



HUMAN  
RIGHTS  
WATCH

# “YOU SAY YOU WANT A LAWYER?”

Tunisia’s New Law on Detention, on Paper and in Practice





# **You Say You Want a Lawyer?**

**Tunisia's New Law on Detention, on Paper and in Practice**

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Printed in the United States of America

ISBN: 978-1-6231-36123

Cover design by Rafael Jimenez

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# You Say You Want a Lawyer?

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## Summary

In 2016 Tunisia's parliament adopted the landmark law on the right of those taken into police custody to see a lawyer. As a result, detainees today are better protected against ill-treatment and forced confessions, but they still suffer from the authorities' failure to apply the law fully and consistently.

The right to an effective defense is a cornerstone of fair trial standards under international human rights law. The assistance of a lawyer, and the ability of the lawyer to engage in the array of activities necessary for preparing the defense, are fundamental to the right to a fair trial and to safeguarding against ill-treatment. The right of access to a lawyer is protected by a number of international and regional treaties, from the perspective both of an individual's right to legal assistance and of the state's obligations to afford detainees effective access to a lawyer.

Parliament adopted Law No.5, revising the Code of Criminal Procedure (CCP), on February 2, 2016, and the law entered into force on June 1 of that year. In addition to granting suspects the right to a lawyer from the onset of detention, the law also shortened the maximum period allowed for pre-charge detention from 72 hours to 48 for crimes, renewable once.

The police investigation stage is particularly important for the preparation of criminal proceedings, as the evidence obtained during this stage is usually the crux of the trial that follows. In addition, suspects taken into police custody are at risk of abuse. Human Rights Watch has documented how, under the old legal framework, the lack of a right to a lawyer while in police custody undermined the other rights of suspects. As shown in Human Rights Watch's 2013 report *Cracks in the System: Conditions of Pre-charge Detainees in Tunisia*, many detainees in police custody said that, in the absence of a defense lawyer, they signed their confessions under threats of violence, intimidation, or slaps, rather than voluntarily.

The entry into force of the new law is a step in the direction of preventing torture, coerced confessions, and other abuses by ensuring access to a lawyer at the earlier stages of detention.

Human Rights Watch interviewed 17 lawyers who, since the entry into force of the new law, have defended suspects in pre-charge detention. We also interviewed state officials, representatives of the bar association, and associations that assist detainees. We interviewed 30 people who had spent days in police custody since Law No. 5 entered into force, including 21 persons who alleged that the police either did not inform them of their right to a lawyer or denied them access to one, despite their explicit request to consult a lawyer.

According to Ministry of Interior figures, only 22 per cent of all suspects detained between June 2016 and May 2017 exercised their right to a lawyer. Such a low figure could be attributed to many factors, including a lack of public awareness of this new right, lack of diligence from the security services in informing the detainees of this right, and the reluctance among some lawyers registered on the Bar Association roster to assist clients in the absence of a scheme covering their fees.

This report gives a preliminary assessment of the implementation of the law, based on the interviews we conducted and the limited quantitative data available.

The defense lawyers Human Rights Watch interviewed unanimously welcomed the law as a step forward for the rights of the defense. One lawyer who represents suspects in terrorism-related cases told Human Rights Watch: “It is an amazing opening. Places that were totally secluded and shielded from any outside scrutiny, especially in terrorism cases, are places we can now visit and monitor the treatment of our clients.”

Despite Law No. 5’s positive impact overall, Human Rights Watch identified several gaps in the law and its implementation.

## **Gaps in the Law**

While the right to a lawyer in police custody is a step forward, the overall framework on arrest and detention in Tunisia needs to be changed to limit arbitrary arrests and avoid unnecessary detentions that are not based on a reasonably well-founded suspicion of criminal wrongdoing.

The CCP does not mandate a specific threshold of suspicion of commission of a crime in order to proceed with a search and arrest. The CCP simply grants officers of the judicial police the right to detain a person if deemed necessary “for the requirements of the investigation.”

The law does not specify a minimum amount of time that the police must wait from the time of notification of the lawyer until they can begin interrogating a suspect, a waiting period designed to give a defense lawyer the time to arrive at the police station in order to attend the interrogation of his or her client. In some countries with a judicial system close to that of Tunisia, this period has been set by law. For example, in France it is two hours. Until Tunisia adopts legislation setting the time that the police must wait after notifying the lawyer before beginning the interrogation, the Ministry of Interior, the Ministry of Justice, and the Bar Association should conclude an agreement specifying this time period.

### **Lack of Diligence in Informing Suspects About Their Rights**

The provision of information to a suspect or defendant is critical to their ability to effectively participate in the criminal process. International case law provides that the authorities have a positive obligation to provide suspects with information on their right to legal assistance. Standards on arrest and detention set out in the African Charter on Human and Peoples’ Rights require the state to inform suspects about their rights orally and in writing.

Law No.5 includes a new obligation on the police to inform detainees and their families of their right to be assisted by a lawyer. However, it does not specify what form this notification must take.

Human Rights Watch interviewed thirteen former detainees who said that they were not duly notified of their right to legal assistance. They said that the police, after taking them into custody, started interrogating them without first mentioning that they had the right to consult a lawyer or to call their families to appoint a lawyer for them.



## **Insufficient Safeguards to Prevent Fraudulent Waivers of the Right to Access a Lawyer**

Detainees have the right to a lawyer under Law No. 5 but may waive that right. Human Rights Watch found many instances where detainees came under pressure from the police to sign such a waiver without reading it. In some cases, they signed the document after being beaten by the police. They only later found they had waived their right to a lawyer.

## **Lack of Private Space for Consultation Between Detainees and Their Lawyers**

A lawyer's ability to provide effective legal assistance depends on the circumstances in which the lawyer can meet or communicate with accused persons. Suspects and accused persons must therefore be able to meet with their lawyer in private, and for an adequate period of time, in order for this right to be meaningful. With respect to the issue of confidentiality, the European Court of Human Rights has stated that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial."

Lawyers told Human Rights Watch that in most police stations, there is a lack of privacy for their communication with their clients, with no specific space reserved for the 30-minute pre-interrogation consultation mandated by Law No. 5, and frequent interruptions by police staff of the conversations between lawyers and clients.

## **Lack of a System to Ensure Legal Aid for Detainees in garde à vue (pre-charge detention)**

While the law provides for the right to a lawyer to detainees in *garde à vue* or pre-charge detention, it does not envisage a system to cover the lawyer's fees for all suspects who cannot afford them. The Legal Aid Law, passed in 2002, provides for legal aid only in cases of serious crimes carrying a minimum prison sentence of five years and only after a lengthy application and appointment process that does not begin until the case is transferred to the court. Thus, there is no system in place to ensure that the benefits of Law No. 5 extend to Tunisians in pre-charge detention who are too poor to pay a lawyer.

## **Delaying Access to a Lawyer in Terrorism-related Cases**

All the lawyers interviewed by Human Rights Watch said that the provision of the law allowing the prosecutor or the investigative judge to delay access to a lawyer for 48 hours after detention in cases involving terrorism-related accusations is applied almost automatically. This makes suspects in these serious terrorism-related crimes more at risk of torture, forced confessions, and other abuses. Human Rights Watch reviewed the police reports and prosecutors' decisions in five such cases. It found that in all those cases, the prosecutors denied the suspect access to a lawyer for 48 hours after detention, without providing individualized reasons to justify their decision.

## **Role of Lawyers**

Law No.5 gives the lawyer chosen by the suspect in pre-charge detention, or appointed by the Bar Association on behalf of the suspect, several important rights, including: the right to consult the investigative documents; the right to visit the suspect and to have a confidential meeting with him or her for 30 minutes prior to interrogation (the lawyer can visit the suspect a second time if the detention is extended); the right to attend the interrogation of the detainee and to attend the detainee's confrontation with witnesses or victims; the right to ask questions of the detainee and others at the end of the interrogation session; the right to note observations in the official minutes of the interrogation or confrontation report; the right to add exculpatory material to the case file; and the right to sign the interrogation report.

Defense lawyers had a varying experience regarding the implementation of these provisions in practice. Some said that usually the police allow them, at the end of the interrogation, to ask questions and to note their comments in the police report or in a separate sheet; others said the police denied them such rights and tried to interfere with the questions they were asking their clients or a third party during confrontations, or did not accept to enter their comments into the police report or into the case file.

## **Main Recommendations**

The Ministry of Interior should train the judicial police on the application of Law No.5 and instruct them to follow scrupulously all its procedural requirements, including respecting

the obligation to inform suspects of their right to a lawyer and to call one if they so desire. The ministry should also hold the police accountable for any failure to do so.

The ministry should put in place a system to safeguard against waivers of the right to a lawyer that are not made voluntarily and with awareness of the risks. Such a procedure could be a standardized form to be read by the police officer, explaining fully and clearly what the right entails and the risks to a detainee who waives the right to a lawyer. The decision to waive could be expressed on a separate form to be signed by the suspect and also be captured by audiovisual means. The waiver should be expressed or signed in the presence of a third party, be it a lawyer, a member of the family, or a different police officer, who would guarantee that the waiver was made voluntarily.

The Ministry of Justice should provide training to judges and prosecutors on the potential inadmissibility of evidence obtained without respecting the right of suspects to a lawyer.

## Methodology

Between April 2017 and January 2018, Human Rights Watch conducted 17 interviews with lawyers who had assisted detainees at police stations since the entry into force of Law No. 5 in June 2016. Human Rights Watch interviewed 30 persons who had been arrested by the police and spent days in police custody, including 21 cases of persons who alleged that they were either not informed of their right to a lawyer or denied access to one, despite their explicit request to consult a lawyer. We also met with representatives of the Ministry of Interior and of Justice as well as international stakeholders who are supporting security sector reform in Tunisia. Human Rights Watch reviewed 12 case files, including the police report and the court's judgements.

Human Rights Watch identified interviewees for this report through its own extensive network of lawyer contacts and through NGOs that work on torture cases. All participants orally consented to be interviewed. They were informed of the purpose of the interview, its voluntary and unpaid nature, and the ways in which the data would be collected and used. Human Rights Watch chose to withhold the names of most former detainees interviewed in this report in order to protect them from retaliation and to protect their privacy. In cases that are already well-known, we used their real names.

Human Rights Watch sent a letter to the Ministry of Interior, on September 25, asking questions about the steps undertaken by the ministry to implement the law (see Annex I). The ministry's reply, dated December 18, 2017, is reprinted in Annex II, below. The report also integrates relevant information from the response.

# Recommendations

## To the Tunisian Government

- Launch or support outreach and dissemination campaigns about Law No. 5, in order to inform citizens of their rights during police custody.
- Extend the existing program that provides legal aid to those unable to afford a lawyer to include legal aid to detainees in police custody; establish an emergency legal aid scheme to facilitate the provision of advice and assistance at places of police custody 24 hours a day for all forms of criminal detention, including both serious crimes and minor offense cases.
- Adopt legislation setting the time that the police must wait after notifying the lawyer before beginning the interrogation. Pending adoption of such a law, the Ministry of Interior, the Ministry of Justice, and the Bar Association should conclude an agreement with the Tunisian Bar Association on the amount of time the police have to wait after the notification of the defense lawyer and before they begin interrogating the suspect, whether or not the lawyer is present.
- Adopt guidelines specifying that the right to a lawyer applies from the time a person is made aware by the competent authorities, by official notification or otherwise, that he is a suspect or accused of having committed a criminal offense or when he or she is taken into custody.

## To the Tunisian Parliament

- Revise the Code of Criminal Procedures (CCP) to reduce the maximum amount of time in police custody before judicial review to forty-eight hours.
- Introduce amendments to the CCP to require a police agent to have a reasonable, individualized suspicion of criminal wrongdoing in order to place a person under arrest.
- Introduce amendments to the CCP specifying that *garde à vue* (pre-charge detention) is a measure of last resort, that police should deprive a person of their liberty only in limited circumstances such as when there is a need to guarantee the presentation of the person before the public prosecutor to prevent the person from committing offenses or modifying the evidence or putting pressure on witnesses or victims or their relatives.

- Introduce amendments to the CCP scrapping the provision that gives the investigative judge and the prosecutor the authority to delay access to a lawyer for 48 hours after the beginning of detention, in cases where the detainee is accused of crimes of terrorism.
- Strengthen the fair-trial rights of defendants to ensure an “equality of arms” between the prosecution and the defense by revising CCP article 154, which provides that the police reports should be considered valid until proven otherwise. This law places the burden of proof on the defendant to show that the statement prepared by the police is false. The law should be revised to eliminate this unfair burden, so that a police statement would be treated the same as all other evidence presented in court with no presumption about its credibility.

## To the Ministry of Interior

- Issue guidelines to the judicial police instructing them to avoid resorting to *garde à vue* (pre-charge detention) for offenses that do not entail prison sentences.
- Put in place a procedure to verify that any waiver made by a detainee of his or her right to a lawyer is informed and voluntary. For example, a standardized form should be read out by the police officer in the presence of the detainee, explaining fully and clearly what the right entails and the risks if a detainee waives his or her right to a lawyer. The signing of a waiver should also be recorded by audiovisual means, or witnessed by a third party, such as a lawyer, a member of the family or another police officer, who would guarantee that the waiver was made voluntarily. For serious crimes, preliminary consultation with a lawyer, by phone or in person, should be required before a suspect could be considered as having waived his or her right to a lawyer.
- Produce a standard notice listing all the rights of persons deprived of their liberty and post it in places of detention where it can be read easily by persons in police custody.
- Include the same information in a form to be signed by each person in custody and give the detainee a copy of that form.
- Ensure that law enforcement officers exercise diligently their obligation to give such notification and to assist in the exercise of all such rights from the very outset of police custody and hold them accountable for failing to perform their legal duties.

## To the Ministry of Justice

- Ensure training of judges and prosecutors on the potential inadmissibility of evidence obtained in contexts where the suspect's right to a lawyer was not respected.
- Maintain clear, up-to-date, and verifiable statistics on the number of complaints of torture in police custody each year and on the judicial status of these cases.
- Encourage judges and prosecutors to routinely ask persons arriving from police custody whether their procedural rights have been respected, and whether the police allowed them to have the assistance of a lawyer.
- Ensure that prosecutors, investigating judges and trial judges reflect in the minutes of the hearing and in the court's written judgment any statements made by defendants before them challenging the veracity of their waiver of their right to a lawyer or inaccuracies in their police statements.
- Ensure that prosecutors and judges resort to the provision in the law allowing them to delay access to a lawyer in terrorism related cases only in exceptional circumstances.

# I. Legal Framework on Arrest and Police Detention

The Constitution of the Republic of Tunisia, adopted in January 2014, provides that all Tunisians have the right to access to a lawyer when arrested for a criminal offense.<sup>1</sup>

Under Tunisia's Code of Criminal Procedure (CCP), the judicial police are responsible for gathering evidence of crimes, finding the perpetrators, and delivering them to the courts.<sup>2</sup> The public prosecutor supervises the judicial police.<sup>3</sup> The police, under the Ministry of the Interior, have primary responsibility for enforcing the law and maintaining order in urban areas. The National Guard, also under the Ministry of the Interior, performs the same function in coastal and non-urban areas.<sup>4</sup>

The police may arrest a person on mere suspicion that he or she has committed a crime. Before the introduction of Law No.5, the judicial police had to notify immediately the prosecutor when placing a person in custody.<sup>5</sup> Law No. 5, instead of requiring a notification of the prosecutor, now obliges the judicial police officers to receive "an authorization of arrest" from the prosecutor before placing a person in custody.<sup>6</sup>

Under the previous law, the police could keep a person in custody for three days in cases of crimes, before they were required to present them to a judge or to the prosecutor. The prosecutor may, by a written decision that explains the reasons, extend custody only once and for the same period.

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<sup>1</sup> Tunisia's Constitution was adopted on January 27, 2014. See article 27: "A defendant shall be presumed innocent until proven guilty in a fair trial in which he/she is granted all guarantees necessary for his/her defense throughout all the phases of the prosecution and trial."; Art. 29: "... The detainee has the right to be represented by a lawyer..."; Art. 108: "... The law facilitates access to justice and provides legal assistance to those without financial means..."

<sup>2</sup> Code of Criminal Procedure, Number 68-23 of 1968, art. 9, [http://www.ejustice.tn/fileadmin/fichiers\\_site\\_francais/codes\\_juridiques/Code\\_procedure\\_penale\\_fr.pdf](http://www.ejustice.tn/fileadmin/fichiers_site_francais/codes_juridiques/Code_procedure_penale_fr.pdf); The functions of judicial police can also be exercised by other services, such as the customs service, endowed by law with the task of conducting preliminary investigations into custom offenses.

<sup>3</sup> Code of Criminal Procedure, art. 10.

<sup>4</sup> Law on the General Status of Internal Security Forces, Number 82-70 of 1982, art. 4. "Internal security forces comprise the agents of national security, national police, the National Guard for civil protection and the agents of prisons and reeducation." Law on the General Status of Internal Security Forces, art.5.

<sup>5</sup> Code of Criminal Procedure, art. 13 bis.

<sup>6</sup> Law No. 5, of February 16, 2016, Modifying and completing some provisions of the penal code, article 13 bis (new).



The law shortens the maximum time of pre-charge detention for the most serious crimes, ones leading to sentences of at least five years in prison, to 48 hours, renewable once by a prosecutor's order, for a maximum of four days. For less serious crimes, leading to less than five years in prison, the maximum time limit is 48 hours renewable only for 24 hours by a prosecutor's order. For the most minor offenses, leading to up to 15 days in prison, the time limit is 24 hours, non-renewable.<sup>7</sup> Law No. 5 requires the judicial police to seek a written order from the prosecutor before placing a person in *garde à vue* (pre-charge detention). It also requires the judicial police, after the first period of *garde à vue*, to bring the suspect before the prosecutor. While this would reduce the period of *garde à vue*, it is still longer than the emerging international standards, which mandate that judicial review should happen within 48 hours of detention.

Tunisian law requires police officers to follow some procedural steps to provide due process guarantees for the suspect.<sup>8</sup>

The law states that the officers of the judicial police may only “keep the suspect after authorization by the public prosecutor.” Authorization can be obtained by any means so long as there is a written record.

The police must inform a member of the detainee's family of the measures taken against the suspect and the place of custody. They must also inform the suspect of their right to request a medical examination during the period of custody. In addition, judicial police officers are required to keep a special register of data including the name of the detainee, the date and time of arrest and entry into custody, the date of release, and whether the family was informed of the detention.

Until the entry into force of Law No. 5 on June 1, 2016, arrested persons had no right to see a lawyer until their first appearance before an investigative judge, which by law took place no later than six days after the beginning of custody. In practice, by that time, many suspects had signed, without a lawyer present, a police statement that could be used against them during trial. The new law includes a breakthrough provision giving the

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<sup>7</sup> Article 122 of the Code of Criminal Procedure defines three types of offences: the crimes, punishable by more than five years in prison; the “délits”, punishable by less than five years in prison; and the “contraventions”, punishable by a maximum of 15 days in prison.

<sup>8</sup> Code of Criminal Procedure, art. 13.

detainee or a family member the right to request the assistance of a lawyer during pre-charge detention.

The police would have to notify the lawyer in advance about all interrogations and all confrontations between the accused and witnesses or victims of the alleged offense and allow the lawyer to be present, unless the accused explicitly waives the right to a lawyer or the lawyer does not arrive within a designated period of time (see below).

The law distinguishes between serious crimes and other offenses.<sup>9</sup> In the latter case, the police officers have only an obligation to notify suspects of their right to a lawyer and to call the one of their choice. In case a suspect does not have a lawyer, the police do not have an obligation to arrange for one. In the case of serious crimes, when the detainee does not have a lawyer, the law provides that the police shall inform the National Bar Association, which should assign a lawyer from a roster of available lawyers.

The new law provides for the invalidation of the proceedings in court if the judicial police breached the procedural requirements of the CCP.

Under the new law, a suspect in police custody who requests to meet with a lawyer is entitled to a consultation of up to 30 minutes from the moment he or she is placed in custody and upon each extension of the period of police custody. A suspect may also request assistance from counsel during interrogation sessions, as well as during confrontations with witnesses or victim(s).

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<sup>9</sup> Referred to as “délits” and “contraventions” in French.

## II. Gaps in the Law

### Vague Standards on Arrest

While the right to a lawyer in police custody is a step forward, the overall framework on arrest and detention must be changed to limit arbitrary arrests and detentions.

In Tunisia, police forces have broad powers to stop and check individuals regardless of whether they suspect criminal activity. The CCP does not mandate a specific threshold of suspicion of commission of a crime in order to proceed with a search and arrest. The CCP grants officers of the judicial police the right to detain a person if it is deemed necessary “for the requirement of the investigation.”<sup>10</sup> Thus, Tunisian law gives the police broad discretion to arrest anyone.<sup>11</sup>

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<sup>10</sup> Code of Criminal Procedure, article 13.

<sup>11</sup> In contrast, other systems have a better definition of the threshold for arrest and placing suspects in *garde à vue*. Subsection 1 of the French code of criminal procedure stipulates that stops for crime investigation and prevention must be based on a reasonable suspicion (“one or more plausible reasons”), linked to actual behavior, that a person may have attempted or committed an unlawful act (infraction) or is preparing to commit a crime. The UK Police and Criminal Evidence Act gives police the power to stop, search, and detain someone only on the basis of a “reasonable suspicion” of wrongdoing. The accompanying Code of Practice explains that: “Reasonable suspicion can never be supported on the basis of personal factors alone without the supporting intelligence or information. For example, a person’s colour, age, hairstyle or manner of dress, or the fact that he is known to have a previous conviction for possession of an unlawful article, cannot be used alone or in combination with one another as the sole basis on which to search that person. Reasonable suspicion cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. A person’s religion cannot be considered as reasonable grounds and should never be considered as a reason to stop and search an individual”.

France’s Code of Criminal Procedure (CCP) defines *garde à vue* and lists the reasons for using it. See article 62-2 of the French CCP: Police custody is a measure of coercion decided by a judicial police officer, under the oversight of the judicial authority, by which a person against whom there is one or more plausible reasons to suspect that he has committed or attempted to commit a crime or offense punishable by imprisonment is made available to investigators.

This measure must be the only way to achieve at least one of the following objectives:

1. Allow the conduct of investigations involving the presence or participation of the person;
2. Guarantee the presentation of the person before the public prosecutor so that he or she can assess the follow-up to be given to the investigation;
3. Prevent the person from modifying the evidence;
4. Prevent the person from putting pressure on the witnesses or the victims as well as on their family or relatives;
5. Prevent the person from consulting with other persons likely to be his co-perpetrators or accomplices; and
6. Guarantee the implementation of measures intended to put an end to the crime or the offense.

See article 63 of France’s Code of Criminal Procedure « Si, avant d’être placée en garde à vue, la personne a été appréhendée ou a fait l’objet de toute autre mesure de contrainte pour ces mêmes faits, l’heure du début de la garde à vue est fixée, pour le respect des durées prévues au II du présent article, à l’heure à partir de laquelle la personne a été privée de liberté. Si la

This unfettered discretion is inconsistent with international standards. Tunisia is a party to the International Covenant on Civil and Political Rights (ICCPR), which prohibits arbitrary arrest or detention. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also mandate that States must ensure that no one shall be subject to arbitrary arrest or detention, and that “arrest, detention or imprisonment shall only be carried out ... pursuant to a warrant, on reasonable suspicion or for probable cause.”<sup>12</sup> The prohibition against arbitrary arrest or detention means that deprivation of liberty for criminal purposes, even if provided for by law, must be necessary and reasonable, predictable, and proportional to the reasons for arrest. In order for an arrest to be reasonable, the evidence at hand would have to satisfy an objective observer that there are reasonable grounds to believe that the suspect has committed a crime.<sup>13</sup>

Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa contain other strong standards.<sup>14</sup> [See section on International Standards below].

Article 1.b. of the Guidelines state that “Everyone has the right to liberty and security of the person. Detention must always be an exceptional measure of last resort. No one shall be subjected to arbitrary or unlawful arrest or detention.”

## Timeframe for the Right to a Lawyer

Law No. 5 specifies the right to a lawyer in article 13 *ter*:

The person in custody, one of his ascendants, descendants, brothers, sisters, spouse, or a person of his choice or, as the case may be, the diplomatic or consular authorities if the detainee is a foreigner, may request, during the period of police custody, the

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personne n'a pas fait l'objet d'une mesure de contrainte préalable, mais que son placement en garde à vue est effectué dans le prolongement immédiat d'une audition, cette heure est fixée à celle du début de l'audition. »

<sup>12</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and People’s rights in 2003, <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>.

<sup>13</sup> In his authoritative commentary on the ICCPR, Manfred Nowak included elements of injustice, unpredictability, unreasonableness, and non-proportionality in the meaning of arbitrariness. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (2nd rev. ed. Kehl am Rhein: Engel), 2005, p.225.

<sup>14</sup> The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) were adopted by the African Commission on Human and Peoples’ Rights (the Commission) during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014.

appointment of a lawyer to assist during his interrogation or confrontation with others by judicial police officers.

When the suspect is accused of a serious crime, and when he does not have a private lawyer, a lawyer must be appointed to him if he asks for one.

The president of the regional section of the Bar Association or his representative shall appoint a lawyer from a roster of available lawyers established for this purpose [...]

If the detainee or one of the persons mentioned in the first paragraph of this article designates a lawyer to assist him during his interrogation, the latter is informed by the judicial police officer without delay by any means leaving a written record of the date of the interrogation of his client and the offense he is charged with, and in this case, no interrogation or confrontation may be conducted without the presence of the lawyer concerned, unless the suspect expressly waives his right or the lawyer does not appear on the due date despite having been duly summoned.

The law does not specify the length of time that the police must wait between the notification of the lawyer about the arrest and impending interrogation of his or her client and the time that the police may begin that interrogation. It states only that the police officer should inform the lawyer “without delay” of the date of the interrogation, and that the interrogation shall not commence before the lawyer is present, unless the lawyer fails to arrive at the specified time.

The Ministry of Interior representatives told Human Rights Watch that this gap in the law initially posed a problem for the judicial police officers, who did not know how long they had to wait for the lawyer before they could commence the interrogation. They said it posed problems of consistency, as some police officers would wait longer than others.<sup>15</sup>

In countries with a judicial system close to that of Tunisia, this waiting period has been set by law (e.g., two hours in France). An unofficial agreement between the Bar Association,

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<sup>15</sup> Human Rights Watch meeting with Ridha Berrabeh, Director of external relations and international cooperation at the Ministry of Interior; Mourad Rezgui, Director of external relations at the National Guard, Mohamed Malaa, director of investigative unit, Anti-Terrorism brigade of the police, Tunis, May 12, 2017.

the Ministry of Interior, and the Ministry of Justice has informally fixed this period to three hours.<sup>16</sup> However, there is not yet anything that would make such a waiting period binding on all judicial police officers.

Law No.5 does not mention the exact time when the right to see a lawyer begins. It only states that the judicial police shall inform detainees, upon their “placement in *garde à vue*,” of their right to legal assistance, without defining when placement in *garde à vue* has happened. This is highly problematic as the police could arrest a person and take the detainee into custody without immediately getting a detention order from the prosecutor. A time can elapse between the moment of arrest and the moment of the detention order, where the detainee is in police custody but not yet in *garde à vue* (pre-charge detention) and thus does not yet have a right to a lawyer under the law.

This legal loophole allows the judicial police to hold someone in custody but not yet formally in *garde à vue*.

In contrast, legislation in other countries, such as the Code of Criminal Procedure in France, specifies that the starting time of the measure is set at the time the person is deprived of his or her liberty.<sup>17</sup>

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<sup>16</sup> Human Rights Watch interview with Wissem Chebbi, member of the Tunisian Bar Association (Ordre National des Avocats Tunisiens), Tunis section, Tunis, September 23, 2017.

<sup>17</sup> See article 63 of the French Code of Criminal Procedure « Si, avant d'être placée en garde à vue, la personne a été appréhendée ou a fait l'objet de toute autre mesure de contrainte pour ces mêmes faits, l'heure du début de la garde à vue est fixée, pour le respect des durées prévues au II du présent article, à l'heure à partir de laquelle la personne a été privée de liberté. Si la personne n'a pas fait l'objet d'une mesure de contrainte préalable, mais que son placement en garde à vue est effectué dans le prolongement immédiat d'une audition, cette heure est fixée à celle du début de l'audition. »

### III. Low Level of Legal Assistance

At a public conference, “Assessing Law No.5 one year after its entry into force,”<sup>18</sup> the Ministry of Interior revealed that out of 24,363 arrests and pre-charge detentions orders, from June 2016 to April 2017, 629 serious crime suspects and 4,772 other offense suspects received legal counsel prior to presentation before a judge. In other words, fewer than one in four detained suspects saw a lawyer during their police detention.

In its letter to the Ministry of Interior, Human Rights Watch asked for data on the number of suspects placed in *garde à vue* for serious crimes and other offenses from June 1, 2016 to June 1, 2017, as well as the number of detained suspects who benefited from legal representation during this period.<sup>19</sup> The Ministry of Interior’s letter to Human Rights Watch, dated December 18, 2017, did not reply to this question.<sup>20</sup>

Human Rights Watch heard several explanations for the apparently low level of legal representation among suspects in police custody. Some representatives of the Bar Association said that difficulties may arise because lawyers who had registered on the roster might not be available when the bar association calls them, either because they are far away from the police station or handling another case.<sup>21</sup> Two representatives of the Bar Association said that lawyers have become reluctant to assist suspects in police custody because if the person has no money to pay them, they generally do not get paid for their consultation.<sup>22</sup> Other lawyers and representatives of Tunisian or international nongovernmental organizations (NGOs) said that because most of the public does not

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<sup>18</sup> Conference organized by Avocats sans Frontières and the National Organisation of Tunisian Lawyers (Bar Association), June 2, 2017, Tunis.

<sup>19</sup> See Annex I.

<sup>20</sup> See Annex II.

<sup>21</sup> Human Rights Watch interview with Wissem Chebbi, Member of the Tunisian Bar Association (Ordre National des Avocats Tunisiens), Tunis section, Tunis, September 23, 2017.

<sup>22</sup> Human Rights Watch interview with Dhaker Aloui, Member of the Tunisian Bar Association, Tunis section, Tunis, September 21, 2017; Human Rights Watch phone interview with Samia Jelassi, Member of the Tunisian Bar Association, Tunis, September 10, 2017.

know about the right to a lawyer while in *garde à vue*, few detainees spontaneously request the assistance of a lawyer.<sup>23</sup>

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<sup>23</sup> Human Rights Watch interview with Holly Hobart, deputy program director of the International Legal Foundation, Tunis, September 25, 2017; Human Rights Watch interview with Antonio Manganella, director of the Tunis office of Avocats sans Frontières, Tunis, January 3, 2018.



## IV. Lack of Diligence in Informing Suspects About Their Rights

The provision of information to a suspect or defendant is critical to their ability to effectively participate in the criminal process. International case law imposes on authorities an obligation to provide suspects with information on the right to legal assistance and legal aid. It is not sufficient for this information to simply be given orally. For example, the European Court on Human Rights stressed that authorities must take all reasonable steps to ensure that the suspect is fully aware of his or her rights of defense and, as far as possible, understands the implications of his or her conduct under questioning.<sup>24</sup>

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<sup>24</sup> *Panovits v. Cyprus*, European Court of Human Rights, Case n. No. 4268/04, 11 December 2008, paras. 67–68. See also *Plonka v. Poland*, European Court of Human Rights, case n. No. 20310/02, 31 March 2009, paras. 37–38. A well-known example of information about rights during police arrest or custody is the Miranda warning. In 1966, the U.S. Supreme Court ruled in *Miranda v. Arizona*, that individuals who are under arrest for suspicion of having committed a crime have certain rights that must be explained to them before any questioning may occur. The rights are designed to protect your Fifth Amendment right to be free from self-incrimination and are read in a warning as follows:

1. You have the right to remain silent and to refuse to answer questions.
2. Anything you say may be used against you in a court of law.
3. You have the right to consult an attorney before speaking to the police and to have an attorney present during questioning now or in the future.
4. If you cannot afford an attorney, one will be appointed for you before any questioning if you wish.
5. If you decide to answer questions now without an attorney present, you will still have the right to stop answering at any time until you talk to an attorney.

The British Notice of Rights, adopted on June 2, 2014, provides detailed information to the suspect about his rights, including his right to a lawyer. The Notice contains the following information to the suspect:

- Getting a solicitor to help you
- A solicitor can help and advise you about the law.
- Asking to speak to a solicitor does not make it look like you have done anything wrong.
- The Police Custody Officer must ask you if you want legal advice. This is free.
- The police must let you talk to a solicitor at any time, day or night, when you are at a police station.
- If you have asked for legal advice the police are usually not allowed to ask you questions until you have had the chance to talk to a solicitor. When the police ask you questions you can ask for a solicitor to be in the room with you.
- If you tell the police that you don't want legal advice but then change your mind, tell the police custody officer who will then help you to contact a solicitor.
- If a solicitor does not turn up or contact you at the police station, or you need to talk to a solicitor again, ask the police to contact them again.

When free advice is not limited to telephone advice from CDS Direct:

- You can ask to speak to a solicitor you know and you won't have to pay if they do legal aid work. If you do not know a solicitor or the solicitor you know cannot be contacted, you can speak to the duty solicitor. It is free.

The Luanda Guidelines, adopted by the African Commission on Human and Peoples' Rights, stress that "at the time of their arrest, all persons shall be informed of the rights [...] orally and in writing, and in a language and format that is accessible and is understood by the arrested person."

The European Directive on the right to information provides that suspects who are arrested or detained must be notified, orally and in writing (by means of a "Letter of Rights"), of the right of access to a lawyer and any entitlement to free legal advice and the conditions for obtaining such advice.

The same directive states that the suspect must be given the opportunity to read the Letter of Rights and be allowed to keep it in their possession throughout the time that they are deprived of their liberty.<sup>25</sup>

Law No.5 makes explicit provision for a right to information about rights. It states:

During police custody, the judicial police officers must inform the suspect in language that he understands of the measure taken against him, its cause, its duration and the possibility of its extension in accordance with paragraph 4 of this law, and they shall read what the law guarantees him, including the possibility of requesting a medical examination and his right to appoint a lawyer to assist him.<sup>26</sup>

In addition, the law provides that the police report shall contain the explicit mention of the notification to the suspect of the reasons for the deprivation of liberty, its cause, duration, and possible extension, as well as the reading to the suspect of the rights contained in the law, including the right to appoint a lawyer to assist the suspect.<sup>27</sup>

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- The duty solicitor has nothing to do with the police."

<https://www.gov.uk/government/publications/notice-of-rights-and-entitlements-english-revised-by-pace-code-c-2014> (accessed February 2, 2018).

<sup>25</sup> DIRECTIVE 2012/13/EU of The European Parliament and of The Council, of 22 May 2012 on the right to information in criminal proceedings, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0013&from=EN> (accessed February 15, 2018).

<sup>26</sup> Law No. 5, article 13 bis new.

<sup>27</sup> Ibid.

The law does not state in what form the information shall be presented to detainees, or whether suspects must be given a document enumerating their rights that they can keep in their possession.

Human Rights Watch met with representatives of the Ministry of Interior, who affirmed that, upon the entry into force of Law No. 5., the Ministry distributed to all the units involved in the implementation of law a written “notice of rights” that officers of the judicial police are required to read to the suspects before any interrogation.<sup>28</sup>

In its answer to Human Rights Watch’s questions (see Annex II), the Ministry of Interior stated:

We issued work notice number 1 dated May 1, 2017 to all agencies tasked with the implementation of the provisions of Law No. 5 of 2016, which included a reminder of the new procedures related to detention in terms of regulating the duties of law enforcement officials, especially as it relates to the requirement of obtaining permission for the detention of someone or bringing someone before the Prosecutor of the Republic in order to obtain an extension, in addition to the guarantees granted to those detained, particularly those related to the appearance of an attorney before the preliminary examiner, with attestation of the means by which the attorney was summoned, whether chosen (by the detainee or his family or diplomatic authorities) or appointed for criminal proceedings. [The notice also relates to] the procedures and formalities of summoning the counsel and the rights granted him by the law, most fundamentally the right to meet his client in private, as feasible logistically and materially as per the circumstances of the detention center.

While it is positive that such a “notice of rights” exists, Human Rights Watch met several former detainees who said that the police did not read them such a statement or inform them of their right to legal assistance or ignored their request for a lawyer. They said when

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<sup>28</sup> Human Rights Watch meeting with Ridha Berrabeh, Director of external relations and international cooperation at the Ministry of Interior, Mourad Rezgui, Director of external relations at the National Guard, and Mohamed Malaa, director of investigative unit, anti-terrorism brigade of the police, Tunis, May 12, 2017.

they were taken into police custody, officers of the judicial police started interrogating them without any mention that they had the right to a lawyer or to call their families to appoint one for them.

For example, Asrar Ben Jouira, communication coordinator for the campaign Fesh Nestanaw? (“What are we waiting for?”), a social movement created to protest a new budget law and tax increases, told Human Rights Watch that she was arrested, together with two other members of the campaign, on January 5, 2018, at around 11 p.m. in Tunis. She said two policemen stopped them, searched their bags, and when they found the campaign’s leaflets and cans of spray paint, took the three to the police station on Cologne Street downtown. She said three policemen interrogated them for two hours.

They asked us all sorts of questions about the campaign Fesh Nestanaw? who funds it, whether we have links with political parties, how did we meet one another. They had confiscated our phones, so we were not able to call anyone. At no point did they mention that we had the right to choose a lawyer. When I asked to call our families or friends, one of them replied, “Shut up. You have no rights here. Don’t teach me how to do my job.” They prepared a police report and asked us to sign it, but we refused. They released us at 1 a.m. They didn’t say whether they were accusing us of any offense.<sup>29</sup>

During the widespread social protests of January 2018, police arrested Ahmed Haj Hessine, who works in a private company in Zaghuan, on January 9. He had received the day before a summons to report to the police station of that city. He said the police interrogated him from 10 a.m. to 5 p.m., confiscating his telephone and failing to inform him that he had the right to a lawyer. They accused him of participation in violent riots in the city the day before. He spent the night in detention in the police jail and was transferred the following day to the first instance court in Zaghuan, where a prosecutor ordered his provisional release pending further investigation.<sup>30</sup>

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<sup>29</sup> Human Rights Watch phone interview with Asrar Ben Jouira, January 8, 2018.

<sup>30</sup> Human Rights Watch phone interview with Ahmed Haj Hessine, January 19, 2018.

Dorsaf Bouguerra, who is unemployed, said she went to the municipal market in Monastir with two other Fesh Nestanaw? members on January 10 to distribute leaflets. Human Rights Watch reviewed the leaflets, which demanded the repeal of the Budget Law and of new tax increases, and reforms to enhance social justice, but did not contain incitement to violence.

At 11 a.m., police in civilian clothes approached them, seized their leaflets, and told them to follow them to the police station. She said the police interrogated the three for three hours, separately, confiscated their phones, and did not allow them to call their family or to seek the assistance of a lawyer. The police took the detainees before the prosecutor charged them with “distributing material harmful to public order” and released them pending further investigations.<sup>31</sup>

H.S, 31 years old, who works as a cleaning lady in an art gallery in Tunis, said she was arrested on suspicion of theft on April 4, 2017, by the judicial police from the Omrane district of the capital. She told Human Rights Watch that the police beat her in the station and never mentioned her right to a lawyer. She said she was coerced to sign a confession that she had stolen her employer’s jewelry, without reading the police report.<sup>32</sup>

Nour B., a 16-year-old high school student in Menzel Jmil, a city 40 kilometers from Tunis, was arrested on January 14, 2017, on suspicion of an arson attack against a police station. He said the judicial police arrested him at night, took him to the police station, and beat him, without ever mentioning that he could have the assistance of a lawyer or allowing him to call his family.<sup>33</sup> A judge in the First Instance Tribunal in Bizerte placed him in pre-trial detention. He spent 21 days in the Mjez el Bab juvenile detention center before the case against him was closed.

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<sup>31</sup> Human Rights Watch phone interview with Dorsaf Bouguerra, January 20, 2018.

<sup>32</sup> See H.S. full story on page 50, section XII. Sample Cases of Denial of the Right to a Lawyer.

<sup>33</sup> See N.B. account on page 52 section XII. Sample Cases of Denial of the Right to a Lawyer.

## V. Dubious Waivers of the Right to Consult a Lawyer

As noted, the law states that those accused shall be informed of their right to a lawyer but can waive that right:

The police officer cannot proceed with interrogation or confrontations without the presence of the lawyer, unless the person in custody expressly waives this right or the lawyer fails to appear at the appointed time after having been duly summoned. The waiver or the non-appearance of the lawyer is noted in the official police minutes<sup>34</sup>.

The law does not require that the detainee, when waiving the right to a lawyer, must sign a waiver to that effect.

Many lawyers said that the investigators often note in the police report that the detainees waived the right to a lawyer when, according to their clients, the police neither informed them of their right to one nor invited them to designate one. This made the lawyers suspect that the waiver attributed to their clients was not one that emanated from an informed consent.

Ahmed Belgith, a lawyer who defends suspects accused of terrorism-related offenses, told Human Rights Watch:

In most cases I deal with, the police investigator notes in his report that the accused expressed that he is not interested in asking for a lawyer to be present with him at the interrogation. When I later ask my client if he was informed of his right to call a lawyer, he usually denies having waived his right to a lawyer. This casts doubt on the investigators' report.<sup>35</sup>

Human Rights Watch reviewed three police reports in cases involving terrorism-related charges in which officers wrote the identical phrase: "After informing the suspect of his

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<sup>34</sup> Law n.5, article 13 *ter*, fourth paragraph.

<sup>35</sup> Human Rights Watch interview with Ahmed Belgith, Tunis, April 25, 2017.

right to a lawyer, the suspect expressed his desire to be heard alone.” Such a waiver, in serious crimes entailing lengthy prison sentences, is problematic if the police had not ensured that the suspect comprehended the risks in waiving this right or had lured the accused into waiving it by making misleading promises.

The case of Mazen Ouji illustrates how the police might have untruthfully recorded that a suspect had waived the right to a lawyer.

Ouji is a 27-year-old student, a member of the political party Ettakattol, and activist in the popular campaign Manich Msemah (“I will not forgive”), which was launched in 2015 following the introduction of a controversial reconciliation law in Parliament.

On September 24, 2017, police arrested Ouji outside of a football stadium in Tunis and detained him overnight.

Mazen Ouji’s brother, Moadh Ouji, told Human Rights Watch that the police arrested Mazen at around 9 p.m. The family did not receive any phone call from the police. When they heard about his arrest from one of Mazen’s friends who had been detained with him, they looked for him in various police stations to no avail. They also called two lawyers who tried to locate him.

One of the two lawyers, Donia Ben Osmane, told Human Rights Watch:

The following morning, we went to look for him in several courts around Tunis, but nobody knew where he was. We finally went to the detention center in Bouchoucha, at around 2:30 p.m. There, a police officer at the entrance told us, “I cannot tell you whether he is detained here.” We were outraged. We told him that we will not leave before we know where he is. We called the Bar Association and complained about this. After more than one hour, another police officer came to tell us that he is in detention in Bouchoucha but he is being questioned in Ben Arous. We went there, but they told us his file had been transferred to another police station, in Rades. It took us an entire day to locate Mazen.<sup>36</sup>

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<sup>36</sup> Human Rights Watch interview with Donia Ben Osmane, Tunis, September 29, 2017.

Ben Osmane said, that at the Rades station, she and the other lawyer were able to read the police report, which stated that when the policeman asked Mazen whether he wants a lawyer or to inform his family, he waived both rights. Doubting that the waiver was genuine, Ben Osmane and the second lawyer challenged its validity before the prosecutor's office.

Ben Osmane said that Mazen had been taken into custody on suspicion of “offending good morals” under article 226 *bis* of the penal code. On September 26, the investigating judge dropped the case and freed him. Reached later, Mazen told Human Rights Watch that the police had never informed him about his right to a lawyer and never asked if he wanted one. He said the arresting officer had slapped his face upon arriving at the Ben Arous police station and confiscated his phone. When he asked the police officer to call his family and a lawyer, the officer asked him, “Where do you think you are?”

Rim Cherni, a lawyer with the Tunisian Organization against Torture (Organisation Tunisienne contre la Torture, OCTT), described three cases to Human Rights Watch where detainees were not allowed to see a lawyer. In one such case, she said, three policemen from the Mourouj 3 police station, in Tunis, arrested Salem Dhahri, 25, for a minor offense, and took him to the police station, on October 31, 2016. She said they called his mother, Farida Dridi, to inform her about the arrest. Dridi, together with Salem's grandmother, went to the police station to see him and ask about the reasons for his arrest. Cherni said that when they arrived at the police station, they saw Salem handcuffed to a chair in one of the offices, and a policeman slapping his face. When they tried to intervene and protested before the head of the police station, he and two other policemen hit them as well. Cherni said the station chief confiscated his mother's phone when he saw her filming the scene. The police then forced them out of the police station. Cherni said Salem signed the police report without the presence of a lawyer. The police report, which Human Rights Watch reviewed, states that Dhahri, when asked whether he wished the assistance of a lawyer, waived his right.<sup>37</sup> Cherni said he denied later, before a judge, that he had waived this right. On November 15, 2016, Cherni filed a complaint before the prosecutor's office of the Ben Arous first instance court, describing the beatings that Dhahri allegedly endured and

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<sup>37</sup> Mourouj 3 police report, dated October 31, 2016, on file with Human Rights Watch.



asking the prosecutor to open an investigation.<sup>38</sup> Cherni said she has not yet been contacted by the prosecutor concerning this complaint.<sup>39</sup>

Another case, which became famous in Tunisia and international media as “l’affaire du bisou” (“the case of the kiss”), also involved an alleged failure on the part of the police to inform suspects of their rights to contact a lawyer and their family and, in the case of foreigners, a consular official.<sup>40</sup>

N.B., a 44-year-old Tunisian woman, working as an executive in a company, and N.M., a French-Algerian 33-year-old man, were arrested on September 30, 2017. According to their lawyer, Ghazi Merabet, they had left a night club in Gammarth, an upscale suburb of Tunis, at 2.30 a.m. They parked their car in a secluded street and were talking to one another when men in plainclothes approached them and asked for their papers. They were then escorted to the police station, interrogated without the presence of a lawyer. They then signed the police report, under duress, according to Merabet. The police then brought them before the prosecutor, who charged them with public indecency, public drunkenness, refusal to comply with an order, and “insulting a public official during the performance of his or her duties.” A first instance court sentenced N.B. and N.M. to three and four months in prison, respectively, and remanded them in prison. The police report, which Human Rights Watch reviewed, mentions that two policemen found them in an indecent position, in their car. The police detention order states that the head of the police station informed the suspects of their right to a lawyer, and that they both waived this right.<sup>41</sup> Merabet told Human Rights Watch that his clients denied waiving their rights to a lawyer and had actually requested one, but the police did not act upon their request.

Human Rights Watch attended their appeals trial, on October 18, 2017. Both N.B. and N.M. recalled before the judge how the police had apprehended them and denied that they were in an indecent position in their car. They also denied that the police asked if they wanted a lawyer. N.M., who does not speak Arabic, said that he was not granted a translator, as

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<sup>38</sup> Request to open an investigation, from lawyer Rym Cherni to the Prosecution office of the First Instance Tribunal in Ben Arous, on file with Human Rights Watch.

<sup>39</sup> Human Rights Watch interview with Rym Cherni, Tunis, September 7, 2017.

<sup>40</sup> Lilia Blaise, “Couple jailed in Tunisia after being caught kissing in their car”, Middle East Eye, <http://www.middleeasteye.net/news/couple-jailed-four-months-tunisia-after-being-caught-kissing-their-car-55456298> (accessed February 13, 2018).

<sup>41</sup> Police report, on file with Human Rights Watch.

mandated by the law. He said he signed, under duress, a police report written in Arabic, which he does not read. On appeal, N.M was sentenced to four months in prison and N.B to two months.

Ines Harrath, a lawyer representing suspects charged with terrorism-related offenses, described to Human Rights Watch a case in which she suspected the police may have faked a waiver of the right to a lawyer. The case involved Rabii Belhoudi, a 19-year-old from Kairouan whom she had already represented seven times during the previous two years. Belhoudi was arrested for the eighth time on suspicion of committing a terrorism-related offense on December 18, 2016.<sup>42</sup>

[Belhoudi's] family did not know his whereabouts for three days. They called me on the fourth day to tell me he had been arrested by the Anti-Terrorist brigade of Gorjani and that he would be transferred to court.<sup>43</sup> When I went to the first instance court in Tunis, the investigative judge was interrogating my client. I read through the police report and found that he had waived his right to a lawyer. I asked him in front of the judge whether this was true, and he said that he had not waived his right and, on the contrary, had asked them to call me, but the police forces beat him and then wrote that he did not wish to have the assistance of a lawyer. I find it hard to believe that a person arrested on terrorism charges so many times, who has a lawyer defending him in all those past cases, would willingly renounce to this right.

Human Rights Watch examined the conditions of the arrests of 23 young men, from Tebourba, a city 40 kilometers from the capital, during the social protests that erupted in Tunisia in January 2018. Human Rights Watch interviewed relatives of five of those arrested, reviewed the police reports for 10, and observed the group trial of all 23 on January 18.<sup>44</sup>

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<sup>42</sup> Human Rights Watch interview with Ines Harrath, Tunis, October 23, 2017.

<sup>43</sup> Gorjani is a well-known police interrogation facility in Tunis, which houses the Anti-Criminal Brigade of the Judicial Police.

<sup>44</sup> "Tunisia: Abusive Treatment During Protests," Human Rights Watch news release, January 31, 2018, <https://www.hrw.org/news/2018/01/31/tunisia-abusive-treatment-during-protests>.

Both the police reports and the relatives' evidence suggest that the men were all arrested during nighttime raids on their homes on January 9 and 13. According to the relatives, the police allegedly beat some of the detainees with batons during arrest, in front of their families. The persons who Human Rights Watch interviewed said the police never told them that they were allowed to send a lawyer to assist their arrested relative.

Several of the men told the judge during their trial that the police beat them to force them to sign confessions, in some cases without being able to read them. A public prosecutor charged them with criminal conspiracy to commit attacks against persons and properties, throwing incendiary objects on private property, and obstructing traffic on public roads, under articles 131, 320, and 321 of the penal code.

A judge from the First Instance Court of Manouba acquitted them all on January 23 and freed them.

Samir Nefzi, 27, a construction worker, told Human Rights Watch that on January 13, he and his brothers were at home when about 20 uniformed policemen forced the front door of the house open and entered. They beat him and his three brothers with batons, forced them into a police car, and drove to the district police station, where they made them kneel and beat them again.<sup>45</sup> He said the police released him and two of his brothers at 4 a.m. but kept one brother in custody. Samir Nefzi said the police did not tell him why he was arrested or that he had the right to call a lawyer.

Dalila Aouadi, 55, Imed Nefzi's mother, said that on January 15, she visited her son who was still in detention. He had a black eye and was limping. She said that he told her that the police beat him at the district police station to force him to confess to the crime of looting and to sign a police report confessing the crime. At no point, she said, did the police tell her she had a right to get a lawyer for her son while he was in police custody. The First Instance Tribunal in Manouba acquitted him of all the charges on January 23.<sup>46</sup>

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<sup>45</sup> Human Rights Watch interview with Samir Nefzi, Tebourba, January 16, 2018.

<sup>46</sup> Human Rights Watch interview with Dalila Aouadi, Tebourba, January 16, 2018.

Asma Dridi, 28, the sister of Mohamed Ali Dridi, another man arrested on January 13, told Human Rights Watch that at about 2 a.m., she heard a loud knock on the door and then heard the police forcing it open. The police, who were in black uniforms, shouted at her mother, “Where is your son?”<sup>47</sup>

They then went to her brother’s room, she said, forced him out while beating him with a baton on his head and back, and took him out to a police van. When the family went to the district station, the police did not let them see him or disclose the reason for his arrest. She said they did not tell them that they had the right to bring a lawyer to represent him. Dridi did not see her brother until January 17, when she visited him in Mornaguia prison. She said he had extensive bruises on his back, and his face was swollen. He told her the police beat him that night in the district police station, as well as other prisoners, during interrogation, and at the end made him sign papers without letting him read them. He was among those acquitted by the First Instance Tribunal in Manouba.

During their trial in the First Instance Tribunal in Manouba, the 23 suspects told the judge, one after the other, that the police in Tebourba had beaten them. Several also claimed that they were not allowed any access to a lawyer, and that they were forced to sign a paper without reading it.<sup>48</sup> During the same social protests, in January 2018, police arrested activists and allegedly denied them the right to a lawyer and in some cases filed police reports saying that the suspect had waived this right.

For example, police arrested Ahmed Sassi, a philosophy teacher and member of the Fesh Nestanaw? movement, at about 10 p.m. on January 11. He told Human Rights Watch that he was in his house with his parents, in Kabarya, a Tunis neighborhood, when the police fired tear gas in the vicinity. Gasping for air, he went outside.<sup>49</sup>

Sassi saw about 10 police officers and, worried about his asthmatic father, asked them to stop firing tear gas so close to the houses. He said they immediately grabbed him, insulted him, and forced him into a police van. They took him to the Jbel Jloud police station, with

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<sup>47</sup> Human Rights Watch interview with Asma Dridi, Tebourba, January 16, 2018.

<sup>48</sup> Human Rights Watch observations during the First Instance Tribunal hearing, Manouba, January 18, 2018.

<sup>49</sup> Human Rights Watch phone interview with Ahmed Sassi, January 18, 2018.

other people they arrested, including many teenagers. He said they interrogated him, without giving him the opportunity to call his family or a lawyer.

Sassi's friend, Manel Chlibi, told Human Rights Watch that, upon learning of his arrest, she went with his father to three police stations in the neighborhood, all of which denied detaining him.<sup>50</sup> It was not until the following morning that they found him in the Jbel Jloud police station. The same day, he appeared before the first instance court of Sijoumi. One of Sassi's lawyers, Oussema Helal, told Human Rights Watch that the police report states Sassi had waived his right to a lawyer.<sup>51</sup>

The investigative judge decided to open an investigation on charges of conspiracy to commit attacks against persons and properties, throwing harmful objects at private property, and obstructing circulation on public roads, under articles 131, 320, and 321 of the penal code. A trial judge acquitted Ahmed Sassi of all the charges.

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<sup>50</sup> Human Rights Watch phone interview with Manel Chlibi, January 13, 2018.

<sup>51</sup> Human Rights Watch phone interview with Oussema Helal, January 13, 2018.

## VI. No Effective Remedy for Breaches of the Right

Law No.5 provides for the invalidation of the proceedings in court if the judicial police breached the procedural requirements of the Code of Criminal Procedure.

Tunisian law has several such provisions on the invalidation of procedures. Article 199 of the Code of Criminal Procedure provides that “any acts or decisions contrary to the requirements of public order, fundamental rules of procedure and the legitimate interest of the defense, are void.”

Article 155 of the CCP provides that “the police report has probative force only so long as it is regular in form and its author acting in the exercise of his functions and reports according to his mandate about what he saw or heard personally. The confessions and statements of the accused or the statements of witnesses, if it is established that they were obtained under torture or coercion, shall be deemed null and void.”<sup>52</sup>

Only one of the 13 lawyers interviewed for this report said he had ever persuaded a court to invalidate proceedings, despite claims of major breaches to the procedural rights of the detainees in many of those cases, notably the denial of the right to a lawyer.<sup>53</sup>

Aida Guizani, a lawyer in Kairouan, told Human Rights Watch of one case where she asked a first instance court to dismiss a police report on grounds of non-respect of the right to a lawyer.<sup>54</sup>

She showed Human Rights Watch a decision that a Kairouan first instance court issued on February 23, 2017. Guizani told Human Rights Watch that on January 12, 2017, the judicial police in Kairouan arrested “W.S,” a young man, on the accusation that he stole a cellular phone. The police report, which Human Rights Watch reviewed, stated that W.S. had waived his right to see a lawyer and to be examined by a doctor. However, Guizani said,

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<sup>52</sup> Code of Criminal Procedures, article 155, [http://www.e-justice.tn/fileadmin/fichiers\\_site\\_francais/codes\\_juridiques/Code\\_procedure\\_penale\\_fr.pdf](http://www.e-justice.tn/fileadmin/fichiers_site_francais/codes_juridiques/Code_procedure_penale_fr.pdf).

<sup>53</sup> Human Rights Watch interview with Wissem Chebbi, member of the Tunisian Bar Association (Ordre National des Avocats Tunisiens), Tunis section, Tunis, September 23, 2017.

<sup>54</sup> Human Rights Watch interview with Aida Guizani, Kairouan, May 17, 2017.

after his family had called her several days after his arrest and she was able to visit him in prison, that she noticed that he had a chipped tooth and marks that beatings could have caused. She asked for a medical examination of her client. She said W.S. told her that the police had not allowed him to call his family or informed him of his right to a lawyer. He said a police officer hit him in the mouth at the police station, while he was handcuffed. In the written judgment, the court acknowledges that the proceedings contained some irregularities, “because the suspect did not exercise his right to a lawyer in *garde à vue*.” However, the court ruled that this “cannot invalidate the entire proceedings,” and that the police report “was admissible as evidence, despite the procedural irregularities.”<sup>55</sup>

In the case of N.B. and N.M. (mentioned in section V. Dubious Waivers of the Right to Consult a Lawyer) who were arrested on September 30, 2017 and sentenced to four months in jail for “public indecency, drunkenness and insulting a public official,” both the First Instance and the appeals judges refused to invalidate the proceedings and decided to sentence them to prison despite alleged procedural violations.

In the First Instance judgment, which Human Rights Watch reviewed, the judge quoted the police report’s description of the accounts of two police officers who proceeded with the arrest and interrogation of N.M. and N.B. It also quoted the denial by the two defendants, during the court session, of their “confessions” as reproduced in the police report, that they were caught in an “indecent” position. However, the judge discarded the repudiation by the two defendants of their confessions and concluded that the police report is valid. The judge quoted article 154 of the CCP, which provides that the police reports should be considered as valid until proven otherwise.<sup>56</sup>

At the appeals trial, the lawyers of the suspects orally listed the violations.<sup>57</sup> They told the judge that their clients had been denied their right to a lawyer. N.M., who had signed a police report in which he had waived his right to a lawyer, later denied ever knowingly signing such a waiver, and told the lawyer he was not able to understand the report’s content, as he does not read Arabic and was not provided with a translation of it. They also mentioned other alleged procedural breaches, such as the lack of notification of N.M.’s

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<sup>55</sup> Judgment of the Appeals Court of Tunis, on file with Human Rights Watch.

<sup>56</sup> Article 154 of the Code of Criminal Procedure states, “the minutes or reports of the judicial police officers shall be considered valid until proven otherwise.”

<sup>57</sup> Human Rights Watch observations during the appeals trial session, Tunis Tribunal, Tunis, October 18, 2017.

“diplomatic and consular authorities.” They pointed to the fact that the police detained and interrogated the suspects even before receiving the prosecutorial order to place them in *garde à vue*, a clear breach of Law No. 5, which provides that the officers of the judicial police cannot “keep the suspect in detention unless they obtain the prosecutor’s authorization.” The police interrogation report, which Human Rights Watch reviewed, was written at 5 a.m., but the prosecutor’s detention order was registered at 6:29 a.m. However, the appeals court judge upheld the guilty verdict and maintained the four-month prison term for N.M., reducing N.B.’s from three months to two.

In this case, the court treated the written statements prepared by the police as presumptively trustworthy and sufficient to convict the defendants and seemed to discount the procedural challenges raised by the defense and convicted the defendants based on their “confessions.”

The main prejudice to the defendants’ right to a fair trial was the court’s failure to make a demonstrable effort to determine the veracity of their claims that they had been victims of abuses, their statements falsified, and other illegal acts. If true, these acts would warrant prosecution as violations of Tunisian law and would also lend credence to their claims that their police statements were inaccurate and not legally admissible as evidence. There was no other evidence introduced in court other than these confessions and police reports.

Effective remedies against breaches of the right to access a lawyer in its various aspects are of the outmost importance. Courts continuing to admit evidence acquired in violation of this right give the police and prosecuting authorities incentives to continue applying abusive practices and violating suspects’ rights.

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems state that: “Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation.”<sup>58</sup>

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<sup>58</sup> The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the UN General Assembly, on December 20, 2012, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V12/528/23/PDF/V1252823.pdf?OpenElement> (accessed March 21, 2018).



## VII. Material Conditions and Confidentiality of Communications

A lawyer's ability to provide effective legal assistance depends on the circumstances in which the lawyer can meet or communicate with accused persons. Suspects and accused persons must therefore be able to meet with their lawyer in private and for an adequate period of time, in order for this right to be meaningful. With respect to the issue of confidentiality, the European Court of Human Rights has stated that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial."

The need for confidentiality has also been emphasized by the Human Rights Committee, which stated in General Comment No. 32 that "Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications." The Committee held in *Nazira Sirageva v. Uzbekistan* that Article 14(3)(b) of the ICCPR had been violated because the suspect and his lawyer were only permitted to meet in the presence of an investigator during the preliminary investigations.<sup>59</sup>

Since confidentiality of communication between a suspect or accused person and his or her lawyer is key to ensuring the effective exercise of the rights of the defense, Tunisia should be required to uphold and safeguard the confidentiality of meetings between the lawyer and the client and of any other form of communication permitted under national law.

Many of the lawyers Human Rights Watch interviewed said that the confidentiality of information was not secured in the police stations where they went to meet with their clients.

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<sup>59</sup> *Nazira Sirageva v. Uzbekistan*, UNHRC, Decision of 18 November 2005, UN Doc. CCPR/C/85/D/907/2000, at para. 6.3. See also *Gridin v. Russian Federation*, UNHRC, Decision of 18 July 2000, UN Doc. CCPR/C/69/D/770/1997, at para 8.5.

One lawyer told Human Rights Watch:

We have the problem of the absence of a specific place for the lawyer to meet with his client and to review the documents, even in special units such as Gorjani and Aouina.<sup>60</sup> Often, we find ourselves obliged to have the meeting with the suspect in the interrogation office. I usually ask the officers to leave the office to be able to have a confidential meeting with my client, but sometimes they disturb us and barge into the office. Other times I feel compelled to shorten my 30-minute consultation because of these bad conditions.<sup>61</sup>

Another lawyer, Khaled Aouinia, who works with Organisation Mondiale Contre la Torture, the international network of lawyers, and has assisted tens of suspects since the entry into force of the law, told Human Rights Watch that in the police stations in Sidi Bouzid where he was called to represent suspects the conditions under which lawyers must attend the early phases of investigation are inadequate for the purpose of client-lawyer consultation.

The police offices do not guarantee the concept of *kholwa*, or privacy, with the client. You enter a police office and you find in it detained individuals and two or three police officers and you have to sit there and talk to your client without any privacy.<sup>62</sup>

The President of the Bar Association in Sidi Bouzid, Miftah Missaoui, said:

The principle of privacy is usually not respected. I often refuse to represent my client in the interrogation phase because of the inadequate conditions in the police offices: no privacy with my client, police officers having access to the room while I talk to my client, and sometimes even the lack of a chair to sit down and talk to the client.<sup>63</sup>

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<sup>60</sup> Gorjeni is an interrogation center for the antiterrorist brigade of the national police and the center for handling other kinds of serious criminals; Aouina is an interrogation facility for the anti-terrorist brigade of the National Guard, in Tunis.

<sup>61</sup> Human Rights Watch interview with Ahmed Belgith, Tunis, April 25, 2017.

<sup>62</sup> Human Rights Watch interview with Khaled Aouinia, Sidi Bouzid, May 16, 2017.

<sup>63</sup> Human Rights Watch interview with Miftah Missaoui, Sidi Bouzid, May 17, 2017.

Rim Cherni, a lawyer working on representing victims of torture with OCTT, told Human Rights Watch that she had to assist persons being held at the Mourouj, Omrane, Bab Saadoun, Hay Zouhour and Sidi Hssine police stations in Tunis. She did so on eight occasions, between June 2016 and April 2017:

Each time I went to these police stations, there was no private room for meeting with my client. The police offered to leave the interrogation office, but then you could still hear them outside of the office, they would barge in from time to time, interrupting me, telling me that the time with my client has ended, although we had not yet used up the regulation 30 minutes.<sup>64</sup>

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<sup>64</sup> Human Rights Watch interview with Rym Cherni, Tunis, September 7, 2017.

## VIII. Derogations in Counterterrorism Cases

Law No. 5, in article 13-3, gives the prosecutor the authority to delay access to a lawyer for 48 hours after the beginning of detention in cases where the detainee is accused of terrorism-related offenses:

“The public prosecutor, in terrorist cases, whenever the needs of the investigation so require, can prevent the lawyer, for a maximum period of 48 hours, from seeing the suspect, conversing with him or her, attending the interrogation or confrontation and consulting the file.”<sup>65</sup>

Human Rights Watch interviewed five lawyers who have defended suspects accused of terrorism-related offenses. They all said that, in the first year after the entry into force of the law, in the cases they handled the prosecutors and investigative judges applied almost systematically the prerogative of delaying access to the lawyer.

Lawyer Anouar Ouled Ali said that in his experience in such cases, “the prosecution postpones the right to a lawyer almost automatically without justifying the decision by asserting the existence of exceptional threats or conditions. Therefore, what was considered as an exception to the right to a lawyer has become the rule in terrorist cases.”<sup>66</sup>

He described to Human Rights Watch one such case:

In January 2017, I represented a woman who had been lured by her husband to travel to Syria and then attempted to come back to Tunisia. Her family had called me and asked for my help in bringing her back. I contacted the Tunisian embassy in Turkey, she went and “surrendered” to the Tunisian authorities there, and the embassy gave her a laissez passer with which she was able to travel with her children back to Tunis. After that, I informed the prosecutor about her case and her return, as he had initiated proceedings against her. But when the police at Gorjani

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<sup>65</sup> Article 13, Law No.5 of February 16, 2016.

<sup>66</sup> Human Rights Watch interview with Anouar Ouled Ali, Tunis, April 26, 2017.

summoned her, they filed a request to delay her access to a lawyer and the prosecutor approved it. So in a case like this, where the lawyer was instrumental in bringing back the accused and cooperative with the prosecution office, the lawyer could still be denied the right to see his client without a written justification.<sup>67</sup>

Ines Harrath, another lawyer, told Human Rights Watch that she has handled around 50 terrorism-related cases since the entry into force of Law No. 5. She estimated that in 80 per cent of these cases, the prosecutor's office postponed the access to a lawyer for 48 hours.<sup>68</sup>

Human Rights Watch reviewed the police and prosecution's case files in five counterterrorism cases. In each of these cases, the arresting authorities petitioned the prosecutor to prohibit the suspect's contact with a lawyer for 48 hours. In one such file, the National Guard of the Sousse district detained a suspect on February 21, 2017, on suspicion of "membership in a terrorist organization." The following day, the head of the district sent a written request to the prosecutor's office of the First Instance Court in Sousse to ask the "authorization to prohibit the lawyer from assisting the suspect." The reply from the prosecutor gave the National Guard in Sousse the right to prevent the suspect from seeing a lawyer, citing "the necessity to protect confidentiality of the investigations."<sup>69</sup>

In another case, the counterterrorism unit of the National Guard in Tunis, on January 1, 2017, arrested a suspect whose brother joined the Islamic State (also known as ISIS) in Syria, on allegations that he had "made contacts on Facebook with suspicious elements suspected of preparing a terrorist attack." The same unit requested the prosecutor's authorization to detain the suspect and to prohibit him from seeing a lawyer. A prosecutor in the special counterterrorism branch of the Tunis Court authorized the National Guard to detain him for five days and to deny him access to a lawyer for 48 hours, citing only "the necessities of the investigation" as the reason for this decision.<sup>70</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> Human Rights Watch interview with Ines Harrath, Tunis, October 23, 2017.

<sup>69</sup> Case documents on file with Human Rights Watch.

<sup>70</sup> Case documents on file with Human Rights Watch.

Such a seemingly peremptory application of the exception to the right to a lawyer, without individualized reasons being provided, contravenes international standards.

As the European Committee for the Prevention of Torture notes, the “question whether restrictions on the right of access to a lawyer are justified should be assessed on a case-by-case basis, not determined by the category of offense involved.”<sup>71</sup> In addition, the former special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated in a 2008 report that “any delay or exclusion of legal representation on security grounds must not be permanent, must not prejudice the ability of the person to answer the case, and, in the case of a person held in custody, must not create a situation where the detained person is effectively held incommunicado.”<sup>72</sup>

The European Court of Human Rights has established that, “while the right of a person charged with a criminal offense to be effectively defended by a lawyer is not absolute, any exception to the exercise of this right should be clearly circumscribed and strictly limited in time and it must not, in the light of the entirety of the proceedings, deprive the accused of a fair hearing.”

There are grounds for concern, based on the frequency with which prosecutors in Tunisia are delaying access to lawyers in terrorism-related cases, that they are doing so reflexively rather than after examining the merits of each case.

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<sup>71</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Access to a lawyer as a means of preventing ill-treatment, 21st General Report, CPT/Inf(2011)28-part1, para.21, <https://rm.coe.int/16806cccd25> (accessed April 20, 2018).

<sup>72</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 40 (accessed April 20, 2018).

## IX. Impact on Torture

Seven years after the revolution, Tunisian police continue to torture suspects, according to various reports. The United Nations special rapporteur on torture, during his follow-up mission to Tunisia in May 2014, noted that, although there was progress in fighting torture, and victims now are less afraid to file complaints, there is unfortunately very little action by prosecutors and by judges in pursuing the complaints for torture both from the Ben Ali era and for the post-uprising cases. He noted that despite the political will displayed by the government and its commitment to combat torture and other ill-treatment, the steps undertaken so far are insufficient to ensure the effective eradication of such practices and to fight impunity, which still prevails in the country.<sup>73</sup>

It is difficult to determine the number of torture cases in Tunisia, including those that Tunisia's judiciary has examined or brought to trial. The only statistics we have are the ones released in November 2015, by the Ministry of Justice, Human Rights and Transitional Justice in its submission to the United Nations Committee Against Torture for its third periodic review of Tunisia. The Ministry stated that the judiciary had before it, between January and June 2014, 230 cases of alleged torture, of which 165 cases were under investigation, 20 had been transferred to the permanent military court in Tunis, six cases had been dismissed due to lack of evidence, the inability to identify the perpetrator, or the statute of limitation on the crime; three where the court had tried the defendants in absentia and sentenced them to pay a fine, and two cases where perpetrators received a two-year suspended prison sentence.<sup>74</sup>

The report did not say what happened in the remaining 34 cases. The report acknowledges that “there is slowness in deciding on issues relating to torture, which contributes to eroding confidence in the judiciary and gives the impression of the existence of impunity.”

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<sup>73</sup> Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Tunisia: More than political will is needed to eradicate torture”, June 6, 2014,

<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=14671&LangID=E> (accessed on April 23, 2018).

<sup>74</sup> Committee Against Torture, Tunisia Report, Third Periodic Review, 6 November 2014, CAT/C/TUN/3/Add.1,

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsn%2fe41KqfmX3PaT%2bm8PgpNqPgg4173SEDxq1mQZu8HZuj1RMBoarCIKCaphmPjmUg%2fFilcCofKBRCfjvILFje%2b24nGten2xY44RCvElbqCFg>, (accessed April 23, 2018)

In its letter to the Ministry of Interior, Human Rights Watch requested information about the number of allegations for torture and ill-treatment in *garde à vue*, from June 2016 to the date of the letter, and whether the Ministry had noted any increase or decrease in the number of allegations compared to previous years.

In its answer, the Ministry stated that “a complaint of torture was filed in 2016. The suspected related to a citizen being subjected to torture by national security staff in Sbeitla during interrogation, and the General Inspectorate found that the claims were without merit in light of the conflicting statements of damage made by the claimant, who suffers from epilepsy ...” The letter stated that a second complaint was filed in 2017 by a woman who alleged that a security official subjected her son, a murder suspect, to violence to extract a confession, but the merit of her claims were not proven. Furthermore, the letter affirmed that “there was no increase in the number of torture cases was recorded in comparison with previous years.”<sup>75</sup>

While it is difficult, without clear statistics, to assess the impact of Law No. 5 on the incidence of torture, some lawyers told Human Rights Watch that they had the impression the entry into force of the law has helped. Lawyer Anouer Ouled Ali said, “I think torture as practiced before has diminished. Places of detention are not any more secret places where the police have absolute powers over the suspect. Once the lawyer has the right to attend the interrogation, he becomes a guarantee against mistreatment during that time.”

However, lawyer Ouled Ali also noted that new forms of torture may arise, such as forced nakedness or threats to rape the suspect or female members of his family, which would not leave physical marks visible to a visiting lawyer.<sup>76</sup> He described to Human Rights Watch one such incident. On February 13, 2017, he said, he went to Gorjani to represent a suspect who had been arrested on suspicion of participation in terrorist networks. When he arrived, he was able to talk to his client for ten minutes. The client said the police had treated him well and did not complain of torture. Two days later, however, Ouled Ali said he received a phone call from the same unit asking him to go to Gorjani to attend the interrogation of the same client. During their private conversation that day, the suspect told him that he had spent the previous night in Gorjani, and that the judicial police there kept him naked from 1:30 a.m. to

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<sup>75</sup> See Annex II.

<sup>76</sup> Human Rights Watch interview with Anouer Ouled Ali, Tunis, April 20, 2017.



10 a.m. in the interrogation room and threatened to rape him. The lawyer said the lack of physical evidence makes it difficult to prove such allegations.

Ines Lamloum, who coordinates the International Organization Against Torture's support centers for victims in Tunisia, told Human Rights Watch that she did not notice any decrease in the torture cases following the adoption of the law:

We have 211 torture complaints since 2013, of which 60 are cases from police custody in 2017. From our perspective, the law has not yet changed the reality of torture in Tunisia. Many of those who came to complain this year said that they were beaten up during arrest, even before arriving at the police station.<sup>77</sup>

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<sup>77</sup> Human Rights Watch interview with Ines Lamloum, International Organisation Against Torture, Tunis, September 11, 2017.

## X. Legal Aid

It is not enough for the authorities merely to allow lawyers access to places of detention. If the detainee does not know a lawyer, or cannot afford one, the state should ensure that he or she is able to overcome these obstacles. Principle 6 of the Basic Principles on the Role of Lawyers is pertinent: “Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.”<sup>78</sup>

Tunisia’s law on access to a lawyer states that a suspect has to be informed of their right to call a lawyer of their choice. Only when the person is suspected of a serious crime does the police officer have the obligation to provide a lawyer to them in the event that they do not have one—unless they waive this right. The law requires the president of the regional section of the Bar Association to designate a lawyer from a pre-established list of duty lawyers available. However, the law is silent on whether the duty lawyers are required to represent clients who cannot pay them.

Tunisia has no system for ensuring legal aid for persons in pre-charge detention who cannot afford a lawyer.

Law No. 52 of 2002, dated June 3, 2002 on the Judicial Aid Grant, provides for legal aid only for representation of the suspect before the judiciary and not during police custody. Even in the former case, it provides for legal aid only in cases of serious crimes and of those other offenses that carry a minimum sentence of at least five years in prison, and only after a lengthy application and appointment process that does not begin until the case is transferred to the court.

Thus, high numbers of Tunisians, particularly poor Tunisians who cannot afford to hire

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<sup>78</sup> Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx> (accessed April 23, 2018).

private lawyers, are in practice unable to exercise their right to the assistance and protection of legal counsel at the police station.

A study by the International Legal Foundation found that “the June 1 amendments have not translated into increased or improved early access to a lawyer for the bulk of suspects. While the law now clearly states that detainees have the right to have a lawyer present during the interrogation and confrontation, there is no acceptance of the obligation to appoint a lawyer (at the state’s expense) at the police station for all suspects who cannot afford to hire a lawyer.”<sup>79</sup>

According to representatives of the Bar Association, this fuels a reluctance of duty lawyers to accept cases where their fees would be covered neither by the legal aid scheme nor by any other system.<sup>80</sup>

Representatives of the Bar Association told Human Rights Watch that they discussed the problem at several meetings with the Ministries of Justice and Interior. To date, however, no measure has been adopted to provide legal aid to indigent suspects at the early stages of the criminal investigation, they said.<sup>81</sup>

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<sup>79</sup> Report of International Legal Foundation-Tunisia, “Early Access to Justice Project,” April 19, 2017.

<sup>80</sup> Human Rights Watch interview with Dhaker Aloui, member of the Tunisian Bar Association, Tunis section, Tunis, September 21, 2017; Interview with Lotfi el Arbi, president of the Tunis section of the Bar Association, Tunis, February 7, 2018.

<sup>81</sup> Ibid.

## **XI. Role of Lawyers**

Under the new legislation, a lawyer has a wide latitude to assist his or her client. The law states that:

The lawyer may consult the proceedings of the investigation one hour before the appointed time of the interrogation or the confrontation [with witnesses or victims or co-defendants] but may not make a copy of the proceedings. However, he may take notes about the file.

The lawyer attends the interrogation and confrontation of the person in custody with others and mentions his observations in the minutes of the session.

At the end of the interrogation or confrontation by the judicial police officer, the lawyer of the suspect may, if necessary, ask questions.

The lawyer of the person in custody may, where appropriate, after his interview with the client or after his client has undergone interrogation or confrontation with another party, mention his written observations in the police report.

In sum, Law No.5 gives the lawyer chosen by the suspect or appointed on the suspect's behalf by the Bar Association several rights. These include: the right to consult the investigative documents; the right to visit the suspect and to have a confidential meeting with him or her for 30 minutes (a second meeting is permitted if the detention is extended); the right to attend the interrogation of the detainee and to attend the detainee's confrontation with witnesses or victims; the right to ask questions of the detainee and others at the end of the interrogation session; the right to note observations in the minutes of the interrogation or confrontation report; the right to add exonerating material to the case file; and the right to sign the interrogation report.

Tunisian law gives lawyers a relatively broad role in representing suspects while they are in police custody. Other jurisdictions, even in Western countries, have restricted such a role in various ways. For example, in the Netherlands, while a suspect in police custody is entitled to consult a lawyer, the general rule is that the detainee has no right to the presence of a lawyer during police interrogation. Similarly, in Canada, while an arrested person has a right under the Canadian Charter of Rights and Freedoms to retain a lawyer, this right does not extend to having the lawyer present during interrogation.

Defense lawyers had a varying experience regarding the implementation of these provisions in practice. Some said that usually the police forces allow them, at the end of the interrogation, to ask questions and to note their comments in the police report or in a separate sheet, others said that they were denied such rights and that the police tried to interfere with the questions they were asking their clients or a third party during confrontations, or did not accept to enter their comments into the police report or into the case file.

For example, one lawyer, Rim Cherni, said that on September 1, 2017, she attended the interrogation of a minor, in the Hay Zouhour police station, in Tunis. She said she saw that her client had signs of what seemed to her to be slaps on the face. She asked him whether the police had slapped him, and he said yes. Cherni told Human Rights Watch that she had asked the interrogating officer to write down this question and her client's answer, but that he had refused to do so.<sup>82</sup>

Lawyer Anouer Ouled Ali told Human Rights Watch that shortly after the entry into force of the law, the judicial police in Gorjani did not let him ask questions of witnesses brought in for confrontation.

They told me: “you don't have this right, if you start asking questions what's the difference then between you and us, do you want to take our place and do the interrogation yourself?”<sup>83</sup>

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<sup>82</sup> Human Rights Watch interview with Rim Cherni, Tunis, September 7, 2017.

<sup>83</sup> Human Rights Watch interview with Anouer Ouled Ali, Tunis, April 26, 2017.

Another lawyer, Marwen Deli, described encountering the same problems during the months following the implementation of the law:

I went to a police station in the town of Rgueb to assist a suspect who had been arrested for theft, in September 2016, at night. I attended the interrogation of my client. After the end of the session, I asked to write my remarks on the police report, as warranted by the law, but the chief of station refused. I told him the law gave me that right, but he did not budge. It was difficult to contest this, especially at night, when there were no representatives of the Bar Association available.<sup>84</sup>

Representatives of the National Bar Association told Human Rights Watch that they held various meetings with the ministries of interior and justice to resolve some of the issues arising from the implementation of the law, including the refusal by the police to let the lawyers write their remarks in the interrogation report. They said these meetings and the training sessions held with high-level police forces helped resolve some of the problems.<sup>85</sup> They also said that the Bar Association had drafted “implementing guidelines” for Law No.5. However, to date, the ministries of interior and justice had yet to adopt those guidelines.<sup>86</sup>

Anouar Ouled Ali, who had mentioned encountering difficulties during the first months after the entry into force of the law, also stressed that he has since been able to write his remarks on the interrogation reports. He said in one case [described above in the section on torture], during the second interrogation of his client by the Anti-Terrorist brigade in Gorjani, on February 15, 2017, the police agreed to note in the report that his client said that the Anti-Terrorist brigade had kept him naked in an office for eight and a half hours.<sup>87</sup>

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<sup>84</sup> Human Rights Watch interview with Marwen Deli, Sidi Bouzid, May 16, 2017.

<sup>85</sup> Human Rights Watch interview with Dhaker Aloui, Member of the Tunisian Bar Association, Tunis section, Tunis, September 21, 2017; Interview with Lotfi el Arbi, president of the Tunis section of the Bar Association, Tunis, February 7, 2018;

<sup>86</sup> The Bar Association, together with Avocats sans Frontières, issued an “Implementing Guide for Lawyers on the Presence of the Lawyer before the Investigative Police,” dated June 1, 2017. The guide is not a binding document.

<sup>87</sup> Human Rights Watch interview with Anouar Ouled Ali, Tunis, April 26, 2017.

## **XII. Sample Cases of Denial of the Right to a Lawyer**

### **Mohamed Ali Agrebi**

Mohamed Ali Agrebi is a member of the executive bureau of DAMJ, an organization that defends lesbian, gay, bisexual and transgender (LGBT) rights.

He told Human Rights Watch that in 2017, he started to assist a Lebanese-British artist, Tanya Khouri, in her project called, “Garden Speak”. The project involved reviving the memory of “martyrs” who were killed by the Syrian regime by writing letters to them. Khouri sent Agrebi some of these letters for translation from English to Arabic.

On February 28, 2018, Agrebi said, seven men in plainclothes came to his workplace in downtown Tunis and arrested him. He said they did not tell him who they were and why they were arresting him. He said they took him to his apartment, which they searched. They confiscated other letters he had, as well as his computer and a computer belonging to DAMJ, as well as sex toys. In the car, they asked him both about the letters and his private life, including his sexual orientation. He said they took him to Gorjani for interrogation, and that’s when he realized that they were from the Anti-Terrorist brigade. They interrogated him from 2 p.m. to 7 p.m., never mentioning to him that he could call a lawyer or that he had the right to inform his family of his detention. After finishing the interrogation, an officer gave him a paper to sign.

He was hurrying me into signing it. I signed without being able to read anything. I felt compelled to do so, there was so much pressure, from all those policemen coming in and out of the room, shouting at me, asking me weird questions.

After he signed, the police allowed his lawyer, whom members of DAMJ alerted about Agrebi’s arrest, in to see him. He said the lawyer took the police report and read it. He asked him, “How come you waived your right to a lawyer? Did you really do it?” That’s

when Agrebi realized that in the paper he signed, the police had written that he did not want a lawyer.<sup>88</sup>

## Hammadi Khlifi

Hammadi Khlifi is a writer and anti-corruption activist. Khlifi posted on his Facebook page, on December 20, 2016, a photo showing President Beji Caid Essebsi with his personal guard, with a comment, “Dear Guard. Are you intending to do it or not? Go ahead, you are still young, and we are all with you.” The photo and comment was apparently an allusion to the assassination of the Russian Ambassador to Turkey, Andrey Karlov, in December 2016.

On December 22, 2016, police arrested Khlifi and held him for two days before releasing him provisionally. He still has a case pending against him for “incitement to murder,” under article 51 of the Decree Law on freedom of the press.

Khlifi told Human Rights Watch that, on December 22, police forces came to his house and took him to the district police station in Sfax. He said:

On the way to the police station, I told the officer: let me call my lawyer for the legal procedures. He responded: “What lawyer? Are you serious? Your brother is your lawyer.” I didn’t understand, as my brother had never studied law. I didn’t insist because I never thought this would lead me to sitting before a court or ending up in a detention center. He made it seem insignificant, so I didn’t resist.

He said they took him to the Sfax District police station, where they interrogated him for two hours, asking him questions about the Facebook post. He said they then took him to Gorjani, an interrogation center in Tunis, where the criminal brigade officers interrogated him.

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<sup>88</sup> Human Rights Watch interview with Mohamed Ali Agrebi, Tunis, March 18, 2018.



He said:

In Gorjani, I asked the investigator, “Can I call a lawyer for the investigation, please?” He said, “you are a law student. If there is something you didn’t like in the report, we will rewrite it.”

Khelifi said after three hours of interrogation, they gave him his written statement, which he then read and signed. He said the police officers obtained a pre-charge detention order from the prosecutor’s office for 48 hours. He then spent the night in the Bouchoucha detention center.

He said the following day, they took him again to Gorjani, where he was finally allowed to meet with his lawyers. The next day, the prosecutor of the first instance court in Tunis charged him with “incitement to murder” under the Decree-Law on freedom of the press.

The same day, a court transferred the case to the Sfax court. Since then, Khelifi has not heard anything more about the case against him.<sup>89</sup>

## **Nour G.**

Police detained and allegedly assaulted Nour G., 17, repeatedly during his arrest and subsequent interrogation, and denied him access to a lawyer and to a doctor, following a complaint from a lawyer accusing him of stealing her handbag.

Nour’s mother, Y. O., 37, told Human Rights Watch that on February 16, 2017, around 10 or 11 p.m., the family was sleeping in their house in Kairouan. She was awoken by the sound of the door being forced open. When she went out of her bedroom to the patio, she saw 12 men dragging her son, Nour, out of his room to the patio, beating him with their fists, kicking him on his legs, and then on his stomach while he was on the floor. When she threw herself on the men who were beating Nour, they beat her as well, she said. After a few minutes of scuffling, the policemen left with her son. She said she went to the police station in Kairouan that night but was unable to see him.

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<sup>89</sup> Human Rights Watch interview with Hamadi Khelifi, Tunis, January 27, 2017.

When she returned the following morning, she said she found her son handcuffed, his face bruised and swollen. One of the policemen told her that Nour is accused of stealing a woman's handbag. She said she told them she wanted a lawyer for Nour. The police replied that he doesn't need one, since his mother is representing him, and that he has no right to a lawyer before appearing in front of a judge, she said.<sup>90</sup>

While the police were interrogating Nour, a lawyer from the Tunisian League for Human Rights, whom Nour's uncle had called, arrived. He declared that the interrogation is illegal because there was no lawyer present.

Y.O. said she left the police station at the end of the afternoon and came back the following day. The station commander told her that insulting a police officer had been added to the accusations against her son. The mother said that when she saw her son, he had fresh marks on his face and neck, and he told her the police had beaten him when he was on his way to getting a urine test to detect drug consumption. She said she asked the station chief to summon a doctor to record evidence of abuse, but he told her, "Those are just scratches."

The police sent Nour to the First Instance court in Kairouan. The judge ordered him held in the Sidi Heni juvenile detention facility in Kairouan. He was charged with the offense of "participation in a criminal association [association de malfaiteurs]" under article 131 of the penal code and "insulting a state official" under article 125 of the penal code. He was sentenced to one year in prison and served three months before being provisionally released.<sup>91</sup>

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<sup>90</sup> Tunisian Code on the Protection of the Child, adopted in 1995, creates an obligation for the authorities, if the child has committed a serious crime, to provide him or her with a lawyer. Article 77 of the law "If the facts imputed to the child are of a serious nature, the public prosecutor must automatically assign a lawyer to assist the child, if he has not chosen one. In any case, the child under the age of 15 cannot be heard by the judicial police without the presence of his guarantor, parents, guardian or close neighbor. The UN Committee on the Rights of the Child, General Comment 10 (2007), on Children's rights in juvenile justice, states that, during police investigations "...the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police. Parents or legal guardians should also be present at the proceedings..."

<sup>91</sup> Human Rights Watch interview with Y.O., Tunis, March 7, 2017.

## Wissam T.

Wissam T., 31, works as a guard in a private house. He said that on February 23, 2017, he was walking in his neighborhood in Kairouan, with a friend, at 10:30 a.m. There was a scuffle on the street and police came to disperse the crowd that had formed. He said they arrested him but let his friend go. He said they took him in a police car to the district station in Kairouan, where a police officer cursed, slapped, and handcuffed him. He said he spent the night in detention. He said the police officers who arrested him and those who interrogated him never mentioned to him his right to a lawyer. He said the following day, they took him to the hospital to get a urine test for drug consumption, but he refused. However, the third day in police custody, he took the urine test after they threatened him with heavier charges if he continued to refuse. Wissam said he tested positive and was sentenced to one year in prison for drug consumption. He spent five months behind bars and was then provisionally released.<sup>92</sup>

## H.S.

H.S., 31, works as a cleaning lady in an art gallery in Sidi Bou Said. She said between February and April 2016, she worked at the house of an elderly woman in Hay Tahrir, in Tunis. After leaving that job she remained in touch with the woman's family until she passed away. Shortly after that, on April 4, 2017, she was about to leave her new place of work when she received a phone call from the police station in the Omran neighborhood of Tunis, summoning her to come in. They refused to tell her the reason, she said.

When she presented herself the next morning, a police officer asked her for her cellular phone but did not tell her anything. Then a senior police officer came and took H.S. to a side office where, together with two other policemen, he started beating her with their fists on her head and back. The senior officer asked her, "Where did you hide the stolen jewelry?" She said then the daughter of her old employer, came to the office and asked her to return the jewelry stolen from her late mother's house.

Saidi said that at no point did any of the policemen mention to her a right to call a lawyer. She said one of the policemen grabbed her by the hair and pushed her into a cell with two

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<sup>92</sup> Human Rights Watch interview with Wissam T., Kairouan, April 12, 2017.

male detainees. She said at 3 p.m. the policemen took her back to the office, where the station chief threatened to rape her in front of her father, she said.

Terrified, she said she lied by telling them that she had stolen the jewelry. She said they took her, that day, to Bouchoucha detention center, where she spent the night. The following day, the police took her back to the same police station, where other officers wrote a police report. H.S. said she cannot read but signed her written statement anyway, with no lawyer present. She was transferred later that day to the Tunis Court of First Instance, where an investigative judge closed the case for lack of evidence.

One week later, she filed a complaint for torture and mistreatment before the prosecutor attached to the First Instance Court in Tunis and sent a complaint through Organisation Contre la Torture en Tunisie, to the disciplinary council of the Ministry of Interior. She said on September 15, 2017, she received a letter from the Ministry summoning her to give her testimony about the incident. On September 21, she went to the Ministry of Interior to give her statement. She said she did not hear from the Ministry after that and does not know what happened with her complaint.<sup>93</sup>

## **N.B.**

N.B., 16, a student at a technical high school in Menzel Jmil, was arrested on January 14, 2017, with three friends. He said he went with them to the public bathhouse (hammam) and then left to have a sandwich in the city center, at around 9 p.m. While they were eating their sandwiches, a police van stopped next to them, five policemen wearing baklavas came out, pointed their arms towards them, and asked them to get inside the van. He said they did not tell them why they were arresting them.

When they arrived at the Menzl Jmil police station, the head of the police station, with three other police officers, took N.B. alone into another office. He said they did not tell him the reason for the arrest or inform him that he could call his family or a lawyer. He understood from the conversation, however, that there had been an attempt to burn down the regional police station that afternoon, and they wanted him to give them names of possible suspects.

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<sup>93</sup> Human Rights Watch interview with H.S., Tunis, September 25, 2017.

N.B. told them he had been in the hammam at the time of the incident and had had nothing to do with it. The head of the police station turned to his agents, and told them, “Take off his pants.” He said at that point he panicked, as he thought they would rape him. He gave them the names of young people from his school and from his kickboxing class.

His mother, Zakia B., told Human Rights Watch that the police did not call her when her son was detained. She started worrying when he did not come home that night. Her husband and she went to the hospital, but he was not there. She said the police called them only at 4 a.m., seven hours after the arrest. They released him later that day. The following day he appeared before the investigative judge of the Menzel Jmil court. There, he denied any involvement in the arson attack or seeing anyone carrying incendiary materials. The judge placed him in pre-trial detention. He spent 21 days in the Mjez el Bab juvenile detention center before the case against him was closed.<sup>94</sup>

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<sup>94</sup> Human Rights Watch interview with Zakia B., Tunis, October 18, 2017.

## **XIII. The Right to a Lawyer in Police Custody: International Standards and Comparative Law**

### **Legal Framework on Arrest and Interrogation**

Tunisian authorities' partial reform of the CCP, while representing a step in the right direction, does not fulfill the requirements of a better regulation for the overall system of arrest and detention in Tunisia. The first standards should be to consider arrest and police custody as an exceptional measure that would impact the security and liberty of the person and should only be used in clearly regulated circumstances.

Article 1.b. of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) state that "Everyone has the right to liberty and security of the person. Detention must always be an exceptional measure of last resort. No one shall be subjected to arbitrary or unlawful arrest or detention." Article 6 states that "Detention in police custody shall be an exceptional measure. Legislation, policy, training and standard operating procedures shall promote the use of alternatives to police custody, including court summons or police bail or bond."<sup>95</sup>

### **Fair Trial and the Right to a Lawyer**

International human rights law enshrines the right of a defendant to a fair trial and defines many components of that right. It also defines rights during arrest and detention that are intended, in part, to protect a defendant's right to a fair trial by, among things, creating safeguards against the use of torture and other improper methods of coercion to extract a statement incriminating oneself or third parties. Statements found to have been obtained using such methods should be inadmissible as evidence against the defendant.

One of the key rights for defendants prior to trial is the right to legal representation and counsel.

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<sup>95</sup> The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), adopted by the African Commission on Human and Peoples' Rights during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014, [http://www.achpr.org/files/instruments/guidelines\\_arrest\\_detention/guidelines\\_on\\_arrest\\_police\\_custody\\_detention.pdf](http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf) (accessed on April 23, 2018).

The ICCPR, in its article 14(3)(b), guarantees a person the right “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” Article 14(3)(d) guarantees a person the right “[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”<sup>96</sup>

Further clarification and enunciation of the legal standards has been developed through the case law of the UN Human Rights Committee.

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, states that:

The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.<sup>97</sup>

The Principles and Guidelines on the Right to a fair trial and legal assistance in Africa, also affirms the right to a lawyer at all the stages of the criminal proceedings.<sup>98</sup>

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<sup>96</sup> International Covenant on Civil and Political Rights, Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, (accessed on April 23, 2018).

<sup>97</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to UN General Assembly resolution 43/173 of 9 December 1988, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>, (accessed December 12, 2017).

<sup>98</sup> Principles and Guidelines:

- a) States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status.
- b) States shall ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar.
- c) States and professional associations of lawyers shall promote programs to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms.

## Timing of Access to a Lawyer

The effective implementation of the right of access to a lawyer entails permitting a detainee to see a legal representative of his or her choice as soon as possible after deprivation of liberty. The UN Human Rights Committee, in its General Comment 32, states that the right to communicate with counsel in article 14 of the ICCPR “requires that the accused is granted prompt access to counsel.”<sup>99</sup>

Guideline 20 of the Robben Island Guidelines for the prohibition and prevention of torture and ill-treatment in Africa, which were adopted by the African Commission of Human and Peoples’ Rights in 2002, also specifically provides for a right of access to a lawyer “from the moment when [persons are] first deprived of their liberty.”<sup>100</sup>

The European Directive on Access to a Lawyer provides that the right of access to a lawyer applies to suspected or accused persons as soon as possible, and in any event: (a) before the start of any questioning by the police or other law enforcement authorities; (b) upon carrying out any procedural or evidence-gathering act at which the person’s presence is required or permitted; (c) from the outset of deprivation of liberty (Art. 3 (1)).<sup>101</sup>

## Standards on the Obligation to Provide Legal Representation to Those Unable to Afford It

The UN General Assembly adopted the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems on 20 December 2012. They enact global standards for legal aid and invite States to adopt and strengthen measures to ensure that effective legal aid is provided across the world: “States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.”

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<sup>99</sup> Human Rights Committee, General Comment 32, adopted during its Ninetieth session, Geneva, 9 to 27 July 2007, <http://www.refworld.org/docid/478b2b2f2.html> (accessed April 23, 2018).

<sup>100</sup> The Guidelines were annexed to the Resolution of the African Commission on Human and Peoples’ Rights on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa of 23 October 2002, [http://www.achpr.org/english/resolutions/resolution66\\_en.html](http://www.achpr.org/english/resolutions/resolution66_en.html) (accessed April 23, 2018).

<sup>101</sup> Article 3 of the DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 22 October 2013 On the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0048&from=EN> (accessed April 23, 2018).



The term “legal aid” is defined in the United Nations Principles and Guidelines as follows:

“Legal aid” includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require.

Furthermore, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.<sup>102</sup>

The Principles and Guidelines on the right to fair trial and legal assistance in Africa offer a set of guidelines on how to ensure an effective legal aid. It states that the accused have the right to legal assistance without payment, if they have no sufficient means to pay for it where the interests of justice so require.<sup>103</sup>

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<sup>102</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the United Nations General Assembly in December 2012, [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf) (accessed April 23, 2018).

<sup>103</sup> Principles and Guidelines:

(a) The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.

(b) The interests of justice should be determined by considering:

1. in criminal matters:

i) the seriousness of the offence;

ii) the severity of the sentence.

2. in civil cases:

i) the complexity of the case and the ability of the party to adequately represent himself or herself;

ii) the rights that are affected;

iii) the likely impact of the outcome of the case on the wider community.

(a) The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

(b) An accused person or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer.

According to international standards, legal aid free of charge should be granted to detainees who cannot afford a lawyer given their social and economic conditions and whenever deprivation of liberty is at stake. Even the possibility of a short period of imprisonment is enough to warrant the provision of legal aid.<sup>104</sup>

The requirement for provision of legal aid during the early stages is reinforced by the UN Principles and Guidelines, which explicitly require states to “ensure that effective legal aid is provided promptly at all stages of the criminal process,” including “all pretrial proceedings and hearings”.<sup>105</sup> Similarly, the Human Rights Committee has also found violations of Article 14(3)(d) and Article 9(1) where a suspect was not provided legal aid during initial police detention and questioning.<sup>106 107</sup>

States should ensure that their legal aid systems are well funded, have adequate financial and staffing resources, and have budgetary autonomy. The Human Rights Committee has also pointed out that “legal aid should enable counsel to prepare his client’s defence in circumstances that can ensure justice,” one of such circumstances being “provision for adequate remuneration for legal aid.”<sup>108</sup> The UN Principles and Guidelines detail what measures a state should take to ensure adequate and sustainable funds are provided for legal aid throughout the country. These include “allocating a percentage of the State’s criminal justice budget to legal aid services,” identifying and putting in place “incentives for lawyers to work in rural areas and economically and socially disadvantaged areas,” and ensuring that the money provided to prosecution and legal aid agencies is “fair and proportional.”<sup>109</sup>

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<sup>104</sup> In *Benham v the United Kingdom*, the applicant had been charged with non-payment of a debt and faced a maximum penalty of three months in prison. The ECtHR held that this potential sentence was severe enough that the interests of justice demanded that the applicant ought to have benefited from legal aid.

<sup>105</sup> The UN Principles and Guidelines, Guideline 4, at para. 44(c).

<sup>106</sup> The UN Principles and Guidelines, Principle 7, at para. 27.

<sup>107</sup> *Butovenko v Ukraine*, UNHRC, Decision of 19 July 2001, U.N. Doc. CCPR/C/102/D/1412/2005, at para. 7.6; *Gunan v Kyrgyzstan*, UNHRC, Decision of 25 July 2011, U.N. Doc. CCPR/C/102/D/1545/2007, at para. 6.3.

<sup>108</sup> UN Human Rights Committee, *Reid v Jamaica*, Decision of 20 July 1990, U.N. Doc. CCPR/C/39/D/250/1987, at para. 13

<sup>109</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the UN General Assembly in December, 2012, [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf) (accessed April 23, 2018).

The Luanda Guidelines affirm that “Detainees shall be provided with the means to contact a lawyer or other legal service provider of their choice or one appointed by the state. State legal assistance should be provided if the detainee does not have sufficient means or if the interests of justice require, for example given the gravity, urgency or complexity of the case, the severity of the potential penalty, and/or the status of the detainee as vulnerable or otherwise protected.”<sup>110</sup>

## Waiver of the Right to a Lawyer

Given the fundamental importance of the right to legal assistance, it may only be waived by the suspected or accused person in limited circumstances. The European Court of Human Rights has considered that a waiver cannot be considered valid and effective waiver in the absence of certain safeguards. It held that any waiver: “must not only be voluntary but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.”<sup>111</sup>

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems stated that states should prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer’s presence and to establish mechanisms for verifying the voluntary nature of the person’s consent.<sup>112</sup>

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<sup>110</sup> The Luanda Guidelines, Article 8,

[http://www.achpr.org/files/instruments/guidelines\\_arrest\\_detention/guidelines\\_on\\_arrest\\_police\\_custody\\_detention.pdf](http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf) (accessed February 13, 2018); “States have adopted various systems for the provision of legal aid. For example, In New Zealand, the Legal Services Agency operates a police detention legal assistance scheme that is available regardless of a person’s financial means, but advice is normally provided by a lawyer on the telephone.

There are many different models for delivering legal advice and assistance to suspects and accused persons at the early stages of the criminal justice process. Many countries in Europe, for example, use lawyers in private practice to deliver legal aid services, with a variety of approaches to remuneration. Others, such as many Latin American countries, Georgia, Israel, and some states in the United States, deliver legal aid in criminal cases through a public defender system. Some countries, such as Malawi, Sierra Leone and South Africa, have pioneered the use of paralegals to address this problem.”

[http://www.unodc.org/documents/justice-and-prison-reform/eBook-early\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf) (accessed February 13, 2018).

<sup>111</sup> The European Court of Human Rights, *Pishchalnikov v. Russia*, September 24, 2009, App no 7025/04

<sup>112</sup> UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 3: Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence, [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf) (accessed February 12, 2018).

Some legislations have also taken steps to ensure that the waiver of the right to legal assistance is voluntary. For example, the Police Service of Scotland has issued a guidance document for access to a lawyer. It states that “where a suspect chooses to waive their rights to solicitor [lawyer] access and/or their right to a private consultation with a solicitor, this must be recorded on the Solicitor Access Recording Form and should be referred to at the start of any interview and also recorded in the Standard Prosecution Report.”<sup>113 114</sup>

Other legislations offer further safeguards against the obstruction of the right of access to a lawyer. For example, in Turkey, the new Criminal Procedure Code, adopted in 2005, provides for criminal liability for any individual who prevents or restricts the right of access to a lawyer.<sup>115</sup>

The Dutch legislation on waivers states that vulnerable suspects or suspects arrested for an offense punishable by a sentence of twelve years or more of imprisonment, can only waive this right after having been informed by a lawyer of the consequences of doing so.<sup>116</sup>

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<sup>113</sup> A standard form distributed to the police and to be filled in at each questioning, interrogation of suspects.

<sup>114</sup> Police Service of Scotland, Solicitor Access Guidance Document, issued on March 20, 2015, [http://www.scotland.police.uk/assets/pdf/151934/184779/psos\\_solicitor\\_access\\_guidance\\_document\\_ver\\_1.00.pdf?view=Standard](http://www.scotland.police.uk/assets/pdf/151934/184779/psos_solicitor_access_guidance_document_ver_1.00.pdf?view=Standard) (accessed December 11, 2017)

<sup>115</sup> Turkey’s Criminal Procedure Code, art. 194.

<sup>116</sup> Paul Mevis and Joost Verbaan, “Dutch Criminal procedure in Relation to European Union and the Council of Europe,” *Erasmus Law Review*, December 2014, [https://www.elevenjournals.com/tijdschrift/ELR/2014/4/ELR\\_2210-2671\\_2014\\_007\\_004\\_002.pdf](https://www.elevenjournals.com/tijdschrift/ELR/2014/4/ELR_2210-2671_2014_007_004_002.pdf) (accessed March 22, 2018).

## Acknowledgments

This report was researched and written by Amna Guellali, senior researcher for Tunisia. Eric Goldstein, deputy director in the Middle East and North Africa division, edited the report. Clive Baldwin, legal advisor, conducted legal review.

Tom Porteous, deputy Program director, conducted program review. An associate in the Middle East and North Africa division provided production assistance.

We would like to thank all the individuals and organizations that supported research and analysis for the report. Among others, these include the Tunisian Bar Association, Avocats Sans Frontières, the Tunisian Organisation to fight torture (l'Organisation Tunisienne contre la torture), the International Organisation Against Torture (Organisation Internationale Contre la Torture), and the National Authority for the Prevention of Torture. A number of lawyers, including Khaled Aouinia, Dhaker Aloui, Wissem Chebbi, Rym Cherni, Ines Harrath, Oussema Helal, Aida Guizani, and Anouar Ouled Ali, also provided indispensable assistance.

## HUMAN RIGHTS WATCH

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# Annex I. Letter to His Excellency Lotfi Brahem

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September 25, 2017

His Excellency Lotfi Brahem

Minister of Interior

Ministry of Interior

Avenue Habib Bourguiba, 1000, Tunis

Fax: xxxxxxxxxxxxxx

We would like to first thank you for the continued collaboration with our organization and for the fruitful meetings we had in April 2017 with senior officials of the ministry of interior.

We are conducting research that would assess the impact of the entry into force of law 2016-05 modifying the code of criminal procedure, related to the situation of people in pre-charge detention. As you know, this law improved the safeguards for the rights of persons in detention by allowing them access to a lawyer in garde à vue. Human Rights Watch had, at the time, commended the adoption of the law and considered it a step forward for detainees' rights. We would like to ask you the following questions to help us assess how the law has been implemented in practice.

- How many people were detained in garde à vue from June 1<sup>st</sup>, 2016 to June 1<sup>st</sup>, 2017? Out of those detained during this period, how many asked for a legal representation and how many benefited from one?
- We would like to have the breakdown of detentions in garde à vue: how many were for minor offenses and how many for serious crimes during the same period?
- We would like to know whether your ministry issued instructions, directives, or guidelines on the implementation of the law to the police

officers in charge of applying it? If yes, can you provide us with those guidelines?

- When defendants, their families, or their lawyers filed complaints alleging denial of the right to a lawyer or failure to inform the detainee of his/her right to legal representation, did the ministry open an investigation into these cases? Can you give us details and specific information about the number of disciplinary or judicial cases brought against police officers for violation of procedural rights during pre-charge detention?
- Are there any specific steps taken in order to monitor the work of the judicial police and ensure that they comply with the requirements of the code of criminal procedure of ensuring the presence of a lawyer during garde à vue?
- Several lawyers told Human Rights Watch that they face difficulties having a confidential conversation with their clients in police custody, given the lack of space and privacy. Has the Ministry taken any steps to ensure good conditions for confidential communication between the lawyer and the suspect in garde à vue?
- Does the Ministry have statistics about the number of allegations for torture and ill-treatment in garde à vue, from June 2016 to date? Have you noticed any increase or decrease in the number of allegations compared to previous years?

Thank you for your consideration.

Sincerely,

[Signature]

Sarah Leah Whitson  
Executive Director  
Middle East and Northern Africa Division  
Human Rights Watch

## **Annex II. Letter from the Ministry of Interior to Human Rights Watch**

*[Received on December 18, 2017]*

### **Information Card**

#### **On Assessing the Mechanisms for Implementation of Law No. 5 of 2016**

The Ministry of Interior issued work notice number 1 dated 1 May 2017 to all agencies tasked with the implementation of the provisions of Law No. 5 of 2016, which included a reminder of the new procedures related to detention in terms of regulating the duties of law enforcement officials, especially as it relates to the requirement of obtaining permission for the detention of someone or bringing someone before the Republic's Prosecutor in order to obtain an extension, in addition to the guarantees granted to those detained, particularly those related to the appearance of an attorney before the preliminary examiner, with attestation of the means by which the attorney was summoned, whether chosen (by the detainee or his family or diplomatic authorities) or appointed for criminal proceedings. [The notice also relates to] the procedures and formalities of summoning the counsel and the rights granted him by the law, most fundamentally the right to meet his client in private, as feasible logistically and materially as per the circumstances of the detention center.

Noting the fact that a working group was formed under supervision of the Ministry of Justice including representatives of the Ministries of Interior and Justice and the Lawyers Association with the goal of preparing an operational guide to clarify the procedures stipulated by Law No. 5 of 2016.

2- The most important guarantees and rights granted to the detainee through the new provisions are: the detainee's ability to retain a counsel to appear with him at hearings or contestations with others before the preliminary examiner; and the attorney's right to visit and meet his client privately and review the examination proceedings during the period of detention. Among the duties of the preliminary examiner are to guarantee that the examination record informs the suspect that he or his family or his representative has the



right to choose an attorney to appear with him. And the Public Prosecutor's office has the authority to regularly conduct the necessary oversight over the record of detention to ensure that it contains, among other things, the request to choose an attorney.

3- The Ministry of Interior is working to ensure the necessary conditions upon an individual's exercise of his right to retain counsel as much as possible, and the work notice referenced above has stipulated the importance of ensuring proper reception of attorneys, including the designation of a waiting space within the [detention] unit if possible. In case of multiple attorneys, steps are taken to allow them to exercise their rights to visit and meet their clients, review the examination proceedings, attend hearings and contestations in such a way as to facilitate the proper course of the examination and hearing, and to appeal to the regionally relevant Republic's Prosecutor with jurisdiction to address any related complications.

4- A complaint of torture was filed in 2016 (suspicion of a citizen being subjected to torture by national security staff in Sbeitla during interrogation, and the General Inspectorate found that the claims are without merit in light of the conflicting statements of damage made by the claimant who suffers from epilepsy. A ruling on the matter was postponed for judicial decision considering that the judiciary has pledged to pursue the matter), and a second complaint in 2017 (filed by a woman on behalf of her son, accused of murder, who alleged that a security official subjected her son to violence to extract a confession, and the merit of her claims was not proven insofar as the examination of this crime was under the direct supervision of the Public Prosecution). No increase in the number of torture cases was recorded in comparison with previous years.

# “YOU SAY YOU WANT A LAWYER?”

## Tunisia’s New Law on Detention, on Paper and in Practice

The right to an effective defense is indispensable to ensuring a fair trial and safeguarding against ill-treatment in detention. In 2016, Tunisia’s parliament adopted a law that greatly enhanced the right to legal counsel of those taken into police custody. If implemented, the law would help prevent torture, coerced confessions, and other abuses.

“*You Say You Want a Lawyer?*” assesses how the law has been applied in practice during the first two years of its existence and identifies serious gaps. The report documents how many detainees are detained and interrogated without seeing a lawyer, either because the police officers did not inform them of their right to a lawyer, or because the police allegedly falsified the case file to indicate the defendant had waived this right. In addition, a provision of the law allowing the prosecutor or the investigative judge in terrorism-related cases to delay the detainee’s access to a lawyer for 48 hours after detention is applied almost automatically rather than on a case-by-case basis, thereby denying terrorism suspects much of the protection provided by the law.

The report calls on the Tunisian authorities to improve implementation of the law by instructing the police to fulfill their obligation to assist detainees in the exercise of their rights from the outset of custody and holding officers accountable for failing to perform their legal duties.



*Police station in Tunis, Tunisia.*

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