy workload of the investigation service which is understaffed given all the investigations awaiting processing. Nevertheless, this judicial system is more proactive in investigating drug trafficking or terrorism. In the case of Taoufik Elaïba, ACAT, TRIAL and the Canadian Embassy have all tried many times to push the investigation on so that the victim can obtain justice. They also supported his request to be pardoned and review his conviction by invalidating the forced confession. Nothing has been done, and the blockage clearly seems to be political in nature. It is likely that similar obstacles, which have nothing to do with budgets or staffing in the Justice Ministry can explain the slowness of many other torture investigations.

### 3.2.2 Investigators' lack of diligence

101. To our knowledge, very few investigations for torture or ill-treatment carried have actually been completed by an examining magistrate. Three of these investigations concern victims monitored by ACAT and TRAIL as part of their legal assistance project. In each of these cases, the organisations highlighted many shortcomings which can be explained in part by the lack of diligence of the magistrates, who did not try to gather all the available evidence<sup>24</sup>.

One of these cases is that of **Barraket Essahel**. It concerns a group of army officers who were arrested in 1991, after being accused of plotting a coup against President Ben Ali. They were tortured and some of them were sentenced to harsh prison sentences at the end of unfair trials. All their careers were ruined, and both they and their families suffered years of harassment.

After the revolution, on 11 April 2011, 13 of the 244 military personnel affected by this wave of repression filed a complaint, assisted by many Tunisian human rights lawyers. The case was brought before civil judicial system, but at the end of the investigation, the examining magistrate referred the case to the military

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<sup>24</sup> Human Rights Watch noted similar shortcomings in the trial of the Martyrs of the Revolution (HRW, Tunisia: *Hope for justice on Past Abuses*, 22 May 2014).

judicial system, deeming that it had jurisdiction since the victims were military personnel. A new investigation was therefore conducted by a military magistrate.

During the two civil and military investigations, the 13 complainants joined by a dozen other victims, provided the names of the many military personnel who summoned them before their arrest, took them to the General Directorate of Military Security (DGSM) [*Direction générale de la sécurité militaire*], where they were questioned, some were then transferred to the Laaouina barracks, then taken to the Ministry of the Interior where they were all tortured. None of the military personnel identified by the victims were questioned by either the civil or military examining magistrates.

Furthermore, the victims accused the then Ministry of Defence of being an accessory along with the directors of the DGSM, who were seen on several occasions at the Ministry of the Interior while the detainees were being tortured. However, no one from the DGSM was interviewed during the investigation. Only the Minister of Defence was questioned by the civil examining magistrate, and was immediately cleared.

Some victims were tortured so badly that they had to be transferred to the military hospital for several weeks. One of them provided the names of the military doctors who were responsible for their care at that time. None of these doctors were interviewed by the examining magistrates who did not therefore try to find out if - as we suspect - the military hospital informed the Ministry of Defence that tortured military personnel had just been hospitalised. In this way, the civil and military judicial systems took great care to protect the Ministry of Defence by concentrating the investigations on the officials in the Ministry of the Interior.

Several victims were sent to Mornag prison at the end of their detention at the Ministry of the Interior. They all showed marks of physical abuse. Neither the prison director nor any officials were interviewed as part of the investigation. They could have nevertheless revealed information about the identity of people who handed over the victims. These included some who were brought before a military examining magistrate at the end of their custody. This magistrate was also not interviewed.

**Wadi Khattali** was arrested on 13 April 2010 at Girgis by several police officers. Suspected of drug trafficking, he was interrogated and alleges to have been subjected to torture and ill-treatment at the Girgis police station then at the Médenine prison to make him confess to having taken and sold drugs. He was brought before an examining magistrate on 20 April. He still had signs of torture and his clothes were stained with blood. Wadi Khattali claims that he reported the torture he had suffered, but the examining magistrate allegedly refused to enter these allegations into the record and ordered him to be transferred to Harboub prison.

His lawyer filed a complaint for torture on 19 March 2011. After a brief preliminary investigation conducted by the state prosecutor in Medenine in 2011, a torture investigation was finally opened, but only one and a half years after the complaint had been filed in March 2011. This investigation was assigned to the same magistrate who had heard the drug trafficking case and had

refused to hear Wadi Khattali's torture allegations when Mr Khattali appeared before him on 20 April 2010.

The impartiality of this magistrate is therefore seriously in doubt. His bias in favour of the accused in the investigation for torture is also clearly evidenced by the fact that the investigation was botched. In fact, the magistrate failed to interview the officer who led the enquiry during which Wadi Khattali was tortured. He also did not question witnesses such as his mother or brother, who saw him at the police station at the end of his custody just before he was transferred to the court, nor did he question Wadi Khattali's co-accused who also appear to have been tortured. Finally, the magistrate did not order the Medico-legal expert appraisal to record the physical and psychological effects of the abuse. The torture investigation therefore resulted in a nolle prosequi order.

### 3.2.3 The medical record, crucial evidence

102. A part of the documentary evidence for torture which an examining magistrate must use is in the hands of doctors. In fact, although the magistrate may reconstruct the facts from interviewing the victim, witnesses and the accused, he must rely on medical experts to put this story to the test using clues provided by the victim's body and psychology. In the case of torture, the role of medical examiners is to establish to what extent the results of the physical and psychological examination are consistent with the crimes alleged by the victim. During the medico-legal examination, which may take place over several appointments, the doctor conducts the examination using a detailed written description of the facts provided by the victim before the appointment. This confidential report covers the statement of the circumstances surrounding the arrest, detention, torture sessions, etc. The medical examiner questions the victim about the physical effects, after being subjected to a specific type of torture in order to test the truth of the allegations. He then carries out a physical examination to see if the torture in question has left any marks. Another part of the examination must be performed by a psychologist or a psychiatrist specialising in this type of trauma.
103. In Tunisia, medico-legal expert appraisals for torture cases present several problems. First of all, **out of the forty or so medical examiners in Tunisia, few are trained in torture documentation, in accordance with the Istanbul Protocol.** Furthermore, as there are so few medical examiners, they all know each other, so that while it is in theory possible to contest a medico-legal report by requesting a counter-expert appraisal, it is difficult to see to whom this task could be assigned. It is highly unlikely that a medical examiner would take the risk of repudiating a colleague by issuing a divergent conclusion.
104. In addition, torture techniques have changed over the last decades. Physical abuse inflicted in the 1990s left marks that were easily detectable and far from ambiguous (scars, fracture calluses, etc.). Progressively, torturers have had access to methods which leave fewer physical marks (mock drowning, being made to stand up for several hours without moving, sexual aggression, humiliation, etc.), but above all psychological and physiological traumas. Consequently, allegations have become more difficult to corroborate through the medical examination. Such examinations were almost never performed before the revolution as the Tunisian judicial system

never conducted torture investigations. **Today, the magistrates more frequently order medico-legal expert appraisals in the event of allegations of torture or ill-treatment, but the examination is often carried out late, or not at all and the marks have had ample time to heal.** This therefore makes it complicated to establish the truth, especially if the victim cannot call on any eye witness to corroborate his story, as if sometimes the case in matters of torture.

This is the case in the investigation into the torture suffered by **Ameur Belaazi** (see § 95). His lawyer filed a complaint for torture on 27 September 2013. The substitute prosecutor in charge of torture cases at the time, did not interviewed him before 22 October. He noted marks of physical abuse in the record, but only ordered a medical expert appraisal on 11 December 2013, after the victim's lawyer had chased him up. The substitute prosecutor also asked the prison to send him a copy of the prisoners medical file. Just after this request, Ameru Belaazi was transferred to the prison in Borj El-Amri, then to Nadhor then to Borj el-roumi, thereby both blocking the medical expert appraisal and the medical file being sent to the substitute prosecutor. At the end of 2014, this expert appraisal had still not been carried out.

105. Another major problem with the medico-legal expert appraisal is the poor communication between medical examiners and the magistrates. The medical examiner writes a report in a technical language that is often incomprehensible to an untrained reader. He then sends the document to the magistrate who interprets it as best he can, or as he wants, without systematically asking the doctor to explain his remarks and conclusions. The magistrates usually regard the expert reports as the absolute truth. Yet, on the one hand, the entire truth behind the abuse is not always reflected in the body. **On the other hand, it is clear that the medical examiners do not always show the necessary diligence. Sometimes, they draw conclusions - generally in favour of police officers - without explaining why they have set aside other equally valid assumptions or more importantly without implicating the security forces.** A medico-legal expert appraisal that is biased or not clear enough may sometimes be enough to clear the police. The victim's lawyer, who is no more knowledgeable than the magistrate in the medical field, has no way of contesting the report's conclusions. As to requesting a counter-expert appraisal, that seems barely relevant given that the Tunisian experts all know each other and would certainly be little inclined to contradict each other.

A recent example of the negative role the medico-legal expert appraisal can play is the case of **Walid Denguir**, who died in suspicious circumstances on 1 November 2013, at the Trik Zaghounen police station in the district of Ouardiyya. The young man had just been arrested near his home. He was dead on arrival at the police station.

As soon as the media got hold of his story on the day of his death, the police explained that Walid Denguir had died of a heart attack. In mid-November, the head of the Sahbi Jouini, national security union [syndicat de la sécurité nationale], was interviewed about the case on *Mosaïque FM*. He stated that Walid Denguir had died from an overdose of cannabis that he had swallowed during his arrest. This union representative nonetheless has no proof to substantiate

such a statement and is not permitted to comment on an ongoing judicial investigation, in his capacity as an official in the security forces.

An investigation was opened on 4 November 2013. Two witnesses to the arrest were interviewed, but the investigation seemed to have mostly relied on the autopsy report. As advisers to the family of the deceased, ACAT and TRIAL obtained a copy of this report which they sent to two European legal medicine experts: Prof. Patrice Mangin (Switzerland) and Pr Hans Petter Hougen (Denmark). Without calling into question the seriousness of the expert appraisal carried out by Dr Ben Khelil, Professors Mangin and Hougen raised key questions which highlighted the need to perform additional analyses and investigations.

The autopsy report dismisses out of hand the traumatic origin of the death due to the absence of major traumatic lesions. Nevertheless, as Professors Mangin and Hougen note, the lack of marks does not mean that there has not been any physical abuse, given that some torture techniques may not leave marks. Furthermore, the report fails to explain the presence of blood around the nose, ears and mouth of the corpse.

The autopsy report concludes that: 'The cause of death is a secondary asphyxiation syndrome with an acute secondary heart failure combined with physical effort and emotional stress in a person who had ingested cannabis.' In short, the Tunisian medical examiner says that Walid Denguir death was due to the combination of physical effort, stress related to his arrest and the consumption of cannabis.

Yet, no analysis has proven that the deceased was under the influence of cannabis at the time of his death. Only a blood test would be able to verify this, but it was not carried out. On the other hand, the Tunisian expert dismissed a major theory that he had nevertheless mentioned in his report, i.e., positional asphyxia which might implicate the role played by the police.

The European doctors confirm that the analysis and findings on the corpse were correctly performed by the Tunisian medical examiner, but they are not sufficient to come to the conclusion given in the report. According to Professor Manguin, positional asphyxia is a more likely theory. But only a blood test can assess if cannabis had been taken, and above all a reconstruction of the circumstances surrounding the arrest would enable more light to be shed on the possible causes of death. However, in June 2014, based on the autopsy report, the prosecutor from the Tunis court of first instance decided to close the case, thereby ruling out the involvement of the police.

106. In addition to or in the absence of the medico-legal expert appraisal, magistrates often ask to have a copy of the victim's prison medical file, always supposing that the victim was imprisoned after being tortured. As we have already explained previously, this medical record often proves to be insufficient since few doctors record the marks of beatings, through lack of expertise, time or sometimes through lack of will. In addition, sometimes for reasons unknown, the prison management blocks the file being sent to the magistrate.

In early February 2012, near to **Bir Ali Ben Khalifa**, the army and the national guard exchanged fire with three armed individuals suspected of belonging to a terrorist group. Following this clash, the security forces carried out a major

wave of arrests. At least 14 people arrested alleged to have been arbitrarily detained and tortured by the counter terrorism police in Laaouina and Gorjani. Following loud protests from several NGOS and lawyers for the detainees, the government set up an investigative commission responsible for investigating the torture allegations. The commission's unpublished report was sent to the examining magistrate no. 14 at the Tunis court of first instance who opened an investigation in December 2012. The magistrate sent a request to the four prisons where the Bir Ali Ben Khalifa detainees were being held to send their medical records. The prisons in Mahdia and Borj el-Amri claimed to have lost them when the prisoners were being transferred. The investigation has been at a standstill since 2013.

### 3.2.4 Omnipotent security forces

107. In filing a complaint, the torture victims open themselves up to the risk of retaliatory measures including death threats, but also police and judicial harassment (see § 85-86) Sidqî Halimi, arrested at least four times since he filed his first complaint for torture is the best example. Witnesses incur similar risks, especially if they are already socially vulnerable. Several witnesses cited in the complaint of Sidqî Halimi have been imprisoned for various offences. The same is true in the case of Walid Denguir. Two neighbours witnessed the arrest, when they were playing football close to the arrest location. At the time when the brief judicial investigation was carried out to determine the circumstances of the arrest, one of the witnesses had fled, because he was being prosecuted for assault and the other was in prison and had not been questioned as part of the investigation. In another case documented by ACAT and TRIAL in which the victim finally withdrew his complaint, the brother - the main witness - and his sister-in-law were arrested and placed in custody for illicit relationships and trafficking alcohol, just after meeting with representatives of the two charities.
108. The problem with this type of harassment by police and the judiciary is that it is difficult to identify as such. The case in which the victim or the witnesses are prosecuted must be scrupulously examined before being able to prove with certainty that these are false accusations intended to compromise the torture investigation. All too often the lawyers cannot or do not want to do this work or find themselves faced with magistrates who are in league with the police. In this case, either the victim abandons his case out of fear that the harassment will escalate, or he continues, like Sidqî Halimi, at his own risk. Victims of torture, like their witnesses can also be offenders, but that should not in theory influence the investigation for torture. Nevertheless, more than often in practice, the magistrates have less consideration for the testimony from a person in detention, always supposing that he accepts the testimony as he is required to do so by the law.
109. **Aside from the pressure on victims and the witnesses, the police sometimes hamper the investigation process by refusing to summon or arrest their colleagues suspected of torture.** There is no police department specialised in cases of physical abuse meted out by State officials in Tunisia; this means that the magistrates must rely on the normal police service.

**Ezzedine Jenayeh**, the former Director of State Security at the Ministry of the Interior also enjoys police protection. Implicated by the victims in several cases of torture, he was already sentenced to five years in prison at the end of the trial of the Barraket Essahal victims on 14 November 2011. He was then considered to have absconded, although it was public knowledge that he was living in Tunisia. He still has considerable influence within the police. He appeared before the military courts in 2015, to appeal his conviction. Since this date, he is still at large.

110. The complaints for torture of detainees arrested under counter-terrorism measures and subjected to physical abuse during their custody have multiplied. Some have led to investigations being opened, but in some cases, when it comes to identifying the torturers, the magistrates were forced to dismiss the cases on the grounds that Article 48, paragraph 1 of the 2003 counter terrorism Act prevents the identity of arresting and interrogating officers from being disclosed. This paragraph provides that: 'necessary measures have been taken to protect those people to whom the law has entrusted the recording and repression of terrorist offences, notably magistrates, police officers and public officials.'<sup>25</sup> This provision is abusively interpreted by the Ministry of the Interior to guarantee the impunity of the police officers suspected of having committed serious human rights violations in the course of their duty.

This occurred during the investigation on the detained tortured in the case of **Bir Ali Ben Khalifa** as well as in the **Mehrezia Ben Saad** murder case. This victim was shot dead in her home, on the night of 30 December 2013, when the National Guard's counter terrorism squad descended on Laaouina to arrest her husband. When the officers burst into her home, Mehrezia Ben Saad was in her bedroom with her child and her husband. The officers opened fire on the family through the bedroom door, subsequently claiming that they were only returning the shots fired by her husband from within the bedroom, a version which was moreover invalidated by the lack of empty cartridges in the home. An investigation was opened to shed light on the circumstances surrounding the women's death, who was killed by one of bullets fired by the officers.

The examining magistrate responsible for the murder enquiry wrote to the General Inspectorate of the National Guard to request the identity of the officers who took part in the raid, as well as the role of each of their weapons. The General Inspectorate replied that Article 48 of the 2003 counter-terrorism act prevented him from revealing the identity of the policemen, making it impossible to carry out the investigation and ensuring total impunity for the perpetrators of the murder. Furthermore, the magistrate gave the national guard in Laaouina a rogatory letter to help in the investigation, in other words to colleagues of the officers of the National Guard's anti-terrorist brigade who were subject of the enquiry. However, in general, common sense prevails, with investigations for national guard officers being assigned to the police and vice versa. The examining magistrate asked the investigators to perform an expert appraisal to determine the path of the bullet. The expert appraisal was carried out, but the final report only referred to the source of the blood in the bedroom,

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<sup>25</sup> The provision was retained within the Article 67 of the new counter terrorism act adopted in July 2015.

falling short of giving conclusions which could be unfavourable to the national guard officers who carried out the attack.

111. Several magistrates interviewed by ACAT have therefore complained of the sometimes blatant lack of police cooperation in investigations for torture or ill-treatment that target their colleagues. However, they consider they are powerless in the face of this phenomenon and some of them even seem to fear the police.

The investigation into the death of **Mehrezia Ben Saad** was first assigned to an examining magistrate at the Tunis court of first instance who referred it to the court in Mannouba near to where the incident occurred. The examining magistrate in Mannouba also passed the case on to the Tunis court of first instance on the grounds that the raid in the victim's home had been ordered by a colleague in Tunis. As the Tunis court of first instance once again denied that it had jurisdiction, the Court of Cassation finally had to assign the case to the court of first instance in Mannouba. The designated examining magistrate within this court tried to pass the case on once again to the Tunis court of first instance, but without success. All these requests to refer the case seem to reflect a certain unease or even fear of the different magistrates in dealing with a sensitive investigation concerning the highly protected police officers of the counter-terrorism squad.

112. The idea has already been put forward to transfer the supervision of the police from the Ministry of the Interior to the Ministry of Justice and assign the task of promoting police officers to the state prosecution office. This doesn't seem to have been included in forthcoming reforms. In the meantime, a specialised police force should be set up to look into cases of police brutality. This police force should be staffed with officers above all suspicion, in the same way as the specialised chambers, which should be set up within the country's first instance courts to try the torturers. However, it is difficult to imagine what safeguards could be set up to guarantee the total independence of these police officers with respect to the Ministry of the Interior, except by getting this unit to report to the Ministry of Justice.

### 3.2.5 No level playing field

113. Faced with all the obstacles hindering the investigations for torture or ill-treatment, the victim's lawyers play an essential role. Indeed, it is pointless for them to wait for the magistrates to conduct exhaustive enquiries in order to find any evidence, witnesses or perpetrators. In view of the resources available to them, the lawyers and their clients must present the magistrates with all the elements which appear relevant to them to get to the bottom of the case.

114. However, the **Tunisian CCP does not guarantee a level playing field for the victims, giving the prosecutor's office an unfair advantage.** According to Article 55 of the CCP, the prosecutor can have access to everything that the examining magistrate has done as part of the proceedings. In addition, he can ask this magistrate to give him all the documents he considers useful to get to the truth. If the examining magistrate refuses, the prosecutor can lodge an appeal in the Indictment Chamber. The CCP does not give such rights to the accused, for whom Article 69 mentions that:

'If evidence can be provided to acquit the accused, this will be promptly verified', without mentioning that the accused can appeal against the examining magistrate's refusal to conduct any of these checks. As for the civil party - the victim of torture or ill-treatment in the cases which interest us - the CCP does not mention his right to participate actively in the search for the truth. Consequently, if the victim's lawyer asks to question a specific witness or suspect and the examining magistrate refuses, he must wait for the magistrate to deliver a judgment at the end of the investigation - often after years of proceedings - before being able to lodge an appeal in the Indictment Chamber in order to receive any additional information about the investigation.

115. Recently, lawyers have noted a new worrying development in judicial practice. In recent years, several people have died in police stations under suspicious circumstances. Each time, the prosecutor opened an investigation on the basis of Article 31 of the CCP, which provides that: 'If the State prosecutor is presented with a complaint with insufficient evidence or grounds, he may request from the examining magistrate to be provisionally informed despite the lack of evidence, until new accusations can be issued, or if applicable new judiciary requests against the named person.' This provision means that the prosecutor can ask to open an investigation to determine whether or not an offence has been committed. **As long as the investigation does not conclude that an offence has been committed, the victim or his family cannot be deemed to have suffered injury. Therefore, the examining magistrate will almost systematically refuse to let them join the case as a victim.** This reasoning has been used in several cases where people have died at the hands of the security forces.

Based on Article 31 of the CCP, an investigation was opened in the case of **Walid Denguir**, who died at the Trik Zaghounen police station on 1 November 2013 (see § 105). The family of the deceased wanted to join the case as an injured party in order to have access to the investigation file to check that the magistrate was committed to finding the truth. They were refused. As a result, the family of Walid Denguir have not been able to ask for a medico-legal counter-expert appraisal, nor submit the expert appraisals of the European doctors requested by ACAT and TRIAL to the examining magistrate, nor request that other witnesses to the arrest be questioned. After the prosecutor dropped the case in June 2014, the family filed a complaint, with an application to join the proceedings as a victim in order to request a new investigation. The appointed examining magistrate, shockingly demanded the the family's lawyer provide him with the file from the first investigation which ended in the case being closed. The lawyer then searched the court, only to find that the file in question had disappeared.

***ACAT-France and FWB invite the Committee to recommend that the State party:***

- ***guarantee that investigations for torture or ill-treatment are assigned to magistrates who have no former link with either the victim or the accused;***
- ***order the prosecutors to send the complaints for torture with sufficient corroboration to an examining magistrate so that the victims can join the case as an injured party and actively participate in the investigation;***

- *amend the CCP so that injured parties can participate in the judicial investigation in the same way as the prosecutor, notably by entitling them to appeal against the examining magistrate's refusal to grant a petition.*
- *order the prosecutors and examining magistrates to conduct rigorous investigations, notably by questioning all relevant witnesses and all suspects mentioned by the victims.*
- *give the judicial inquiry unlimited access to the archives of the political police and the Ministry of the Interior which could be used as proof in proceedings for torture or ill-treatment;*
- *if the investigating magistrate requires help from the police, ensure that the police officer appointed has no links with the officers implicated, which might compromise his impartiality and independence;*
- *set up a specialised police force reporting to the Ministry of Justice to conduct investigations into torture and ill-treatment;*
- *amend the counter terrorism Act to ensure that it cannot be invoked by senior officials in the security forces to refuse to give magistrates the names of the officers involved in the arrests or interrogations, who are subject to complaints of brutality or torture;*
- *demand that the magistrates promptly decide to carry out a physical and psychological expert appraisal when they asked to investigate allegations of torture or ill-treatment;*
- *order prison directors, who have been asked by a magistrate to comply with a medico-legal expert appraisal by transferrin the detainee(s) to a hospital within no more than one week so that the expert appraisal can be carried out.*
- *assign the physical and psychological medico-legal expert appraisals for torture victims to doctors trained in the Istanbul Protocol; these doctors should present their findings in accordance with the Protocol's requirements.*

### 3-3 Trials symptomatic of conciliatory justice

#### 3.3.1 Stalled proceedings

116. To-date few trials for torture or brutality perpetrated by State officials have seen the light of day. While the investigations tend to drag on, sometimes trials are constantly adjourned.

In June 2011, **Rached Jaïdane** (see § 13) filed a complaint for torture and ill-treatment during his secret detention at the Ministry of the Interior in 1993 and then during his 13 years in prison. The examining magistrate who took on the case carried out a prompt but slipshod investigation. First of all, when Rached Jaïdane was questioned, the examining magistrate did not attempt to identify potential witnesses who might have seen the victim when he was detained at the Interior Ministry or when he was brought before the examining magistrate after 38 days of torture. Neither did he question the main witness mentioned by Rached Jaïdane, nor the examining magistrate who had seen him after his arbitrary detention at the Interior Ministry, when the torture marks were still visible, nor even the prison doctor on the '9 April' when he was imprisoned just after his court visit. Nor did he check the truth of the defence's arguments

provided by the accused at their hearing, notably the alibis mentioned by some of them.

The examining magistrate closed the investigation on 16 February 2012 and sent the case for trial. The trial opened before the Criminal chamber of the Tunis court of first instance on 14 March 2012. After this the hearing was continuously adjourned for more than three years. Each time, the adjournment was justified either due to the request of one of the suspects' lawyers who were trying to gain time, or by the absence of one or the other of the accused, due to an alleged illness or quite simply, because they simply refused to attend the hearing. The judges normally are within rights to refuse such delaying tactics, but they nevertheless accepted all requests for adjournment. Finally, the courts delivered its judgment on 8 April 2015, acquitting all the accused with the exception of Ben Ali.

### 3.3.2 Derisory sentences given the seriousness of the facts

117. Until now, with one exception<sup>26</sup>, In the few trials that were held for acts of torture committed by public officials, the judges chose to classify them as acts of brutality rather than torture. In certain cases, that can be explained by the fact that the physical abuse was perpetrated before torture was criminalised (see § 1-10), in others, it is due to the magistrates erroneous acceptance of torture.

118. In fact, in judicial practice, **magistrates tend to reduce torture to extreme physical or mental pain and suffering carried out in order to obtain confessions or information.** This restrictive definition of torture was reinforced after the revolution by reforming Article 101 bis of the CC which restricted the goal of physical abuse to obtaining confessions or information (see § 21-22). As a result, the magistrates often prefer to apply the term 'brutality' to the physical abuse carried out in prisons against the detainees, or by police officers, with the exception of custody, without taking account of the seriousness of the physical abuse.

In the case of **Ali Qalii** mentioned above (see § 91), the victim suffered physical abuse in detention. He had just left the Borj el-Amri prison, on 14 January, on the orders of the prison governor, when the army intercepted him with other inmates. They were all taken back to prison and beaten up. A guard and a senior lieutenant from the prison, beat, punched and kicked Ali Qalii once he was on the ground. He lost two teeth from the blows and a third was broken. Then the officials put him in solitary confinement for two weeks. After his pardon a few weeks later, he filed a complaint for torture. He still had bruises from the beatings, which were recorded during a medical examination. The prison officer who assaulted him was sentenced to one year in prison, not for torture as his lawyer had demanded, but for the crime of brutality based on Article 103 of the CC which 'punishes any civil servant to five years in prison and a fine of one hundred and twenty dinars, who without legitimate reason, infringes the individual freedom of someone or uses or gets others to use brutality against an accused person, a witness or an expert witness, to obtain confession or statements. The sentence is reduced to six months in prison if there were only

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<sup>26</sup> This was the trial of Sami Belhadef's torturers (see § 119)

threats of violence or ill-treatment.' On appeal, the Court declared that it did not have jurisdiction and referred the case to the military court. In the meantime, the officer, who was sentenced is still free and has even been promoted to the grade of captain and is now the Director of Monastir prison. Ali Qalii received no compensation. He died in March 2014.

During the revolution, **12 people** were tortured in the police stations in Talaa and Kasserine. In particular, they were tortured using the bath tub and roast chicken techniques and were burned with cigarettes, etc. A few months later, the Tunisian judiciary opened several investigations into what was called the 'Martyrs of the Revolution' cases. These were notably aimed at uncovering the truth about all serious violations of human rights perpetrated by the security forces in the Kasserine Governorate between 17 December 2010 and 14 January 2011. The torture victims who were questioned implicated many police officers. However, only one policewoman, Rebha Sammari was prosecuted and only for brutality and not for torture<sup>27</sup>. She was sentenced to 10 months in prison on appeal for having used brutality against two victims at the Telaa police station. There was therefore no other investigation into the torture suffered by the Kasserine victims and none of the other torturers or their superiors were implicated, some of whom were only questioned as witnesses. Nevertheless, the 12 victims are injured parties in the trial, to whom the military court deems that it has delivered justice through its verdict.

119. Aside from the problem of the inadequate legal classification, **judges show considerable clemency towards public officials who have committed acts of brutality; When they are sentenced, they get a light sentence compared to the alleged crimes.**

On 29 November 2011, in the case of **Barraket Essahel**, the military court issued sentences of between three and four years in prison for those convicted persons in custody and five years for those who had absconded. On 7 April 2012, the criminal chamber of the military court of appeal reduced the terms handed out to the convicted prisoners to two years.

When questioned about the lenient prison sentences handed out to the accused in the above-mentioned Barraket Essahel case, the principal military state prosecutor explained that the judiciary had little evidence to justify longer sentences. However, as we have seen (see § 101), the examining magistrate failed to question many of the witnesses either mentioned by the victims or who were easily identifiable. Moreover, it seems that neither the examining magistrate nor the trial judges attempted to obtain archive copies from the Ministries of the Defence or the Interior which would have certainly enabled them have more certainty about the chain of responsibilities.

In the Barraket Essahel case, the decision - delivered by the military judge, then by the military court of appeal - which reduced the prison sentences - appears to be a conciliatory ruling. The aim was to satisfy both the victims, full of expectations towards the judiciary in view of the revolution's promises, and the accused by

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<sup>27</sup> The *addendum* to the periodic report of Tunisia before the Committee Against Torture confirms that the courts did not accept the crimes of torture during the trials for the martyrs of the revolution, despite acknowledging that several victims alleged that they had been tortured.

carrying out an investigation with few corroborated witness statements, so that according to the judges, it was impossible to deliver a harsher sentence. In the end, everyone was dissatisfied with the verdict. The victims rightly considered that the sentences of three to four years handed down to the accused held in custody did not reflect the seriousness of the physical abuse suffered, without mentioning the sentence of two years delivered after the appeal. As for the perpetrators, they believed they had been convicted in order to satisfy the victims, but considered that there was not enough evidence to establish their guilt.

On 25 March 2011, the Tunisian judicial system for the first and, to our knowledge, only time, delivered a conviction for the crime of torture based on Article 101 bis of the CC, as per the version in force in 2004, when the crime was committed. The victim, **Sami Belhadeb**, had been arrested on 3 March 2004 by police officers from Ariana, who suspected him of being involved in a series of burglaries. At the police station, the suspect was placed in the roast chicken position and beaten with a pipe on the soles of his feet. This led to a wound on the left foot which became infected so much that the Bouchoucha custody unit refused to admit him. When Sami Belhadeb was placed in pre-trial detention, three days after his arrest, he saw the prison doctor who immediately hospitalised him so he could be operated on.

On 13 March 2004, the prisoner's lawyer filed a complaint for torture. It was only six years later that the Court of First instance in Tunis finally passed judgment, based on the statements of the victim, the accused and many witnesses including a police officer, as well as the victim's medical file. After ascertaining the truthfulness of the allegations of torture, the court sentenced the four convicted officers to only two years in prison, without explaining this clemency. The convicted officers lodged an appeal. Before the court passed judgement, the victim forgave them, which led the court to reduce their sentence to a two-year suspended sentence.

120. The punishment meted out in the cases of Barraket Essahel, Ali Qalii, Sami Belhadeb and those of the martyrs of the revolution cannot be considered to be satisfactory. They do not deliver justice to victims who therefore have their injury minimised. Nor do they fulfil their function in preventing torture, since they are not sufficiently dissuasive. They therefore seem to be a conciliatory approach which can never satisfy all parties.

### **3.3.3 The impunity of magistrates and doctors who are accessories to torture**

121. **To-date, no examining magistrate or prosecutor have been implicated for closing their eyes to the physical abuse when a victim is brought before them with visible marks of torture after their arrest. Health professionals continue to enjoy the same automatic immunity**, with the exception of one doctor who was prosecuted after the revolution in an investigation relating to a person who died from torture at the beginning of the 1990s.
122. Nevertheless, there are several legal arguments that would allow these officials to be prosecuted for being an accessory to torture or at least non-assistance to persons in danger. Article 32, paragraph 4 of the Criminal Code provides that a person is treated as being an accessory in a crime or an offence, if they have knowingly aided or

abetted the criminals to ensure they are not punished. This paragraph ensures that someone can be punished for being an accessory, not if they aid before or during the crime but afterwards, whenever this aid is given so that the main perpetrators of the crime go unpunished.

123. Both under Ben Ali's regime and still today, many magistrates and doctors refuse to take note of allegations of torture from the victims who are brought before them, helping the torturer to cover up their crimes. Prosecution for being accessory to torture, even if the defendant neither participated nor incited in the torture, is even more justified in that, given the specific function, the magistrates and doctors, have a professional and ethical duty to condemn torture whenever they see it, or whenever it is brought to their attention.

124. In certain cases, seen by ACAT and FWB, the examining magistrates or doctors were not just content to cover up for the torturers by not denouncing the crime to the judiciary, they even put pressure on the victims or actively helped the torturers in carrying out their abuse.

**Rached Jaïdane** and his fellow inmate, **Mohamed Koussai Jaïbi**, were brought before the examining magistrate of the Tunis court of first instance on 4 September 1993, after more than a month of arbitrary detention and torture at the Ministry of the Interior. Mohamed Koussai Jaïbi explained to the magistrate that he signed a confession under duress and the magistrate threatened to send him back for more torture if he did not stand by his confession. In June 2013, with the support of ACAT and TRIAL, the victim filed a complaint for torture against the officials of the Ministry of the Interior and demanded that the examining magistrate be prosecuted based on Article 103 of the CC which 'punishes any civil servant to five years in prison and a fine of one hundred and twenty dinars, for infringing individual freedom without a legitimate reason, or getting others to use violence against an accused person, witness or expert witness, in order to obtain a confession or statements. The sentence is reduced to six months in prison if there was only threats of violence or ill-treatment.' The torture investigation has up till now been limited to questioning the victim. The examining magistrate in question has not been prosecuted or even questioned.

More recently, in 2008, **Mohamed Zaïed** was arrested on the grounds that that he was suspected of drug trafficking. He states that he was tortured during his custody within the Tunis customs squad and was mistreated at the Bouchoucha depot where he was forced to sleep on the floor handcuffed to bars in a crowded cell. The examining magistrate in charge of his case, to whom Mohamed Zaïed stated that he refused to confirm the contents of his confession because it had been obtained under torture, subjected him to further investigation conducted by the Kabaria drug squad. There he was again tortured at the hands of this second squad, which including being whipped and burnt with a cigarette. The examining magistrate is an accessory to this abuse, since he did not halt the second investigation when Mohamed Zaïed revealed to him that he had again been tortured by this second squad.

125. Still today, the magistrates are hostile to the idea of implicating their fellow officials, perhaps for some, out of fear of reprisals. Tunisian law grants immunity to magistrates. Therefore, to file a complaint against one of them, a petition must first be filed to lift the immunity at the clerk's office at the Ministry of Justice. This is a considerable obstacle in fighting impunity.

After his arrest and torture at the police station in Gafsa in 2008, **Moudhafer Labidi** (see § 87) was brought before an examining magistrate. The prisoner had visible marks of torture, but the examining magistrate did not follow up the victim's allegations. In the complaint for torture that he had wanted to file in June 2014, Moudhafer Labidi's lawyer implicated the examining magistrate. The court told him that he must withdraw the magistrate's name from his complaint before filing it, due to the immunity enjoyed by the suspect.

### 3-4 Missing statistics

126. In its follow-up report to the Committee, Tunisia supplied statistics to prove that it was tackling immunity. It also mentioned that 230 cases of torture were being heard before the Tunisian courts between 14 January 2014 and 1 July 2014. Among these 230 cases, 165 were still in the investigation phase. We don't know exactly what happened to the other 65 cases. Twenty cases - perhaps included in the 230 - were transferred to the military courts. Six others were dropped by an examining magistrate for lack of legal elements, lack of proof, inability to identify the guilty party or the limitation period. In three other cases, the accused were convicted in absentia to a prison sentence or a fine. Finally, in both cases, the accused were given a suspended sentence.

127. These statistics are not sufficient to be able to make a reliable assessment of the Tunisian authorities' achievements in fighting impunity for torture. First of all, they do not specify how many complaints have been filed for acts of torture, so that we cannot know what proportion of complaints filed led to an investigation being opened. AISPP members have studied the records of the registry offices of the courts of first instance in the country and estimate that more than 400 complaints for violence committed by State officials were filed between the start of 2011 and May 2014. 70% of these were closed<sup>28</sup>. Nevertheless, even if after studying the registry office records it is not possible to have a precise idea of the number of complaints filed, given that it appears that they are not all entered into the court clerks' office records or, for complaints filed in Tunis, in the special register for complaints of torture and ill-treatment. In fact, Brahim Bouslah, the former substitute prosecutor in Tunis, responsible for the register of torture cases, stated that he only recorded complaints once their was sufficient evidence<sup>29</sup>. Consequently, when he received a complaint which it considered too vague, he summoned the victim to get more information about the circumstances of the offence, before registering the complaint. ACAT and FWB have not been able if the substitute prosecutor has taken or found the time to speak with all the victims whose complaints he considered to be insufficient, in order to get additional information. It is therefore possible that some complaints were never registered (see § 87).

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<sup>28</sup> Interview with Saida el-Akermi, May 2014.

<sup>29</sup> Interview with Brahim Bouslah, May 2014.

128. **The statistics mentioned in Tunisia’s periodic report to the Committee Against Torture do not make it possible to assess if the work accomplished by the judiciary to investigate complaints of torture has been thorough.** Indeed, to achieve this, we need to compare the alleged crimes with the legal classification given by the Prosecutor, then by the examining magistrate, and finally by the trial and appeal court judges. It is therefore probable that crimes were classified by the magistrates as ‘acts of violence or brutality’ based on Article 101 or 103 of the Criminal Code (CC), when they should have been classified as ‘acts of torture’ based on Article 101 bis of the CC and should therefore be punishable by a heavier sentence. This is particularly true for torture carried out in prisons, since magistrates tend to consider torture to be physical abuse used to get a confession. Furthermore, many cases of torture – especially those committed before the revolution – concern people who other than the physical abuse, suffered arbitrary detention for longer than the authorised custody period of six days. Such crimes are punishable under Article 250 of the CC with a ten-year prison sentence and a fine of 20,000 dinars for anyone who, without lawful order, captures, arrests, detains or hold a person against their will, with an even harsher sentence in aggravating circumstances. However, according the court records, few investigations and prosecutions are based on Article 250 of the CC.
129. The merits of the legal classification chosen by the magistrates can only be determined by in-depth analysis of the case and the evidence to ensure that the magistrates do not minimize the seriousness of the crimes by opting for lighter penalties. According to several human rights NGOs working on torture, such as AISPP, OCTT and FWB, many complaints which go on to be investigated, are closed by the prosecutor or end up in a *nolle prosequi* from the examining magistrate. Here again, it is only by studying the case that one can determine the merits of the classification. If it is not possible to do this analysis, it is impossible to interpret the number of cases closed and certainly does not mean that the closed complaints were not without merit.
130. In the two cases followed by ACAT and TRIAL, it appears that the classifications were abusive and were really intended to cover the torturers.

The first case concerns **Wadi Khattali** who alleges to have been tortured during his custody in April 2010 (see § 101). The investigation for torture was assigned to the same examining magistrate who closed his eyes to the physical abuse after the victim’s custody. It was therefore no surprise that the investigation was closed after a *nolle prosequi* order, which rather than reflecting the lack of evidence, points to the examining magistrate partiality and lack of rigour. Furthermore, at the request of ACAT and TRIAL, who provided legal assistance to the victim, Wadi Khattali’s lawyer appealed this decision and the court of appeal ruled in his favour and ordered a second investigation. The examining magistrate reissued a *nolle prosequi* ruling, which was against dismissed by the court of appeal. The lawyer brought the case before the Court of Cassation in order to transfer the case to another court.

In the second case, that of **Walid Denguir** (see § 105), who died in suspicious circumstances in the police station at Ben Arrous in November 2013, the

prosecutor of Tunis 2 closed the case in June 2014. To-date the report of the investigation cannot be found, but according to the lawyers, it seems that the prosecutor mainly used the conclusions of the autopsy report. However, ACAT and TRIAL submitted this medico-legal expert appraisal report to two European legal medicine experts. These experts stated that based on the Tunisian report, it was not possible to determine the cause of death, nor dismiss the possibility the the police officers had used violence against the detainee. They highlighted the need to carry out tests, especially blood tests, as the only way to determine if the deceased was under the influence of cannabis during his death - along with additional investigations without which the responsibility of the police could not be ruled out. These tests and investigations have apparently not been carried out.

***ACAT-France and FWB invite the Committee to recommend that the State party:***

- ***guarantee that the trials will take place within a reasonable time frame;***
- ***train the examining magistrates and the trial judges in the international law applicable to torture and notably in international case law so that they are better able to distinguish torture from ill-treatment;***
- ***Take all necessary measures to ensure that acts of torture are prosecuted as such and not categorised as ill-treatment;***
- ***Ensure that doctors and magistrates, who are accessories to torture by failing to record physical abuse when the victim brings it to their attention, are prosecuted.***

## 4- The errors of the transitional justice process (Article 14)

### List of issues concerning France's seventh periodic report, § 14 (CAT/C/FRA/Q/34)

*In view of paragraph 293 of the State party's additional report, please explain how the Transitional Justice Law and the concomitant comprehensive strategy<sup>62</sup> will give effect to the four constituent parts of transitional justice (truth, criminal justice, reparation and guarantees of non-recurrence). In particular:*

*(a) As far as truth-seeking is concerned, please describe the action taken and planned in response to the reports of the National Fact-Finding Commission and the National Commission of Investigation on Corruption and Embezzlement.<sup>63</sup> Please provide information on the scope of the mandate of the Truth and Dignity Commission and the steps taken to ensure that it successfully completes its various tasks,<sup>64</sup> especially in respect of access to State archives and judicial files and protection for witnesses and victims;<sup>65</sup>*

*(b) As far as criminal justice is concerned, please supply information on the functioning of the special chambers set up under Decree No. 2014-2887 of 2014;*

*(c) As far as reparation mechanisms are concerned, please say what action has been taken and is planned to ensure that the same type of violation gives rise to the same possibilities for and forms of reparation, that there is no discrimination between male and female victims and that reparation encompasses the provision of free medical and psychological assistance enabling the victim to be rehabilitated and reintegrated into society.*

### 4-1 Partial reparation for victims

#### 4.1.1 'Restitution' (Restoring previous status)

131. On 19 February 2011, the interim government of Tunisia adopted the statutory decree no. 2011-1 declaring an amnesty for all so-called 'political' prisoners convicted for infringement of the internal State security, violations of the counter-terrorism Act, breaches of statutes on media and communications and any other legislation which had been used to convict people for their political opinions or religious practices. This was an essential first measure to provide reparation to victims of repression under Ben Ali's regime. Initially, this statutory decree was intended to order the immediate release of anyone imprisoned for one of the above-mentioned offences. For those who had already been released during the revolution, it considered their previous conviction as non-existent.

132. 'Restitution' is a 'kind of reparation which aims to re-establish the status of victims to that which existed before the Convention was violated, by taking into account the specific issues for each case.' It notably implies immediately releasing victims or re-examining their conviction, whenever their detention is based on confessions obtained under torture. **To our knowledge, to-date, no conviction has been quashed, dismissed or reviewed on the grounds that it has been delivered based on forced confessions.** There are nevertheless still hundreds of convictions being served which were based on such confessions. 'Restitution' also includes allowing the victim to be reinstated to the job they held before they were subjected to torture, if the physical abuse was accompanied by detention or unfair dismissal. In this area, the Tunisian Government has adopted several measures.

133. The decree of 19 February 2011 mentioned the right of former political prisoners to have their jobs reinstated. It was supplemented by two other statutes. The decree no. 2012-3256 of 13 December 2012 set the procedures for reinstating the officials who were given a general pardon and had their administrative status reinstated. There are no statistics on the number of former public officials deprived of their employment under Ben Ali who were able to be reinstated into the civil service. The NGO Soumoud, set up after the revolution, has documented the cases of more than 12,000 former prisoners, relatives of former prisoners and people who were harassed under Ben Ali's regime. Out of all the people represented by the organisation, around 1,500 of them, who were employed in the civil service or in a semi-public organisation prior to their arrest, had their jobs reinstated, following the decree of 13 December 2012. Nevertheless, the reinstatements did not take account of the promotions that the prisoners would have received if they had not lost their jobs. They now need to be trained in order to rise up through the ranks of the civil service. In the meantime, despite the positive progress in recovering their jobs, it does not compensate for being deprived of their wages and career progression for years. Additional measures were adopted to reinstate victims in the Barraket Essahel case. In December 2012, the victims were awarded the Order of the Republic and on 24 July 2014, they participated in a passing out parade in military uniform during an official ceremony led by the President of the Republic.
134. Furthermore, the victims who were either students or working in the private sector when they were arrested, were given the opportunity to enter the civil service through the Act no. 2012-4 of 22 June 2012 concerning direct recruitment. This act gave former prisoners or their heirs six months to request a post in the civil service. Here again the problem of jurisdiction arises. The applicants often do not have the right qualifications since they were unable to finish their studies or gain any professional experience, which means they were recruited into low-level positions. In addition, their final recruitment is only confirmed after a two-year internship after which they can be dismissed if they are not found to be suitable.
135. Those who had already reached retirement age when the act on direct recruitment was adopted, are excluded and do not have access to any retirement benefit either. On the other hand, those who were employed in the civil service before their arrest and who were over 60 when the statutory decree on reinstatement was adopted, did not have their jobs reinstated but were entitled to retirement benefits. However, the amount of these benefits is calculated on the contributions paid in to the system by the beneficiaries, always supposing they had paid in enough, since this measure does not compensate for periods without contributions. You need to have paid into a retirement plan for at least twenty years to get a good retirement. For the moment, no measure has been planned for the National Social Security Fund [*Caisse nationale de sécurité sociale*] or the National fund to protect social retirement [*Caisse nationale de protection de la retraite sociale*] to take account of the years in which these people were held prisoner or deprived of employment. The situation seems even more complicated, in practice, for heirs when the pardoned relation has died. According to Soumoud, in September 2014, 800 files of wives and children of pardoned prisoners were waiting for their application for direct employment to be considered.

### 4.1.2 Compensation

136. When it comes to the issue of compensation, the decree of 19 February 2011 mentioned the right of the beneficiaries of the pardon to monetary reparation, by virtue of a procedure to be defined subsequently. The government waited until 9 July 2013 to adopt the decree no. 2013-2799 which set out the terms and procedures for examining urgent compensation claims for those people who had been given a general pardon. This decree provides that the beneficiaries of the pardon in 2011 or their heirs can request an advance on the compensation, if their income is lower than a threshold set subsequently at 500 dinars per month. The decree does not therefore govern the final compensation procedure, but only the allocation methods for an advance to the most vulnerable victims or their heirs. The commission created by this statute should in time, set up a final commission system which has still not happened. According to Soumond, only 2,100 former prisoners or their heirs had received emergency compensation in September 2014. They all received a fixed sum of 6,000 dinars. Those who had their jobs reinstated in the civil service or who were able to get direct employment in the civil service, had no such right to compensation. The Act no. 2014-2/ of 19 June 2014, concerning settling the situation of military officers injured by the so-called 'Barraket Ellis' case extended the Act of general pardon of 19 February 2011 to victims of this case, both in terms of reinstating their jobs and compensation. But for the moment, the victims have yet to receive anything. **Consequently, with the exception of the emergency compensation given to a small percentage of former prisoners, who were covered by the general pardon, nothing has been done in this area.**

137. Tunisian law provides nothing for those who were not imprisoned, but who lost their job under Ben Ali or even under Bourgiba due to their political activism or because they were closely related to a presumed political opponent. There are therefore probably thousands of wives, brothers, sisters, parents and children who lost their job due to a presumed activism of one of their close relatives.

### 4.1.3 Rehabilitation

138. The third component of the duty to reparation, as defined by the Committee, concerns rehabilitation. Rehabilitation includes medical and psychological care as well as legal and social services. As far as access to care is concerned, this is a problem for most Tunisians, but it is even worse for former prisoners who suffer from the effects of torture and prison. Those who have been able to be directly recruited into the civil service have access to the social security system guaranteed by their job, but it is a potential problem for all others. According to Soumond, those who have a national health insurance card have a minimum level of cover which does not cover for example the treatment of cancer, hepatitis C and other diseases often developed by former prisoners. Within the Ministry of Health, a technical committee handles all requests from the needy who want to financial assistance for serious illness, but it takes a long time to examine these applications. Until now, psychiatric care has been provided by a few charities, but this is far from being generalised. On 9 December 2014, the Tunisian Ministry of Health opened the first state rehabilitation centre for torture victims. This centre is supposed to provide free physical and psychological care to all victims of torture and not just former political prisoners.

139. A lot still needs to be done to provide reparation to torture victims, and notably the many victims who are not former political prisoners and who have yet to receive any reparation. All this work was assigned to the Truth and Dignity Commission (IVD) set up by the Act on transitional justice of 15 December 2013.

#### **4-2 Uncertainties as to the mandate of the Truth and Dignity Commission**

140. On 15 December 2013, the constituent National Assembly adopted the Institutional Act no. 2013-53 concerning the establishment of transitional justice and its organisation. Transitional justice is defined in Article one as the 'consistent process of approved mechanisms and resources to understand and handle human rights violations committed in the past by revealing the truth, by compensating the victims and restoring their rights.' Therefore, transitional justice consists of several complementary components, notably seeking the truth and preserving memories, criminal prosecutions for perpetrators of crimes, reparation and rehabilitation for victims, reform of institutions to ensure the violations are not repeated and finally reconciliation.

141. The act which set up the Trust and Dignity Commission (IVD) comprising 15 members and notably responsible for investigating electoral fraud, corruption, financial crimes and serious violations of human rights<sup>30</sup> perpetrated by or with the complicity of State officials from the time Habib Bourguiba took office in 1955 until the act came into force in December 2013. It provides that after investigation, the IVD transfers the cases to special chambers, created within the courts of first instance and made up of magistrates who have taken no part in political trials under Ben Ali. The investigation component on serious crimes therefore only represents a part of this body's work. It is also charged with providing reparation to victims, collecting and conserving archives and suggesting reforms to prevent such repression ever being repeated.

142. Within the IVD, the Act created an Arbitration and Reconciliation Commission that has jurisdiction over all the previously mentioned crimes. For crimes of torture, forced disappearance, manslaughter, sexual violence, and death penalty delivered after an unfair trial, the Commission may hear petitions from victims of violations, perpetrators, with the consent of the victims or even the State. Reconciliation may take place with the permission of the victims if the perpetrators of the violation admits their crimes and issue a written apology. Reconciliation will not prevent the perpetrators being prosecuted, but the court will take account of this when deciding on the punishment.

143. IVD was set up in May 2014 and has already received 28,087 complaints. We can only be circumspect given the size of the task. The Act only gives IVD five years from its creation to get to the truth of the violations committed over more than 60 years, among many other tasks. The IVD law provides for the creation of special chambers within the courts of first instance based in the courts of appeal. These chambers are supposed to rule on crimes of torture, forced disappearance, manslaughter, sexual

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<sup>30</sup> This covers the crimes of torture, forced disappearance, manslaughter, sexual violence, and death penalty delivered after an unfair trial.

violence, and death penalty delivered after an unfair trial. None of these chambers have as yet been set up.

144. **There are significant uncertainties as to how the work done by IVD will fit into the judicial system.** What criteria will IVD use to send a case to one of the specialised chambers? If a case is referred to the judicial system, will an investigation be carried out by an examining magistrate or will the initial IVD enquiry be subject to a review, given that the investigators in the IVD do not have all the necessary expertise to conduct a quasi-judicial investigation? If IVD fails to refer a case to the judicial system, will the victim still be able to file a complaint and get a judicial investigation opened? What will be the impact of the conciliation procedure provided for under Act no. 2013-53 on the criminal punishment for serious offenders? Will the specialised chambers of courts also have jurisdiction to hear acts of torture committed after the revolution and which therefore do not fall within IVD's mandate? There are many unanswered questions on IVD's mandate, working methods and scope.

145. Without being able to assess the work carried out by the body, it is essential to ensure that the normal judicial system plays a major role in protecting freedom and fighting impunity. Magistrates should not use IVD as an excuse for rejecting complaints or lack of investigations by saying that the task should be carried out by IVD. IVD is not intended to be a substitute for the judicial system.

***ACAT-France and FWB invite the Committee to recommend that the State party:***

- ***As quickly as possible, adopt legislation which guarantees redress for victims of torture which includes the essential components of 'restitution', compensation, rehabilitation, satisfaction and guarantees that it will not be repeated;***
- ***Extend the reparation measures to the close relatives of torture victims who have suffered or continue to suffer personal injury from the torture of their relative, especially if such torture was followed by arbitrary detention of the victim for political or religious reasons or based on confessions signed under duress;***
- ***Ensure that all victims of torture or ill-treatment have the right to bring their complaint before the judicial system, independently of investigations carried out within the IVD;***
- ***clarify the relations between the IVD and the judicial system;***
- ***ensure that the specialised chambers created by the Act on transitional justice are aware of all cases of torture and ill-treatment, and not only those which are referred to them through the Truth and Dignity Commission;***

## 5- Using confessions obtained under torture (Article 15)

### List of issues concerning France's seventh periodic report, § 14 (CAT/C/FRA/Q/36)

*With regard to paragraph 297 of the additional report, please describe the measures taken by the State party to guarantee the enforcement, in practice, of article 155, paragraph 2, of the new Code of Criminal Procedure on the inadmissibility of confessions obtained under torture or coercion.<sup>67</sup>*

*Please comment on reports of systematic extraction of confessions under torture, particularly in cases of alleged terrorism.<sup>68</sup> Please explain the value that judges attach to police reports contested by an accused person who claims to have been tortured and forced to sign such reports. Please provide examples of cases in which a judge found such reports invalid.*

146. Article 155 of the CCP, as amended by the Statutory decree 106 of 22 October 2011 provides that 'statements and confessions of the accused and statements of the witnesses will be deemed null and void, if it can be established that they were obtained under torture or duress'

147. In spite of this ban, magistrates still frequently take account of confessions that the defendants allege were signed under duress. The confession is the crucial piece of evidence in the Tunisian penal system, certainly because of the lack of resources and skills of the police hinders the development of investigative methods which would enable it to develop other methods of producing evidence<sup>31</sup>. Magistrates have total discretion to assess the importance of the confession (Article 152 CCP). In practice, they almost systematically assign them a level of absolute importance, especially during the investigation stage. Consequently, suspects are frequently placed in pre-trial detention based on confessions signed under torture at the police station.

**Nourredine Gandouse** was arrested in February 2013 under counter terrorism measures. While he was in custody, he was tortured then placed in pre-trial detention simply on the basis of his confessions and those of his co-defendants extracted under torture, according to his lawyer. He was finally acquitted on 1 March 2016 after more than three years in pre-trial detention.

148. Confessions signed under torture are frequently used in terrorism cases, but this phenomenon also affects those suspected of taking drugs or other banal offences. The lawyers nevertheless point out that sometimes the examining magistrate then decides to release the suspect provisionally, without formally invalidating the confession. According to the many magistrates interviewed by the ACAT, the examining magistrates are too busy to try and find other evidence and they therefore willingly rely on the confessions. Furthermore, they don't have the necessary authority over the police to conduct their investigations. They do not dare question the work of the police officers by questioning them about the visible signs of torture on the suspect brought before them or declare the records invalid. Consequently, in the best of cases, the examining magistrates suggest that suspects file a complaint for the physical abuse they have suffered, as a way of extracting themselves from the case

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<sup>31</sup> ROJ, report n°2, *op. cit.*, p. 38.

and pushing responsibility onto the face to face hearings between the police and the prosecutor or the examining magistrate who carry out the torture investigation.

149. We have not heard of any recent cases where trial judges used confessions obtained under torture, from either victims or lawyers, with the exception of one case, which ACAT has been following for years.

**Mohamed Salah Jakhrouf** was arrested on 4 May 2014, when he was 19. He alleges that he was tortured by the Gorjani interrogators during his period in custody, and under duress signed a confession acknowledging that he belonged to a terrorist movement. When he was brought before the examining magistrate, the magistrate recorded marks of physical abuse but nevertheless ordered the young man to be placed in pre-trial detention. Mohamed Salah Jakhrouf retracted his confession before the examining magistrate and then before the trial judges, but was nevertheless sentenced to 12 years' imprisonment on the sole basis of the confession signed by him and his co-defendants under torture.

150. To our knowledge, to-date, no conviction has been quashed, dismissed or revised on the grounds that it has been delivered based on forced confessions under torture. There are probably dozens, if not hundreds of prisoners serving out their sentence delivered before the revolution based on forced confessions.

This is notably the case of **Taoufik Elaïba** (see § 98) This 50-year-old man who holds dual Canadian-Tunisian nationality was arrested on 1 September 2009 at home by officers from the national guard and taken to the station at Laaouina. He was tortured and held in inhumane conditions for the entire time that he was in custody. Under torture, he ended up signing a confession, which was used to place him in pre-trial detention for trafficking cars. He nevertheless reported the abuse to the examining magistrate whom he was brought before after 11 days in custody.

Taoufik Elaïba filed a complaint for torture several times through his lawyers, including after the revolution. This did not prevent the Court of first instance in Tunis from sentencing him to 22 years in prison based on forced confessions, nor the Court of Appeal from confirming his conviction on the same basis.

After his appeal was quashed, Taoufik Elaïba requested that his sentence be reviewed based on Article 277 of the CPP, which provides that the 'review is only possible to redress the use of erroneous facts, committed to the detriment of a person convicted for a crime or an offence. Indeed, the fact of the judge taking into account the confessions given under torture should be considered as a use of erroneous facts as defined by Article 277 and overturn the conviction. The review request made by Taoufik Elaïba was implicitly rejected. It is likely that the Ministry of Justice decided to wait for the conclusions of the torture investigation before granting the review. However, this investigation, which was opened after filing several reminder complaints, has been at a standstill for more than two and a half years.

***ACAT-France and FWB invite the Committee to recommend that the State party:***

- ***amend Article 277 of the Criminal Procedure Code to include taking into account confessions given under duress to the list of use of erroneous facts which can lead to a review of the trial.***
- ***promptly release or send for retrial those victims of torture in detention who allege that they have been force to sign confessions under duress;***
- ***guarantee a compensation to people who were imprisoned based on confessions that they themselves and/or alleged accomplices were forced to sign under torture, independently of the reparation that they must without fail benefit from as victims of torture.***