

# Human Rights Watch

## Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

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First Torture Trial Shows Need to Remove Obstacles to Accountability

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(Tunis) Tunisia's first torture case to go to trial following the ouster of President Zine el-Abidine Ben Ali highlights the need to address inadequacies in the legal framework for trying torture crimes, Human Rights Watch said today. Many other cases of torture are likely to be filed against former President Ben Ali and his associates, as other victims step forward to file complaints.

Human Rights Watch studied the first torture case and the country's current legal structure and procedures. The research identified a series of issues that Tunisia must address to bring justice to victims of crimes during the Ben Ali era and beyond, Human Rights Watch said.

Torture was rampant in Tunisian prisons during the 23-year Ben Ali presidency, and blighted the lives of thousands, said [Eric Goldstein](#), Middle East and North Africa deputy director at Human Rights Watch. Effective prosecution of torture requires an adequate legal framework as well as political will to end impunity.

On April 12, 2012, a military appeals court reduced the prison sentences imposed on former Interior Minister Abdallah Kallel and three other former security officials for the offense of violence against others. The court upheld prison sentences handed down to Ben Ali and four other officials who were tried and convicted in absentia for the same offense.

The case displayed the Tunisian authorities' lack of political will to demand the extradition of Ben Ali from Saudi Arabia, to stand trial for human rights abuses, Human Rights Watch said. Ben Ali fled to Saudi Arabia on January 14, 2011.

During the Ben Ali presidency, authorities practiced torture in a systematic manner and at all stages of criminal justice proceedings, from arrest and police interrogation to post-conviction incarceration, extensive documentation by Tunisian and international human rights organizations has shown.

The crime of torture was incorporated into Tunisian law in 1999 pursuant to Law no. 89 of August 2, 1999. Tunisia's National Constituent Assembly should harmonize Tunisian law with the Rome Statute of the International Criminal Court (ICC) by incorporating crimes against humanity, war crimes, and genocide into existing Tunisian law. This should be done either by revising the penal code or passing implementing legislation, Human Rights Watch said. The Assembly should also incorporate the various forms of criminal responsibility set out in international criminal law into Tunisian law.

On April 12, the Court of Appeal of the Military Tribunal of Tunisia reduced by half the four-year sentences issued on November 29, 2011, by the Permanent Military Court of Tunis for Kallel, the interior minister under Ben Ali from 1991 to 1995; Mohamed Ali Ganzoui, the ministry's director of special services from 1990 to 1995; and security officials Abderrahmen Kassmi and Mohamed Ennacer Alibi. The appeals court also confirmed five-year prison terms for Ben Ali and the four other defendants convicted in absentia.

All the defendants were convicted of using violence against others either directly or through others in 1991 against 17 high-ranking military officers who were detained and accused of plotting with the Islamist Party, Ennahdha, against President Ben Ali. The 17 were among the suspects in the Barraket Essahel case, named for the town where the plotters were accused of holding secret meetings. The interrogators of these officers allegedly subjected them intentionally to severe physical pain, amounting to torture under international law. However, charges of torture were abandoned by the military prosecutor at an earlier stage of the proceedings.

The Tunisian government should formally request the extradition of the former president from Saudi Arabia so that he can face accountability for the serious human rights abuses committed under his rule, Human Rights Watch said. In addition to the Barraket Essahel case, Ben Ali is also facing trials before military courts for the killing of protesters during the Tunisian uprising. He has already been convicted in absentia for various financial crimes. Authorities should also search for the four other officials who were convicted for

using violence in the Barraket Essahel trial and whose whereabouts are unknown.

Human Rights Watch's research identified five areas in which action is needed by the government to bring justice for the Ben Ali-era crimes and to prevent future crimes. Mustering the political will to extradite Ben Ali is the first.

The second involves holding these trials in civilian rather than in military courts, in conformity with international standards. Tunisia should not grant military tribunals jurisdiction over human rights violations committed by security forces against civilians, as occurred in the case against Kallel and his codefendants, Human Rights Watch said. All trials must also meet international standards of fairness, which includes giving the defendants adequate opportunity to prepare their case and challenge the evidence and witnesses against them.

The three other issues concern the application of the law:

The lessons learned from this case, and the substantive flaws, should be used to reform the framework for all the torture cases yet to come from the Ben Ali era, Goldstein said. It is crucial for the sake of accountability that the courts have in place a system for prosecuting this crime that ensures justice for victims and fair trials for the accused.

Human Rights Watch in the paper that follows details the flaws in the legal framework for trying torture cases. It is not in a position to comment on the fairness of the trial of Abdallah Kallel and his co-defendants, which is a separate issue.

### **Background on the Case**

The Barraket Essahel case goes back to 1991, when authorities said they had uncovered a plan orchestrated by officers to topple President Zine el-Abidine Ben Ali and establish an Islamist regime. Between May and July 1991, 244 army officers were arrested. Many of them were tortured by state security agents in the Tunis headquarters of the Interior Ministry, Mohsen Kabi, president of the organization Justice for Former Political Prisoners, told Human Rights Watch.

In July 1992, 171 of the officers were tried by the military tribunal of Tunis on charges of conspiring against the security of the state. Thirty-five were sentenced to life in prison and the others were sentenced to terms of from one year to 24 years.

Before the trial, in August 1991, authorities freed some of those who had been arrested after months of torture. Although these officers had never been put on trial or convicted, the authorities summarily dismissed some of them from their posts and subjected them to years of police harassment, Kabi said.

In April 2011, after the revolution, 17 of the Barraket Essahel defendants filed a complaint for the crime of torture before a civilian court. The original complaint accused Ben Ali and Interior Ministry officials, along with the defense minister during that time, of complicity in torture. The civilian investigating judge transferred the case to the military tribunal, on the grounds that military courts have jurisdiction over crimes committed by military officers, in accordance with article 22 of Law no. 70 regulating the Basic Law of Internal Security Forces.

The civilian investigating judge had initiated investigations on the basis of article 101(2) of the penal code, which provides for up to eight years in prison for the crime of torture. However, the military investigating judge decided to abandon those charges on the grounds that article 101(2) had taken effect only in 1999 (as Law no. 89 of August 2, 1999) and that applying it would contravene the principle of the non-retroactivity of penal law, since the facts of the case go back to 1991.

The first instance military court convicted the defendants on the basis of article 101 of the penal code, which provides a five-year prison term for any public agent who uses or causes to be used, without legitimate purpose, violence against persons, while on duty. Following the appeals court verdict of two years imprisonment, lawyers for all the defendants announced that they would apply to the Court of Cassation to quash the verdict, mainly on the grounds that the limitation period for prosecution had run out.

### **Lessons Learned and Issues to Be Addressed for Future Trials Involving Torture:**

#### **Try Human Rights Violations before Civil Courts**

After Ben Ali was ousted, the interim government overhauled the military judicial system. The Decree-Law no. 69 of July 29, 2011, introduced three main reforms:

Although these reforms may enhance the fairness and independence of trials before military courts, they do not address the international norm that the jurisdiction of military courts should be restricted to trying purely military offenses, Human Rights Watch said.

The UN Human Rights Committee urges states parties to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to try military personnel who are charged with human rights violations in civilian courts. The wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel ... contribute[s] to the impunity which such personnel enjoy against punishment for serious human rights violations, the committee wrote in its concluding observations from 1999 on a report by Chile.

In *Suleiman v. Sudan*, the African Commission on Human and Peoples Rights affirmed that military tribunals should only determine offences of a purely military nature committed by military staff and should not deal with offences which are under the purview of ordinary courts. In addition, the principles and guidelines on the right to a fair trial and legal assistance in Africa proclaimed by the African Commission on Human and Peoples Rights states, the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.

#### **Clarify Liability Emanating from Command Responsibility**

The prosecution of Kallel and Ganzoui was based on their alleged responsibility for the conduct of security forces under their command at the time of the events. During the trial, the defense lawyers contended that the prosecution provided no evidence that Kallel and Ganzoui either gave orders or were in any other way involved in the torture. They argued that the prosecution was imputing guilt to the defendants merely on the basis of their political responsibility, without proving that they exercised effective control over their

subordinates, who, the lawyers said, received direct orders from President Ben Ali.

Regardless of the exact role played by Kallel and Ganzoui in these events, Tunisian legislators should revise the penal code to fully incorporate the principle of command responsibility for international crimes in accordance with international law, Human Rights Watch said. The jurisprudence of international criminal tribunals concurs that command responsibility is a well-established principle of conventional and customary law, as stated by the International Criminal Tribunal for Former Yugoslavia. Additionally, it is set out in the Rome Statute of the International Criminal Court (ICC), which Tunisia ratified in 2011.

Tunisian law is not well-equipped to address command or superior responsibility. It states that persons can be held criminally accountable only for the direct commission of a crime or for complicity in it. Article 32 of the penal code sets out the meaning of complicity, which can take the form of either facilitating the commission of the crime by aiding, abetting or assisting, giving instructions to commit it, or conspiring with others to fulfill the criminal purpose.

Such forms of criminal responsibility do not cover the liability known in international law as command or superior responsibility, in which the superior did not order the crime nor facilitate its commission, but knew or should have known of the crime but failed either to prevent it or submit it for investigation and prosecution.

To ensure fair trials for the accused as well as justice for victims, legislators should revise the laws to spell out in a more precise way the conditions under which a superior will be criminally responsible for the conduct of his subordinates, Human Rights Watch said. Tunisian judges should apply the criteria laid down in the Convention against Torture and by the UN Committee against Torture in providing the definitive interpretation of that convention for the crime of torture.

The UN Committee against Torture, in its general comment on the Convention against Torture, stated that, [t]hose exercising superior authority including public officials cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.

In addition, international law, and Tunisia's membership in the ICC, requires it to adopt the principle of criminalizing command responsibility for torture in instances in which the torture in question is so widespread and systematic in nature that it meets the criteria of a crime against humanity. The Rome Statute, which created the ICC, sets out that command responsibility imputes liability to the military commanders or civilian superiors for crimes committed by subordinate members of armed forces or other persons under their effective control.

Appropriate conceptions of criminal responsibility are necessary for accountability at all levels, including for those whose responsibility extends beyond physical commission of the crime, Human Rights Watch said.

### **Remove Retroactivity Barriers to Prosecuting Torture**

Although Tunisia ratified the Convention against Torture on September 23, 1988, it did not sign into law any legislation designed to harmonize its laws with this international convention until 1999. Judges in the Barraket Essahel case ruled that to charge the defendants under the 1999 law defining and prohibiting the crime of torture would violate the principle that forbids retrospective application of criminal law. According to this principle, no person can be convicted for conduct that did not constitute a crime at the time it was committed (*nullum crimen nulla poena sine lege*). This principle purports to safeguard individuals against arbitrary decisions of the authorities.

The judges characterized the facts of the case based on article 101 of the penal code, which criminalizes acts of violence but does not refer to torture. Article 101 provides for a maximum sentence of five years in prison and considers the offense as a minor crime, which carries a lighter punishment than the crime of torture. The crime of torture, set out in international law as the deliberate infliction of severe pain or suffering, is not the same as a simple act of violence. Article 4 of the Convention against Torture includes these requirements for Tunisia and the other member states:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Under Article 14 of the Convention against Torture:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to adequate compensation.

A prerequisite for the victims right to redress is the existence of a legal framework that allows for the recognition of the violations as torture. The Committee against Torture's current draft comment on article 14 says, [s]tates parties must enact legislation and establish complaints mechanisms, investigation bodies and institutions capable of determining the right to and awarding redress for a victim of torture and ill-treatment. Inadequate national legislation interferes with this right to redress.

The conclusion of this trial highlights the need to make it clear in Tunisian law that the crime of torture was prohibited at least from 1988, Human Rights Watch said. A growing body of international jurisprudence and scholarship holds that the principle of non-retroactivity of criminal law does not apply when an act, even though it was not punishable under national criminal law at the time when it was committed, was nevertheless criminalized either (i) under international law, or (ii) according to the general principles of law recognized by the community of nations.

Article 15.2 of the International Covenant on Civil and Political Rights affirms the principle of non-retroactivity but also asserts, [n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Torture has long been recognized as a crime in international law, codified by the Convention against Torture. Tunisia ratified the convention in 1988. Thus this crime can be considered as having been criminalized in Tunisia at least since that time, regardless of whether it was explicitly incorporated in the Tunisian penal code.

### **Remove the Statute of Limitations for Serious Rights Violations**

Tunisia's law specifying the prescription period that applies to the crime of torture represents another challenge to ensuring accountability. On October 22, 2011, the eve of elections, the interim government promulgated an amendment to the penal code provisions on torture that introduced a statute of limitations of 15 years from the time of the commission of the offense. After this time, prosecutions cannot be brought. Before this amendment, torture as a crime under Tunisian law had a statutory limitation of 10 years, as for all other crimes. However, international customary law has long recognized that a statute of limitations should not apply to serious violations of human rights.

In the Barraket Essahel trial, lawyers for the defense contended that because 20 years had passed since the alleged crimes, the defendants should benefit from the statute of limitations spelled out in article five of the Code of Penal Procedure. However, the first instance military court, in its November 29 ruling, rejected this argument, noting that paragraph two of article five states, The statute of limitations is suspended when prosecution is impossible due to a legal or factual obstacle.

The court concluded that the statute of limitations did not apply in this case because the victims could not file complaints during the 20 years because the alleged perpetrators controlled the security apparatus and the judiciary. Such reasoning, although it overcame in this case the hurdle of the statute of limitations, highlights the need to review the laws on such statutes, and to align Tunisian legislation with international customary law by clarifying that there is no statute of limitations for the crime of torture.

In its annual reports, the UN Committee against Torture has consistently criticized the existence of statutes of limitations on torture in domestic legislation of states parties and called on them to amend their penal codes to ensure that acts of torture are not subject to any statute of limitations. In its report for 2009-2010, the committee reiterated that, bearing in mind the long-established *jus cogens* (a peremptory norm of general international law accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted) prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation.

In addition, international human rights monitoring bodies have held that statutes of limitations do not apply to serious human rights violations. For example, in 2001, the Inter-American Court of Human Rights, in the *Barrios Altos* case, held that:

This Court considers inadmissible the provisions for amnesty or statutory limitation periods and the establishment of exemptions from responsibility that attempt to impede the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extrajudicial or arbitrary executions and forced disappearances, all prohibited because they contravene inalienable rights recognized in international human rights law.

### **Demonstrate Political Will to Pursue the Extradition of Ben Ali**

The Kallel trial displayed the lack of political will on the part of Tunisia's interim authorities to press for the extradition of former president Ben Ali, who has other pending cases at the military courts for the killing of protesters during the Tunisia uprising.

While there is an international arrest warrant pending against him, Tunisia has yet to implement the request for his extradition from Saudi Arabia, which has granted Ben Ali refuge since January 2011.

Although no bilateral extradition agreement exists between Tunisia and Saudi Arabia, both countries are bound by the Convention against Torture, which Saudi Arabia has also ratified, in 1997. Article eight paragraph two stipulates that if a state party that makes extradition conditional on the existence of a treaty receives a request for extradition from another state party with which it has no extradition treaty, it may consider this convention the legal basis for extradition in respect to such offenses.

Ben Ali has been convicted of various crimes, ranging from embezzlement of public funds to possession of illegal drugs. He has also been charged with the murder of protesters in the days before his ouster. But because Tunisian interim authorities have not asked Saudi Arabia to extradite Ben Ali, the courts trying these cases have tried him in absentia, sentencing him to a total of 60 years in prison.

Since his appointment as new head of government, Hamadi Jebali has said several times that the extradition of Ben Ali is not a priority of the interim authorities. On February 17, 2012, on the eve of an official visit to Saudi Arabia, Jebali said on Radio SAWA that he would not discuss Ben Ali's extradition with the Saudis, calling the case Minor, not a priority.

The refusal to undertake an effort to extradite Ben Ali denies Tunisians the possibility of seeing the person whom many consider to be the one most responsible for grave human rights violations answer in court for his actions, Human Rights Watch said.

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