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FLAWED ACCOUNTABILITY

Shortcomings of Tunisia's Trials for Killings during the Uprising



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Summary

During Tunisia's popular uprising that toppled President Zine el Abidine Ben Ali, Tunisian security forces killed 132 protesters and injured hundreds more across the country. Many of the deaths and injuries, which occurred between December 17, 2010 and January 14, 2011, resulted from the security forces' excessive use of force.

After the fall of Ben Ali, the interim authorities launched an official fact-finding commission into the killings, and subsequently judicial authorities initiated criminal investigations and prosecutions in connection with the killings and other serious abuses perpetrated during the uprising. Altogether 53 former government officials, police and other security forces were brought before military tribunals for trial in late 2011.

Those convicted in June 2012 included Ben Ali (who was tried in absentia), former minister of the interior Rafiq Haj Kacem, and five former directors general in the Ministry of the Interior. The courts also convicted 21 other defendants while acquitting 25 others. Almost two years later, the military court of appeal upheld the conviction and life prison sentence for Ben Ali, but significantly reduced the sentence of other defendants after amending their charges.

This report evaluates Tunisia's efforts to hold to account those responsible for unlawful killings and other serious human rights violations committed during the uprising. It also assesses the extent to which the investigations and trials respected relevant international standards, notably those governing fair trials and the effective investigation of human rights violations.

The report finds that the trials were marked by six major shortcomings that led to their failure to achieve full accountability for human rights violations.

Jurisdiction of Military Courts

Under Tunisian law, the jurisdiction of military courts is extended to also cover crimes committed by security forces. However, the fact that the trials took place in military courts also contributed to the undermining of accountability in three main ways.

First, it resulted in extensive procedural delays. The investigation was initiated by the civil courts, which proceeded with the gathering of evidence, the hearing of witnesses, and the necessary forensic examinations before transferring it to the military jurisdictions after they determined that one or more alleged perpetrators were military or security forces personnel. The military investigative judge, then, restarted the investigations before proceeding with the indictment and the transfer of the case to the military accusation chamber.

Second, while Human Rights Watch did not find evidence of direct political instructions being given to the military court, there was a perception on the part of victims that the executive had undue influence on the military courts' decision to hand down lenient sentences on those convicted. Although military justice was reformed in July 2011 to bring it more in line with international fair trial principles, military judges are still formally dependent on the Defense Ministry through the High Council of Military Judges, headed by the defense minister, which oversees the appointment, advancement, discipline, and dismissal of military judges. In addition, it is the Tunisian president who appoints civilian judges to serve in military courts by decree, following recommendations by the ministers of justice and defense. International standards require investigation of violations perpetrated by members of the armed forces or security forces not be carried out by members of the same forces subject to the same line of command; a basic principle that was ignored in these investigations.

Third, families of the deceased and the injured were prevented, as *parties civiles* (civil parties), from participating in the investigation phase. Indeed, the Code of Military Justice did not allow parties to join a case before military courts as "*parties civiles*." Therefore, they did not have access to the investigations or to the proceedings.

The military justice reform of July 2011 allowed victims to be civil parties and to launch civil actions before military justice. However, the reform had as a date of entry into force of September 16, 2011. As a result, between May 2011, when the civil courts transferred almost all of the cases to the jurisdiction of military courts, and September 2011, when the investigations were concluded, the victims and their families had no access to the military courts and were unable to introduce new evidence, request further investigations, or make any submissions to the investigative judge.

Weak Evidence Gathering

The fact that the civil prosecutor only formally started investigating the case in late February 2011, after families of victims brought complaints before civil courts, meant that they did not conduct immediate field investigations. As a result valuable forensic evidence was lost. Victims' representatives contended that the court could have ascertained the identity of each direct perpetrator with more certainty by reviewing a register of arms and ammunitions that they claim the Ministry of Interior maintains. The register records the weapons and ammunition distributed to each member of the security forces and the amount of ammunition they return at the end of their duty. While the military tribunals, especially at the appeals level, made efforts to obtain further evidence relating to the circumstances in which individual killings occurred, several victims' families reported that the tribunals had not called in necessary forensic expertise in investigating their relatives' cases, failed to call those the families regarded as key witnesses, and neglected to conduct on-site investigations.

Flaws in Legal Reasoning

In its written judgment, the military appeals court analyzed the criminal responsibility of the minister of interior and the general directors of security forces. It found evidence of their participation in the criminal acts through planning of the repression of popular protests, failure to give clear instructions to security forces to use force only when necessary, and failure to provide the police with sufficient non-lethal means of crowd control.

However, the military appeals court ruled that article 32 of the Tunisian penal code on "complicity in criminal acts," which the first instance military tribunals had relied on to convict the senior level commanders and impose long prison sentences, required the court to demonstrate that the accused had taken positive actions contributing to the crime. The appeals court determined that in the absence of formal written orders to their forces from the accused commanders, the first instance tribunals had erred in applying article 32 on complicity, and that the defendants were guilty of the lesser charge of "unlawful abstention," a failure to act to prevent, rather than complicity in unlawful killings. This lesser offense, defined in article 1 of law n.48 of June 1966, provides a maximum sentence of five years in prison, and the appeals court accordingly reduced the defendants' sentences. In doing so, the appeals court held that the defendants were only criminally liable due to "negligence." However this fails to reflect the gravity of the crimes committed

and also appears to overlook the appeals court's own finding as to the positive involvement of the high level officials in the crimes.

The court listed evidence that the officials had been a part of a group that planned to quell popular protests through the use of violence, and when doing so, were following direct orders from then-President Ben Ali. The court's conclusion that the defendants had not undertaken positive acts contributing to the crimes appears in contradiction with this evidence. Moreover, international criminal case law shows that it is not necessary to find evidence of written or explicit orders in order to prove complicity in serious international crimes.

Lenient Sentences or Acquittals

In the few cases where judges identified the direct perpetrator of the killing and found sufficient evidence to prove his criminal liability, they decided to requalify the facts from deliberate killing to "manslaughter," arguing that the circumstances of these cases reveal that the accused fired at protesters during chaotic times without have a specific intent to kill. The court, thus, has minimized the criminal liability for the use of firearms, although the circumstances of the cases appeared to show that the accused did not abide by the requirements of necessity and proportionality in using them or by the progressive incremental steps when opening fire, as required by Tunisian law. The court did not incorporate this in its judgments.

Lack of Adequate Law on Command Responsibility

The trials were based on the alleged responsibility of the defendants for the conduct of security forces under their command, but Tunisian law is not well-equipped to address command or superior responsibility. It states that a person can be held criminally accountable only for the direct commission of a crime or complicity, in accordance with article 32 of the penal code. Tunisia's penal code is ill-equipped to handle such cases because it lacks a provision criminalizing command responsibility, a key concept in international criminal law that makes commanders and civilian superiors liable for serious crimes committed by their subordinates if the superiors knew, or had reason to know, of the crimes and failed to take all reasonable steps to prevent or punish them.

Lack of Political Will to Extradite Ben Ali

Ben Ali fled to Saudi Arabia on January 14, 2011. Although an international arrest warrant is pending against him, the Tunisian government has made only perfunctory efforts to obtain his extradition from Saudi Arabia to stand trial in person. The failure to secure the presence of Ben Ali at trial curtailed the ability of the tribunals to cross-check the facts and to have a key witness. One of the elements the tribunals at the first instance relied on to convict Ben Ali and other high ranking officials was testimony from former Prime Minister Mohamed Ghannouchi that Ben Ali told him he was ready to kill a thousand people to quell the protesters. The tribunal inferred from this testimony the theory that an order to kill protesters trickled down from Ben Ali to the operational level through the high-ranking directors of the Ministry of Interior. It also relied on three key speeches from the former President in which he directs security forces to meet the protests with utmost force. Ben Ali is thus a key player in the trials and his absence constitutes a serious gap in accountability efforts.

Transitional Justice Law and Accountability

A review of judicial efforts to investigate and prosecute abuses against protestors during Tunisia's uprising clearly shows a failure on the part of the justice system to punish perpetrators and bring justice to victims' families. The courts sentenced senior officers of the Ministry of Interior to sentences of only three years in prison despite the killing of at least 132 protestors and the injury of 1,452. This outcome amounts to a denial of the right of the victims and their families to an effective remedy. Successful prosecutions are the most effective deterrent of future abuse and the starting point of bringing justice to the victims and their families. It is thus important that the quest for justice continues. The transitional justice framework might offer a new avenue to pursue it.

On December 24, 2013, the National Constituent Assembly (NCA) adopted the Law on Establishing and Organizing Transitional Justice. The law sets out a comprehensive approach to addressing past human rights abuses. It envisages a 15-member Truth and Dignity Commission to uncover the truth about abuses in Tunisia from July 1955 through 2013. The law establishes mechanisms for reparations to victims, institutional reform, vetting civil servants, and national reconciliation. It also establishes specialized chambers within the court system to try grave abuses committed between July 1955 and December 2013.

Following the outcry sparked by the military appeals court's decision on April 12, 2014 to reduce the sentences of the high commanders and directors of the Ministry of Interior to three years in prison, the National Constituent Assembly enacted another law on June 2014 specifically addressing how transitional justice mechanisms might tackle human rights abuses committed during the uprising. The law qualifies the killing or injuring of protesters during the 2010-2011 uprising as "gross violations of human rights" under the jurisdiction of the transitional justice law. It further specifies that when the Truth and Dignity Commission decides to transfer cases of abuses committed during the uprising to the public prosecution office, it will automatically transfer them to the specialized chambers which will have primary jurisdiction to try those cases. In such cases, the invocation of *res judicata* – a matter already judged – shall not forestall prosecution, according to the transitional justice law.

While the reopening of the cases of human rights abuses committed during the uprising might be a way to address the shortcomings and the lack of justice for the victims, it poses serious concerns with respect to the rights of the defense. The transitional justice framework would allow that a person who was tried by the military court and sentenced to a prison term or acquitted for criminal conduct could face a second trial before the specialized chambers for the same offense. This contravenes one of the basic rights stated in Article 14's paragraph 7 of the ICCPR, which prohibits "double jeopardy." There are two main exceptions to the prohibition of double jeopardy under international law – when there are new exceptional circumstances, such as the discovery of new evidence, or when the previous proceedings were not conducted independently or impartially in accordance with due process or were conducted with the purpose of shielding the person from criminal responsibility.

The Truth and Dignity Commission – with its broad access to archives and testimony – could discover new facts significant enough that they could arguably justify a second prosecution of someone already tried. They can also make a case-by-case evaluation of whether the trials satisfied the test; that they were conducted independently and impartially with the intent to bring the person to justice rather than allowing impunity. In such circumstances the transitional justice mechanisms now established in Tunisia could close the accountability gap left open by the flawed trials of those accused of killings and serious human rights abuses during the Tunisian uprising.

Recommendations

To the Public Prosecutor

- Direct all prosecutors to investigate in a thorough, impartial, and timely manner all allegations of serious human rights violations by law enforcement officials, regardless of rank or whether the victim or family has filed a formal complaint.
- When allegations of misconduct are made against a police officer, the unit to which s/he belongs should be immediately excluded from any role in conducting the police investigation of the incident, beyond that of providing witness statements. Authority should be immediately handed over to the prosecutor. Police teams from other stations should provide assistance as necessary.
- Ensure that every investigation is conducted promptly and impartially, introduce regulatory timeframes for providing evidence, and ensure that prosecutors investigate all those responsible, including superiors.

To the Interim Government

- Redouble efforts to ensure that the key suspect in these trials, former president Ben Ali, is extradited from Saudi Arabia.
- The Minister of Interior should issue a binding decree urging all security forces to adhere at all times to key international standards, notably the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
- Ensure a disciplinary investigation into all commanding officers who knew, or who should have known, about serious crimes committed by their subordinates, and failed to act to prevent and punish them.
- Inform victims and their families in a timely manner about the outcome of internal investigations and disciplinary measures, and make this information public as an indication that the ministry will not tolerate abuse.
- Cooperate fully with criminal investigations and preserve all potential evidence of serious human rights violations in the possession of security agencies.
- Determine procedures for appointing judges and prosecutors to the Specialized Chambers of the transitional justice law consistent with the requirements of

independence and impartiality. The decree should follow the procedure set up by the constitution for the nomination of judges, that is, on the basis of selections and recommendations made by the Supreme Judicial Council.

- Establish witness protection units that will take all appropriate measures to ensure the safety of witnesses and victims' families during and after the investigation and trial.

To the Tunisian Parliament

- Amend articles 20 and 22 of law 69-4 of January 24, 1969, regulating public meetings, processions, parades, public gatherings, and assemblies to limit the use of lethal force to cases of self-defense or the defense of others against the imminent threat of death or serious injury, to prevent a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.
- Reform the penal code to include a provision on command responsibility consistent with its definition under international law; this principle being part of international customary law, the law on transitional justice should set out clearly to ensure that its application will be backdated to 1955.
- Adopt an implementing legislation for the Rome Statute that will incorporate the criminalization in domestic law of war crimes, crimes against humanity, and genocide.
- Reform Tunisian legislation to restrict the mandate of military justice only to military crimes committed by military personnel, and excluding all cases where the defendant or victim was a civilian.

To the Members of the Truth and Dignity Commission

- In line with its mandate under the transitional justice law, review all the cases of human rights abuses committed during the uprising that were tried by the military courts in order to establish the truth of what happened. When the commission discovers significant evidence that was not available or known at the time of the previous trial, or in cases in which it considers that the prior proceedings were not

conducted independently or impartially in accordance with the norms of due process recognized by international law, and/or were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice, it should transfer the cases to the prosecutor for a new trial before the Specialized Chambers.

To Governments and Institutions that Provide Assistance to Tunisia

Under the rubric of judicial reform and rule of law assistance programs

- Encourage Tunisia to investigate all allegations of serious human rights violations by law enforcement officials;
- Assist the Tunisian authorities in making a thorough and comprehensive reform of the security sector;
- In consultation with national authorities, consider carefully how assistance designated for justice sector reform could be better targeted to support efforts aimed at bringing to justice and defending perpetrators of serious human rights abuses.
- Fund assistance that may be available to support the Specialized Chambers of the Transitional Justice Law, to provide for a witness and victim protection and support scheme, forensic investigation and expertise, training for practitioners on serious crimes, international security assistance, law reform, defense representation, and outreach and public information to the population.

Methodology

Human Rights Watch conducted research on the military trials of security force members and officials implicated in the use of unlawful force to suppress protests during the Tunisian uprising between December 2011 and April 2014. The primary aims of the research were to assess the extent to which these trials: (1) afforded defendants their right to a fair trial, and (2) were effective in delivering accountability for the serious human rights violations that occurred.

Human Rights Watch observed several of the group trials at the first instance and appeals phase concerning the killing of protestors during Tunisia's 2010-2011 revolution, and conducted interviews with 50 people. These included relatives of people killed or injured during the uprising, families of the accused, victims' representatives, defense lawyers, military magistrates, judicial officials, and civil society actors concerned with the trials. Human Rights Watch researchers also reviewed the case files of the group trials in the military tribunals of Tunis, Le Kef and Sfax, including the indictments; the evidence compiled by investigative judges; the evidence submitted in court; the transcription of the interrogation of victims, witnesses and accused; and the final judgments delivered by the military tribunals in the first instance and appeals cases.

I. Background

Response of Security Forces to the Popular Protests

Following the self-immolation of street-peddler Mohamed Bouazizi in Sidi Bouzid on December 17, 2010, thousands of Tunisians took to the streets to protest against President Zine el-Abidine Ben Ali and his government. Many were youth from the poorer cities and neighborhoods. The police responded to the protests with teargas, plastic and rubber bullets, and live ammunition. Protesters threw stones at the security forces, and in some instances, Molotov cocktails. Some of the deadliest incidents took place on January 8, 9 and 12, 2011 in Kasserine, Tala and Regueb, where more than 22 people were killed and hundreds of others injured, and in Tunis, the capital, and its suburbs, where more than 21 people were killed between January 13 and 15, according to the final report of the National Fact Finding Commission established in February 2011 to investigate the abuses committed during the uprising. Most of the 132 casualties resulted from live gunfire that the police used in situations where deadly force could not be legally justified. The use of force also resulted in the wounding of around 1,452 persons between December 17, 2010 and January 14, 2011.¹

Reports by non-governmental organizations, including Human Rights Watch, found that security forces used excessive force in suppressing demonstrations.² The police, for the most part, failed to adhere to the requirement under Tunisian law to take graduated measures before opening fire towards the upper bodies of demonstrators. During its investigation, Human Rights Watch obtained statements from witnesses who said the police had fired at them without warning, and medical evidence indicating that several protesters had suffered gunshot wounds to the back or in the head, suggesting that the security forces had shot to kill

¹ National fact-finding Commission on Abuses Committed from December 17, 2010 to the end of its Mandate, created by decree-law n.2011-8 of 18 February 2011, <http://www.legislation-securite.tn/fr/node/30896>; The Commission published its final report in April 2012, <http://fr.slideshare.net/marsedkadha/ss-12834630> (accessed Dec 1, 2014).

² "Tunisia: end excessive use of force," Human Rights Watch, news release, January 14, 2011, <http://www.hrw.org/news/2011/01/14/tunisia-end-use-excessive-force-free-political-prisoners>; "Tunisia: hold police accountable for shootings," January 29, 2011, <http://www.hrw.org/news/2011/01/29/tunisia-hold-police-accountable-shootings>; Amnesty international, "Disturbing new evidence of Tunisian security forces brutality," January 27, 2011 <http://www.amnesty.org/en/news-and-updates/disturbing-new-evidence-tunisian-security-forces-brutality-2011-01-27> (accessed December 3, 2014); Amnesty international, "Tunisia in Revolt, state violence during anti-government protests," Al Index: MDE 30/011/2011, March 1, 2011 <http://amnesty.org/en/library/asset/MDE30/011/2011/en/e991941e-ccee-498b-a7ce-39e594c9d10a/mde300112011en.pdf> (accessed December 5, 2014).

and had used lethal force on persons who, at that moment, were not endangering the police officers' lives. Cases documented by Human Rights Watch and others, strongly indicate that Tunisian security forces failed to abide by relevant international standards contained in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the UN Code of Conduct for Law Enforcement Officials, and to comply with Tunisian legislation relating to the use of force and firearms.³ In most cases that Human Rights Watch investigated and documented, it appeared that Tunisian security forces had fired live ammunition at protesters who were posing no threat to their lives or the lives of others. According to the case files of the judicial proceedings relating to the killings of protestors, 89 per cent of victims sustained gunshot injuries in vital areas such as the head and the chest.

Articles 20-22 of Tunisia's Law 69-4 of January 24, 1969, regulating public meetings, processions, parades, public gatherings, and assemblies, provide that law enforcement officers may resort to the use of firearms only when they have no other means to defend “the places they occupy, the buildings they are protecting, or the positions or persons they are assigned to guard, or if the resistance cannot be mitigated by any means other than the use of arms.”

The same law states that, if protesters “refuse to disperse” in the face of warnings by law enforcement officers, the officers may resort to the following measures to force them to disperse:

- Water cannons or police clubs;
- Teargas;
- Firing shots into the air;
- Firing shots above the heads of protesters; Firing towards the legs of protesters.

The law states that only when “the protesters try to achieve their goal by force despite having used all of these means,” will “security agents fire directly at them.”

³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx> (accessed December 1, 2014); Code of Conduct for Law Enforcement Officials, adopted December 17 1979, resolution 34/169, G.A <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx> (accessed December 1, 2014).

Tunisian law applies a lower standard in defining the circumstances in which law enforcement officers may use lethal force than the UN Basic Principles. The latter states, “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life,” whereas Tunisian law permits law enforcement officers to use lethal force to protect their positions or buildings. In this respect, Tunisian law fails to meet the threshold set under international law, which requires that any use of force by law enforcement officers must be both necessary and proportionate, and permits intentional lethal force only when it is strictly required to protect life.

The Military Justice System in Tunisia

Tunisia’s military justice system derives from the code of military justice, promulgated on January 10, 1957.⁴ The military justice system is composed of three permanent military first instance tribunals and a military appeals court;⁵ a Military Chamber of Indictment (*Chambre militaire de mise en accusation*) before the Permanent Military Tribunals; the Military Court of Cassation, which is a section of the ordinary Court of Cassation, in which sits a high military officer appointed by the Ministry of Defense; military investigative judges and the military public prosecutor.⁶

The military courts have jurisdiction over military offenses, offenses committed against the army, and offenses against the ordinary law when they are committed by military personnel against other military personnel either in-service or when off-duty.⁷ The jurisdiction *ratione personae* of the military courts covers officers of the army and several other classes of military personnel, as well as civilians alleged to have committed or participated in offenses in military barracks, or to have committed defamation against the army.⁸ According to this

⁴ Decree n° 57-9, January 10 1957, <http://www.legislation-securite.tn/fr/node/27829> (accessed December 1, 2014).

⁵ The permanent military Tribunal of Tunis (covering the governorates of Tunis-Ariana-Manouba-Ben Arous-Bizerte -Nabeul-Zaghouan-Sousse-Monastir); the permanent military tribunal of Le Kef (covers the governorates of Kef- Jendouba- Beja-Siliana-Kasserine- Kairouan) and the permanent military tribunal of Sfax (covers the governorates of Sfax- Mehdiya- Sidi Bouzid-Gabes- Médenine-Tataouine-Tozeur- Gafsa- Kebili).

⁶ Code of Military Justice, 10 January 1957, art.1.

⁷ Code of Military Justice, 10 January 1957, art.5.

⁸ Code of Military Justice, 10 January 1957, art.8. - art 91 of the Code of Military Justice stipulates that it “is punishable with three months to three years imprisonment anyone, military or civilian who commits in public and by words, gestures, writings, drawings, photography or films, outrages against the flag or the army, offenses against the dignity, the reputation or the

classification, the competence *ratione personae* of the military courts includes members of the internal security forces that constitute “a civil armed force” under the control of the Ministry of the Interior, including the agents of the National Security organization and of the National Police.⁹ Under article 22 of Law 70 of August 1982 regulating the Basic Status of Internal Security Forces “cases involving agents of the internal security forces for their conduct during the exercise of their duty and linked to internal or external state security, or to the protection of public order [...] during public meetings, processions, marches, demonstrations, and gatherings, must be transferred to the competent military courts.”

Military courts comprised a key element in the repressive apparatus of the state under the presidencies of Habib Bourguiba, 1957-1987, and Zine El Abidine Ben Ali, 1987-2011. Under both presidents, persons were convicted in blatantly unfair trials before military courts for political crimes.¹⁰

In July 2011, six months after the ouster of Ben Ali, the interim government issued two decree laws, number 69 of July 29, 2011, amending the military justice code, and number 70 of July 29, 2011, on the organization of military justice and the statute of military judges.

These reforms had four main objectives, according to the military prosecutor:¹¹

1. To reinforce the independence of military justice from the executive. The previous law gave the ministry of defense wide powers in procedural matters. The

moral of the army, or acts undermining military discipline, obedience and due respect to superiors or criticizes the action of military hierarchy or the military officers which offends their dignity.”

⁹ The statute of Interior Security Forces, August 6 1982, Law no. 82-70, arts. 22, 4.

¹⁰ January 17 1962, the military tribunal of Tunis conducted the trial of 26 people accused of plotting against the state, including several well-known opponents of Bourguiba, and sentenced 12 to the death penalty and others to life imprisonment. During the so-called Bouchoucha and Baab Saadoun trials in 1992, military courts convicted more than 265 activists of the officially unrecognized Islamist party Ennahdha of offenses against state security in blatantly unfair trials and imposed heavy prison sentences. In 1991, the military tribunal of Tunis tried and convicted 171 military officers on charges of conspiring against state security in a trial that appeared to be politically-motivated and failed to respect fair trial guarantees; see Amnesty International, “Tunisia: Ten years on - no justice for Bab Saadoun and Bouchoucha prisoners while civilians continue to be brought before military courts,” AI Index MDE 30/018/2011, September 1, 2011 <http://www.amnesty.org/en/library/asset/MDE30/015/2002/en/45c08df4-d7f1-11dd-9df8-936c90684588/mde300152002fr.html> (accessed December 15, 2014); Human Rights Watch, *Tunisia: Military courts that sentenced islamist leaders violated basic fair trial norms*, vol.4, Iss 9, October 1992, <http://www.hrw.org/legacy/reports/pdfs/t/tunisia/tunisia.920/tunisiag2ofull.pdf> (accessed December 1, 2014).

¹¹ Human Rights Watch interview with Colonel Marouane Bouguerra, General military prosecutor, October 2011.

commencement of criminal proceedings in the military courts required the approval of the minister of defense.¹² The minister also had authority to order the suspension of the execution of any sentence imposed by a military tribunal.¹³ The new decree laws abolished both these powers.

2. To increase the presence of civil judges in military courts. Decree law number 69 requires the president of the tribunal and the presidents of sections to be judges from the civilian courts.¹⁴
3. To establish a double degree of jurisdiction through the creation of a military appeals court; and to lengthen the time limit for appealing a decision to the cassation court, harmonizing it with the 10 day deadline for filing that applies to decisions rendered by the civilian judiciary.
4. To ensure access of victims to military justice. The original Code of Military Justice did not allow parties to join a case before military courts as *parties civiles*.¹⁵ Decree law 69 changed this. Its article 7 provides the “constitution of civil parties and the launching of civil actions are allowed before military justice in conformity with the rules and procedures set up in the criminal procedure code.” The code of criminal procedure allows “all those who have personally suffered a harm as a direct result of the offense” to bring an action. In addition, victims now have the right to make claims for reparation under the criminal procedure code.

Steps Toward Justice

At the end of February 2011, civil investigative judges began official investigations into the killings that occurred between 17 December 2010 and 14 January 2011. They collected evidence, interrogated several hundred witnesses, and issued indictments against some alleged perpetrators. By May 2011, however, the civil investigative judges determined that they should transfer the cases to military courts on the grounds that article 22 of the 1982

¹² Code of Military Justice, 10 January 1957, arts. 15,21.

¹³ *Ibid.*, art. 44.

¹⁴ Modifying and completing the military justice code, July 29 2011, art 10.

¹⁵ Code of Military Justice, 10 January 1957,, art. 7. *Partie civile* is a feature of civil law systems that allows victims to act as formal parties in criminal cases and participate in proceedings more fully than if they serve as witnesses, such as by having the opportunity to inspect documents related to the proceedings. See FIDH, “Victims’ Rights Before the ICC,” http://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf (accessed December 1, 2014);

law regulating the Basic Status of Internal Security Forces gave military courts jurisdiction over cases in which those accused were security forces personnel.

The directorate of military justice decided to group cases together based on the territorial jurisdiction of the first instance military courts of Le Kef, Tunis and Sfax. There were group trials in Le Kef and Tunis of more than 40 alleged perpetrators and other separate trials in the Sfax tribunal.

Le Kef Military Tribunal

The group trial held before the Le Kef first instance military tribunal concerned killings committed in the western cities of Tala and Kasserine, mostly between January 8 and 10, 2011. On the evening of January 8, the anti-riot police who arrived in Tala from other towns, shot five people dead. They killed a sixth person on January 12, before they left the town and the army replaced them. In Kasserine, where anti-government demonstration began with a protest rally by lawyers on January 4, police began using live fire against protestors on January 8 resulting in the death of 14 protesters.¹⁶

Following the transfer of the cases initially filed in the first degree tribunals of Kasserine, Kairouan, and Le Kef to the military judicial system, the military investigative judge of the Le Kef Military Tribunal, Faouzi Ayari, issued indictments against 22 defendants on August 17, 2011. The criminal appellate division of the Le Kef Appeals Court reviewed the indictment and confirmed the charges on September 6, 2011.¹⁷ The trial started at the Le Kef Military Court on November 28 with 22 defendants. It concerned 23 killings and hundreds of cases of people injured as a result of the actions of security forces in Tala, Kasserine, Kairouan and Tajerouine.

The tribunal held 10 hearings in which it examined evidence and questioned the defendants and witnesses. Oral arguments involving the public prosecutor and lawyers representing the defendants and the victims began on May 21, 2012.

¹⁶ "Tunisia: hold police accountable for shootings," Human Rights Watch news release, January 29, 2011.

¹⁷ Confirmation of charges before the Appellate section of the Appeals tribunal Le Kef, September 6, 2011, is on file with Human Rights Watch.

The Le Kef Permanent Military Court issued its judgment on June 12, 2012. It convicted former president Ben Ali in absentia of complicity in murder, under article 32 of the Tunisian penal code, and sentenced him to life in prison. It convicted Rafiq Haj Kacem, interior minister from November 2004 to January 12, 2011, on the same charge and sentenced him to 12 years in prison. It also convicted and imposed 10 year prison sentences on Adel Tiouiri, former director general of National Security; Jalel Boudrigua, former director of the Anti-Riot Police (*Brigades de l'ordre public*, known as les “BOP”); Lotfi Ben Zouaoui, former director general of Public Security; Youssef Ben Abdelaziz, a former brigadier general in the Anti-Riot Police; and Khaled Ben Said, former director of the Special Anti-Terrorist Brigades. The tribunal also convicted six lower-ranking officers of murder of protesters under articles 201, 202, and 205 of the penal code, and sentenced them to prison terms ranging from one to 15 years.¹⁸

The tribunal acquitted several other defendants, among them Ali Seriati, director general of the Presidential Guard from September 1, 2001 to January 14, 2011, and Ahmed Friaa, interior minister between January 12 and 27, 2011. It acquitted several commanders supervising the security forces in Tala and Kasserine during attacks on protesters, including Moncef Laâjimi, head of the Anti-Riot Police in Tala from January 10 to 12, and Moncef Krifaâ, regional director of the Anti-Riot Police at the time of the events, as well as several other lower-level officers.¹⁹

The Tunis Military Tribunal

The Tunis first instance military tribunal conducted a group trial of 43 defendants, including Ben Ali, tried in absentia, the two ministers of interior in office at different times during the course of the uprising, five directors general of security forces, and 35 lower ranking officers. The tribunal addressed shootings in the governorates of Tunis, Bizerte, and Nabeul that resulted in 45 deaths and 97 injuries. The trial began in November 2011, after civilian investigative judges from Tunis, Bizerte, and Nabeul courts had transferred

¹⁸ See Appendix I: Table Summarizing the Group Trials.

¹⁹ Ibid.

the cases to the military justice system, in accordance with article 22 of Law 70 of August 1982 regulating the Basic Status of Internal Security Forces.²⁰

On July 19, the Tunis Permanent Military Court convicted Ben Ali, in absentia, of complicity in murder under article 32 of the penal code, and sentenced him to life imprisonment. It convicted former interior minister Rafiq Haj Kacem on the same charges, imposing a 15 year prison sentence. The court also convicted Ali Seriaty, former director general of the Presidential Guard, sentencing him to 20 years in prison, and imposed 10 year prison sentences on: Adel Tiouiri, former director general of National Security; Jalel Boudrigua, former director of the Anti-Riot Police (*Brigades de l'ordre public*, BOP); Lotfi Ben Zouaoui, former director general of Public Security; Mohamed Ali el Abed, former director general of the National Guard. The court convicted 14 lower-ranking officers for the murder of protesters under articles 201, 202, and 205 of the penal code, imposing prison sentences ranging from one to 15 years. The tribunal acquitted several other defendants, among them Ahmed Friâa, interior between January 12 and 27, 2011.²¹

The Sfax Military Tribunal

There were several separate trials in the Sfax military tribunal.

The first judgment was on April 30, 2012, and resulted in the court sentencing of two policemen, Omran Abdelali and Mohamed Said Khlouda, to 20 years in prison and an 80,000 dinar fine (US\$49,230) for killing Slim Hadhri, who was shot dead while participating in a demonstration on January 14, 2011 in Sfax, a city 270 kilometers south of Tunis. The appeals military court lowered on September 2012 the sentence to 10 years in prison for Abdelali and acquittal for Khlouda.

Another trial concerned the killing of three protesters in Degueche, a town 10 kilometers from the southwestern city of Tozeur. Abdelkader Mekki, Maher Labidi and Amjad el Hammi were killed and two other people were wounded during a protest organized on

²⁰ Confirmation of charges before the appellate division of the appeals court of Tunis, September 15, 2011, is on file at Human Rights Watch.

²¹ See Appendix I: Table Summarizing the Group Trials.

January, 11, 2011 in the city. The court charged only one alleged perpetrator, Taieb Amami, a lieutenant in the National Guard, with premeditated murder. On February 15, the Tribunal sentenced the perpetrator to 15 years in prison.

Killings in Regueb

On January 29, 2013, the military tribunal of Sfax pronounced its verdict in the killings that occurred in the city of Regueb, a city in the governorate of Sidi Bouzid, sentencing Mourad Jouini, a commander in the anti-riot police, to 10 years in prison and lieutenant Bassem Akremi, in absentia, to 20 years in prison. The accused were implicated in the deadly repression of protests in Regueb, which is 50 kilometers southeast of the city of Sidi Bouzid. The crackdown on protests in Regueb left five people dead and 32 wounded.

Military Appeals Court

The court began hearing appeal proceedings on October 11, 2012. It held 10 hearings in relation to the group trial of Tunis and 10 hearings for the group trial of Le Kef. The court heard the testimony of the witnesses and took several complementary initiatives, such as requesting relevant mobile telephone companies to provide the court with a list of all telephone conversations that the defendants had had between December 17, 2010 and January 14, 2011.

The appeals military court delivered judgment in the two group trials of Le Kef and Tunis and one of the Sfax separate trials on April 12, 2014. Although they had been treated separately until that point, the court decided to join the cases for the purpose of sentencing.

The court confirmed the first instance conviction of Ben Ali for complicity in murder and his sentence of life imprisonment, but it reduced the charges and sentences in relation to other defendants. The court ruled that former interior minister Rafiq Haj Kacem, and former senior security officials Adel Tiouiri, Jalel Boudrigua, and Ali Seriaty, were guilty, under article 1 of law n.48 of June 1966, of “failure to act,” a lesser charge than that of which the first instance courts had convicted them, and reduced their sentences from 20 to 3 years of imprisonment. In all cases, the court said that the time already served should be deducted. The tribunal sentenced the lower-ranking officers to prison sentences ranging from one to three years for the murder of protesters under articles 201, 202, and 205 of the penal code.

II. The Military Trials: Achievements and Shortcomings

Fair Trial Guarantees

Human Rights Watch monitored several sessions of the group trials before the first instance tribunals and the appeals military court. At those sessions, the judges generally handled the courtroom management of multiple defendants and civil parties properly and allowed the defendants and their counsel ample opportunity to submit motions, argue, and rebut.

The courts appeared generally to respect the defendants' right to receive a fair trial. The courts respected the right of all defendants to engage lawyers of their own choosing. Defense counsel confirmed to Human Rights Watch that they had received access to the case files and to all of the documents that they contained, including the indictment, the testimony of victims and witnesses, and all other evidence introduced during the proceedings.²² The courts also permitted defense counsel to cross examine witnesses, to call witnesses of their own, and to introduce evidence.

Former president Ben Ali was the only defendant tried in absentia. International law does not prohibit trial *in absentia*, but holds that it is an inadequate substitute for the normal trial process where an accused is present to face his accusers. Courts trying defendants in absentia should institute procedural safeguards to ensure the defendant's basic rights, such as notifying him in advance of the proceedings, of his right to representation in his or her absence, and affirming the defendant's right to a retrial on the merits of the conviction following the person's return to the jurisdiction. Tunisian criminal procedure law does not have specific provisions on trials in absentia. The Le Kef Tribunal did appoint a lawyer to defend Ben Ali, but the lawyer did not participate fully in the proceedings. During the final pleadings, he was present but declined to make an argument. These elements indicate that the minimum procedural safeguards for trials in absentia were not met in this case.

²² Human Rights Watch interview with Anas Mnasser, Defense lawyer of Rafiq Haj Kacem, former Minister of Interior; Human Rights Watch interview with Moez Cherif, Defense lawyer for Jalel Boudrigua, former General director of anti-riot brigades; Human Rights Watch interview with Abada el Kefi, Defense lawyer for Ali Seriati, former director of presidential guards.

The Jurisdiction of Military Courts

As noted above, under Tunisian law, military courts had jurisdiction over all crimes committed by members of the security forces at the time of the 2011 uprising, under article 22 of Law 70 of August 1982 regulating the Basic Status of Internal Security Forces. However, the conduct of these uprising-related trials before military courts served to undermine accountability in several ways.

First, it caused delays in concluding the investigations and in bringing the prosecutions. Civil courts initiated the investigations, civil investigative judges proceeded to gather evidence, take the testimony of witnesses, and undertake forensic examinations, but then had to transfer the cases to military jurisdiction once they determined that the alleged perpetrators included one or more members of the military or security forces. The military investigative judge then began the investigations again, taking similar steps to those already undertaken by the civil court investigative judges, before proceeding with the indictment and the transfer of the case to the military accusation chamber. This delayed the conclusion of the investigation and the opening of court hearings. The transfer of the cases to the jurisdiction of military courts also caused discontent among victims and their families who had filed complaints before civil courts only to see them transferred, five months later, to military courts.

Second, military jurisdiction created a perception, particularly among victims and their families, of collusion between the military court and Tunisia's executive authorities to ensure that defendants received lenient sentences. Despite reforms to the military justice system outlined above, military judges remain formally linked to the Defense Ministry through the High Council of Military Judges. This body, headed by the defense minister, oversees the appointment, advancement, discipline, and dismissal of military judges. In addition, the Tunisian president appoints civilian judges to serve in military courts by decree, pursuant to the recommendation of the ministers of justice and defense. The general military prosecutor is appointed by the minister of defense and works under his supervision. All prosecutors and investigative judges who serve in the military courts are members of the military. Thus, military courts cannot be considered as structurally independent from the executive branch. This lack of independence of military courts understandably heightened suspicions among victim and their families that the courts

remained susceptible to political pressure, leading to lenient sentences for those convicted in relation to the uprising killings and the acquittal of other accused. The International Covenant on Civil and Political Rights (ICCPR), which Tunisia ratified in 1969, sets out international legal standards for the conduct of fair trials and for ensuring that victims of rights violations have an effective remedy. Criminal trials must be by a “competent, independent and impartial tribunal established by law.”²³

The UN Human Rights Committee, the expert body that monitors state compliance with the ICCPR, has called upon state parties to subject military and security personnel to civilian jurisdiction for alleged human rights abuses.²⁴

Other international human rights standards are clear that cases arising from human rights violations committed against civilians are to be tried in civilian courts, not military courts, including when the alleged perpetrators are serving members of the military or other security forces. For example, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa state that “the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.”²⁵ Similarly, the United Nations Principles for the protection and promotion of human rights through action to combat impunity assert: “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”²⁶

²³ International Covenant on Civil and Political Rights, art.14.

²⁴ In its 1993 observations to Egypt, the HRC considered that “military courts should not have the faculty to try cases which do not refer to offenses committed by members of the armed forces in the course of their duties.” UN Human Rights Committee, Comments on Egypt, UN Doc. CCPR/C/79/Add.23 (1993), para. 9. In 1997 it urged the Colombian government to take “all necessary steps... to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts,” specifically recommending “that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts.” UN Human Rights Committee, Comments on Colombia, UN Doc. CCPR/C/79/Add.76, (1997), para. 34.

²⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on human and peoples’ rights in 2003, <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/> (accessed December 1, 2014).

²⁶ Principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/Sub.2/1997/20 (1997).

Third, families of the deceased and the injured were prevented, as *parties civiles*, from participating in the investigation phase. Indeed, the Code of Military Justice did not allow parties to join a case before military courts as *parties civiles*.²⁷ Therefore, they did not have access to the investigations, they could not ask for cross-checking of the testimony of witnesses heard by investigative judges, and they could not introduce additional evidence.

The reforms to the military justice system decreed in July 2011 allowed victims to be civil parties and to initiate civil actions before military courts in conformity with the rules and procedures contained in the code of criminal procedure (which allows “all those who have personally suffered a harm as a direct result of the offense” to bring an action). However, the July decree law entered into force only on September 16, 2011, the same month that the investigative judges of the first instance military tribunals concluded their investigations and issued indictments. Consequently, victims and their families had no access to the military courts between May 2011, when the civil courts transferred almost all of the cases they had initiated to the jurisdiction of the military courts, and September 2011, when the military investigative judges concluded their investigations. Thus, they could not introduce evidence, request further investigations, or make any submissions to the investigative judges.

Lamia Farhani, the sister of Anis Farhani, killed by police gunshot on January 13, 2011, who also acts as a lawyer for the victims, told Human Rights Watch:

My brother was killed in the rue de Cologne, in downtown Tunis, on January 13, 2011. We filed our complaint before the [civil] first instance tribunal of Tunis. We had direct access to the judge, we went to see him several times, we introduced evidence such as the videos which clearly show the sequence of events leading to my brother’s killing, and we asked him to hear several witnesses. The civil judge completed his investigation, issued the indictment and transferred the case to the accusation chamber of the first instance tribunal of Tunis, which was supposed to confirm the charges.

²⁷ Code of Military Justice, 10 January 1957, art.7. *Partie civile* is a feature of civil law systems that allows victims to act as formal parties in criminal cases and participate in proceedings more fully than if they serve as witnesses, such as by having the opportunity to inspect documents related to the proceedings. See FIDH, “Victims’ Rights Before the ICC,” http://www.fidh.org/IMG/pdf/4-CH-1_Background.pdf (accessed December 1, 2014).

However, the accusation chamber decided to transfer the case to military jurisdiction in August 2011. From that date and until the end of the military investigations in September 2011, we were kept out of the proceedings. The military investigative judge called two witnesses to the killing of my brother to hear their testimonies again. I wanted to have access to the testimony and read them, I went to the military tribunal but they told me that I cannot get any court document and that I should ask the lawyers of the accused to give me the transcription of the testimonies.²⁸

Other lawyers representing victims said that their lack of access during the investigation phase conducted under military jurisdiction prevented them from introducing witnesses and other evidence. Charfeddine Kellil, a lawyer for some of the victims, told Human Rights Watch:

The investigation phase is the pillar of the trial, the prosecutor will bring the charges based on the facts assembled during this phase, and the courts are bound to determine criminal responsibility based on this evidence. During this crucial phase, we were not allowed to have access. Later, we were able to access the court, but time had passed, and crucial evidence was already lost.²⁹

Weak Evidence Gathering

For the first time in Tunisia's history, prosecutors were responsible for investigating a former head of state, former interior ministers and other senior officials, and for gathering evidence about human rights violations committed by the security forces. They therefore lacked expertise in determining what evidence they needed to seek from the Ministry of Interior and how to go about obtaining it.

Moreover, as the civil court prosecutors formally began their investigations only in late February 2011, weeks after the killings and other shootings of protesters, they did not conduct field investigations and, inevitably, valuable forensic evidence was lost. For

²⁸ Human Rights Watch interview with Lamia Farhani, Tunisia, August 7 2014.

²⁹ Human Rights Watch interview with Charfeddine Kellil, Tunisia, August 6 2014.

several weeks after the ousting of Ben Ali, the police withdrew from the streets and, although the military took over law enforcement activities, uncertain security conditions prevented many judges and prosecutors assuming their duties. Morgues did continue to function and in some cases, forensic medical doctors conducted preliminary autopsies and detailed their findings in reports. However, in most cases those responsible for dealing with the bodies of those killed failed to preserve the bullets that had caused the casualties and to seal them for use as evidence in future prosecutions. Normally, a prosecutor's permit is required before a burial certificate can be issued in the case of death due to a bullet wound but amid the chaos of the uprising many families took relatives who had been shot and killed for immediate burial.

The delay in starting the civil court investigations clearly hampered the ability of both the civil and, subsequently, the military investigative judges to collect adequate forensic evidence, as reflected in the indictments of the two First Instance Military Tribunals of Le Kef and Tunis. These consist largely of interviews that the military investigative judges conducted with hundreds of witnesses, few of whom could identify the killers in specific cases. Their testimonies recounted the events and describe the context and the circumstances in which the police resorted to lethal force against protesters, but they failed to identify the police officers who fired the fatal shots, who were often a mix of locally-based officers and officers brought in from other regions. For some of the victims' families interviewed by Human Rights Watch, this failure to identify the individuals who killed their loved ones was the greatest source of frustration.³⁰

Victims' legal representatives contended that the courts could have had greater success in identifying the direct perpetrators in particular cases if they had reviewed a register of arms and ammunitions issued to individual police officers and official logbooks detailing their deployment.³¹ The registers are said to record the weapons and ammunition issued to

³⁰ The investigative judges were able to identify only a few direct perpetrators. In the Tunis military tribunal, the court identified Abdel Basset Ben Mabrouk, first lieutenant in the Anti-Riot police in Bouchoucha, Tunis, thanks to video tapes and 5 testimonies, and charged him for killing at point range Anis el Farhani, on January 13, 2011 in Tunis city center. It identified, thanks to testimonies of eyewitnesses, three police officers as the perpetrators of the three killings on January 13 in Ras Jbel, a town 40 km north of Tunis. In Le Kef military tribunal, the tribunal identified Bechir Bettibi, lieutenant colonel in the Anti-Riot Police, as the perpetrator of the killing of Wajdi Saihi, on January 12, 2011 in the city of Tala.

³¹ Human Rights Watch interviews with Charfeddine Kellil, Amor Safroui, Leila Haddad, Lamia Ferhani, lawyers for the victims; Human Rights Watch observations during hearing, Le Kef Military Tribunal, May 2012.

each officer at the start of an operation and the amount of ammunition they return afterwards, and to record the names and identification of police and other security forces deployed to each location. The lawyers for the victims formally requested the First Instance Tribunals of le Kef and Tunis to ask the Interior Ministry to make available these registers, but the two tribunals dismissed the request. The Appeals Military Court, at its first hearing, pledged to execute all the requests made by lawyers for both the defendants and the victims of the crimes, and subsequently wrote to the Ministry of Interior asking that it surrender to the court all records relating to weapons and ammunition issued to the police and other security forces at the time of the killings and all logbooks showing the deployment of security forces in locations where the use of live ammunition by police had resulted in casualties. In its response dated 18 December 2012³², the Ministry of Interior affirmed that the logbooks no longer existed, having been destroyed when several police stations were burned during the uprising. In apparent contradiction to this, at hearings before both the first instance and appeals courts, several police officers accused of firing at protesters were able to produce the original logbooks recording where they were at the time of the firing, and so exonerate themselves.³³

The first instance tribunals also dismissed requests by lawyers of the victims for records of all cellular phone calls made by the defendants between 17 December 2010 and the 14 January 2011. Victims' lawyers argued that such records could provide evidence that the commanders and directors had circumvented the interior ministry central operations room and passed on orders to shoot and kill protesters using their personal cellular phones. The appeals military court instructed the relevant phone companies to surrender these records, which showed that the directors and operational commanders had exchanged hundreds of calls during the period of the uprising, peaking in the days when the killings took place. The court was unable to learn the content of any of these phone conversations, however, because they were technically available for one year only before the phone companies deleted them. If the first instance courts had ordered the phone companies to hand over these records within 12 months of the killings, they may have assisted the identification of

³² Appeals Military Court final judgment, fourth volume.

³³ Ayech Ben Soussia, during the 7th hearing at the First Instance Military Court in Le Kef, produced a register of arms and ammunitions printed from the official printing agency of national security forces to prove that he had not used the ammunition distributed to him. Human Rights Watch observations during the hearing.

individual perpetrators and revealed whether there was evidence of the existence of orders to kill, or to use force without abiding by the requirements of necessity and proportionality.

Several families of people killed by the security forces told Human Rights Watch that the first instance military tribunals had failed to engage necessary forensic expertise, to call key witnesses to the killings, and to conduct on site investigations.³⁴ For example, Najet Nammoussi, mother of Mohammed Ennaceur, told Human Rights Watch:

My son was killed on January 13, 2011 in Hammam Lif [a southern suburb of Tunis]. On January 13, he was watching TV with his brother in the living room at 6 p.m. There were several protesters gathering in the street down my building and chanting anti-regime slogans. I left the apartment and went to the rooftop with neighbors to see what was happening in the street. From the roof I could see the police station around 200 meters distant from my building, where there were around 7 a.m. policemen wearing black uniforms and masked with hoods. Around 6:30 p.m. I heard my son screaming “My brother is dead.” I went down in a panic. I found my son lying in the corridor, full of blood, motionless. I asked my son what happened, and he said that they were watching TV and all of a sudden there was a sound, a bullet pierced the iron frame of the window and shot my son in the neck. He died on the way to the hospital. To date, the prosecutor or investigative judges did not come on the crime scene to make the necessary on site investigations in my house. My lawyer requested the testimony of the director of the police station at that time, to ask him about the police forces engaged in quelling the protests under his control. However, the military tribunal did not order his testimony.³⁵

A lawyer representing the family, Charfeddine Kellil, corroborated this account. He told Human Rights Watch that he submitted a request to the appeals military court to summon

³⁴ The military prosecutor lambasted the first instance military courts for their lack of onsite visits and requested the appeals court to close the gaps in the investigations by doing several onsite visits, including to the headquarters of the anti-riot police and to several locations where killings took place. Military appeals court hearing, Human Rights Watch observations.

³⁵ Human Rights Watch interview with Najet Namoussi, mother of Mohamed Nasser, Tunisia, July 2014.

the director of the police station as a witness.³⁶ Kellil said he considered the police station director's testimony crucial to ascertain the full circumstances of the shooting, as he was likely to have been the officer who requested police reinforcements and had a direct connection to the crime scene, as the fatal shot was fired from the roof of his police station. However, the appeals military court failed to summon the police station director even though other evidence was insufficient to identify the police officer who fired the shot that killed Mohammed Ennaceur.

Leila Haddad, a lawyer representing several victims' families, told Human Rights Watch that in her view neither the first instance military tribunals nor the military court of appeal proceeded with sufficient diligence to achieve justice, notably by failing to call key witnesses in some trials. She cited, as an example, the case of Rached Belarbi, shot on January 13, 2011 in the Mornaguia neighborhood. His shooting was observed by two witnesses who provided testimony to an investigative judge of the Tunis First Instance Military Tribunal stating that officers from Mornaguia police station had shot Belarbi. One witness provided a detailed description of the officer who fired the shot but, Haddad said, the investigative judge failed to summon the police station director to testify, although he might have been able to identify the officer who fired the fatal shot as the shooting occurred in front of the police station.³⁷

Chedli Mezlini, father of Kais Mezlini, killed on January 13 in Mnihla, told Human Rights Watch that his son had joined other young people holding a peaceful protest in Mnihla, where he and two other young men were shot at a distance of about 200 meters from the police station. He said witnesses told him that they had seen his son shot in the head by police, followed in quick succession by Thabet Ayari, who had gone to his son's assistance, and then a third man named Hichem, as he tried to provide assistance. All three died en route to hospital. Mezlini said that following an autopsy conducted at Charles Nicole Hospital he received a certificate detailing the wounds that had caused his son's death, including the direction from which the fatal bullet struck him. Despite this, he told Human Rights Watch, both civil and military investigative judges had failed to visit the site of the

³⁶ Human Rights Watch interview with Charfeddine Kellil, July 2014.

³⁷ Human Rights Watch interview with Leila Haddad, Tunisia, October 2013.

fatal shooting of his son and the two other men, or to check the distance between the police station and the location where they sustained their fatal injuries in order to determine the provenance of the shooting.³⁸

Flaws in the Legal Reasoning

According to its written judgment, the judges of the first instance military courts relied on inferential reasoning and circumstantial evidence to convict the directors of security forces on charges of complicity in murder. They surmised the existence of orders to use deadly force based on two speeches made by then President Ben Ali, on January 10 and January 13, 2011. In the first, he vowed to quell protests firmly whereas, in the second, delivered on the eve of his flight from Tunisia to seek refuge in Saudi Arabia, he said, “Stop using live ammunition.” The judges inferred from this last instruction the existence of previous orders to use live ammunition, although the court obtained no documentary evidence of such orders.

The judges also inferred that all of the accused directors general of the security forces were party to this plan to use force, including live fire, against protesters because they had participated in crisis meetings that the authorities had held on January 9, 10, 11, and 12 to devise a strategy for handling the protests. The judges inferred that the highest office holders of the state had ordered the use force to quell the protests, and had transmitted these orders through the chain of command, through the directors general of the security forces to the regional directors of the anti-riot police, and then through them to lower-ranking officers and men deployed on the streets.

The military appeals did not accept these findings by the first instance court, however. It overturned the first instance judgment because, the appeals court said, it could find no conclusive evidence that the senior officials among the defendants had engaged in positive acts to further the criminal enterprise. The appeals court analyzed the meaning of complicity in Tunisian law, and noted that article 32 of the penal code requires that a court must demonstrate the existence of one or more of the positive actions listed in the law to

³⁸ Human Rights Watch interview with Chedli Mezlini, Tunisia, January 2014.

prove complicity.³⁹ The court ruled that mere “incitement,” without evidence of such positive actions, does not amount to complicity. The court declared in relation to defendant Jalel Boudriga, former head of the Anti-Riot Police, and repeated in relation to each of the other former general directors of the security forces:

The files of the case do not contain any evidence that all the legal requirements of complicity in deliberate killing and complicity in attempted killing are met ...although there is evidence of dereliction of duty in supervising his subordinates deployed on the ground and prohibiting them in a clear and explicit way from firing in the direction of the protesters...there is no evidence indicating his positive effective contribution in assisting his subordinates to fulfill the criminal aim or that he knew of the criminal intentions of his subordinates.⁴⁰

The military appeals court determined that, on the basis of the known facts, Boudriga and the other former general directors were guilty of criminal negligence, in the sense of article 1 of law n.48 of June 1966 and that the first instances courts had erred in finding them guilty of complicity in murder.⁴¹ Law n.48 provides that anyone who willfully abstains from performing an action to prevent the commission of a crime or a violation of a person’s physical integrity shall be punished with up to five years in prison.

- The military appeals court said that it was unable to find conclusive evidence of any explicit written orders issued to the police and/or other security forces to kill protesters. The court also found that the absence of any written legal orders to use force also curtailed its ability to prosecute the defendants for alleged complicity.
- In essence, therefore, the military appeals court concluded that the killings of protesters had resulted from the individual acts of rank and file members of the police and other security forces, and that the former senior level officials accused,

³⁹ Tunisian Penal Code art. 42 states that “Is considered an accomplice and punished as such: a person who by gifts, promises, threats, abuse of authority or power, conspiracy, caused the offense or gave instructions to commit it; procured weapons, instruments or other means to facilitate the execution of the offense, with knowledge of the purpose stated above, helped the offender in preparing or facilitating the offence.”

⁴⁰ Appeals court written judgment, Fourth volume, p.1611.

⁴¹ Law n. 48, June 3, 1966, <http://www.iort.gov.tn/WD12oAWP/WD12oAwp.exe/CONNECT/SITEIORT> (accessed December 1, 2014).

including the former interior minister and the general directors of the ministry of interior, shared liability only because they had not acted to prevent such crimes.

However, the military appeals court failed to take account of relevant circumstantial evidence in determining the criminal liability of some of the senior level accused. Moreover its reasoning is contradicted by evidence that the accused planned the repression – evidence that the court itself listed in its verdict.

- The senior officials all participated in a crisis team that then President Ben Ali formed on January 8, 2011 to devise a strategy for responding to the popular protests. This crisis team met daily, beginning on January 8, and took several operational decisions that the security forces deployed in each region then implemented.
- The high numbers of people killed and injured, and the widespread use of deadly force by security forces across the country indicate that the killings did not result from the individual reactions of police officers to the protests but rather formed part of a strategy of deliberately using excessive force in an attempt to quell the protests.
- The court found that in most cases protesters had posed no danger to the police or others when they were shot, and that their deaths amounted to unlawful killings resulting from the use of unjustified and excessive force. The court dismissed defense arguments that police fired in self-defense, stating that there was no evidence in police files to indicate that protesters had posed a threat to the lives or safety of the police officers deployed against them.
- The court also found that the former interior minister and general directors of the security forces had failed to provide the police and other security forces with sufficient non-lethal means of crowd control but had rather reinforced their arsenal by providing arms and ammunition of a military nature. This, the court said, had contributed to making it inevitable that large numbers of people would be killed or injured during the three weeks that culminated in Ben Ali's fall. The court found too that the authorities delivered arms and ammunitions to the security forces during the uprising by means other than the normal procedures as a result of a direct written order from one of the defendants, former head of the Anti-Riot police Jalel Boudriga. Under the normal procedure, each battalion would have only one type of

automatic arm called Steyr and 20 live bullets, but Boudriga ordered that officers deployed on the streets should receive additional arms and ammunition.

- The senior officials on trial knew about the killings soon after they began and that at least some had resulted from excessive force, yet they failed to take measures either to prevent further killings or to hold to account those of their subordinates who were responsible.
- It was not until 2:25 pm on January 14, that the first orders to the police to exercise restraint when dealing with demonstrations were issued (by the then Interior Minister Ahmed Friaa who had taken over from Rafiq Haj Kacem on January 12). This order prohibited the use of live ammunition and directed the police to fire into the air, above the heads of protesters, if they had exhausted all other less forceful means to disperse the protesters.
- Concerning the question of the knowledge that the senior level defendants possessed, the appeals court gathered evidence that they had each closely monitored the events and had received information on an hourly basis, by means of security notes, about the events in Tunisia's various regions. Moreover, statistical analysis of the cellular phone records that the military appeals court obtained from telephone operating companies showed that senior security forces commanders had maintained almost constant contact with their seniors within the interior ministry. The court concluded that the senior officials among the defendants had been kept well informed of events, knew what was happening, and knew of the killings of protesters and the circumstances of those unlawful killings, and that there was a strong presumption that they had ordered their subordinates to commit the crimes.⁴²
- International case law established long ago that it is not required to prove the existence of written or explicit orders to commit crimes to determine the question of criminal liability.
- But even when strictly applying Tunisian law, the court failed to take account of all the elements that it had itself listed as evidence that the accused were

⁴² Military Appeals Court written judgment, fourth volume, p.1116.

accomplices in the crimes, and had facilitated their commission. Article 32 of Tunisia's penal code encompasses the notion of aiding and abetting, stating that an accomplice is someone who assisted the offender in the commission of a crime.

The military appeals court sentenced former president Ben Ali to life in prison when delivering its April 12, 2014 verdict. It found that as head of state he commanded the security forces, in accordance with article 2 of law 70 of 1982 specifying that the president has direct or indirect supervision of all of Tunisia's security forces. The court found also that Ben Ali not only failed to take any measures to stop the killings but made speeches in which he used inciting rhetoric to brand the protesters as "violent thugs," and said that he would thwart their efforts to destabilize the state using all means necessary.

The court did not follow this same reasoning with regard to the former minister of interior and the former directors general of the security forces. The court sentenced these defendants to three years in prison for "dereliction of duty" or "failure to act." This discrepancy between the severity of the sentence imposed on Ben Ali and the leniency of the sentences imposed on other former senior officials underscores the court's failure to analyze the command and control structures of the Ministry of Interior in depth, in order to determine the responsibility of each defendant.

If the court concluded correctly that Ben Ali was complicit in the murder of protesters, based on its finding that he had ordered the killings and that the decision to use force to quell the protests was taken by officials at the highest level of the state apparatus, those orders and the strategy of quelling the protests by force could only have been implemented through command and control structures. The court thus ignored the facts it had itself collected about the existence of a plan to quell protests through excessive use of force and failed to implement international standards on criminal liability for grave human rights violations.

International case law established long ago that it is not required to prove the existence of written or explicit orders to commit crimes to determine the question of criminal liability. For example, the International Criminal Tribunal for Ex-Yugoslavia, in its judgment in one of the cases, considered that "planning implies that "one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases". The Trial Chamber is of the view that circumstantial evidence may provide sufficient proof of

the existence of a plan⁴³". The Akayesu Trial Chamber was of the opinion that "ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. There is no requirement that the order be in writing or in any particular form; it can be express or implied. That an order was issued may be proved by circumstantial evidence."⁴⁴ Moreover, for the form of criminal liability known in international law as aiding and abetting, international case law held that "the actus reus of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite mens rea. In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime."⁴⁵ The military appeals court failed to take account of relevant circumstantial evidence in determining the criminal liability of some of the senior level accused. Even when strictly applying Tunisian law, the court failed to take account of all the elements that it had itself listed as evidence that the accused were accomplices in the crimes, and had facilitated their commission. Article 32 of Tunisia's penal code encompasses the notion of aiding and abetting, stating that an accomplice is someone who assisted the offender in the commission of a crime.

Lenient Sentences

In the few cases where judges identified the direct perpetrator of the killing and where the military appeals court found sufficient evidence to prove his criminal liability, the court re-qualified the facts from deliberate killing to "manslaughter," holding that the circumstances of the cases showed that the accused had opened fired during chaotic events and lacked a specific intent to kill. In this way, the court minimized the criminal liability for using firearms against protesters although the circumstances of the cases showed that the accused were highly experienced in the use of firearms, and had failed to abide by the requirements of necessity and proportionality when using firearms or the

⁴³ ICTY, Trial Chamber, Prosecutor v. Blaskic, Trial Chamber, 3 March 2000, IT-95-14-T

⁴⁴ Prosecutor v. Akayesu, Case no. ICTR-96-4, Judgment, 2 September 1998, para.483.

⁴⁵ Prosecutor v. Blaskic Case N. IT-95-14-T, Judgment, 3 March 2000, para.284.

progressive, incremental steps that Tunisian law requires of police and other security forces involved in crowd control.

For example, Human Rights Watch reviewed the case of Anis Farhani killing, on January 13, 2011. A first lieutenant in the anti-riot police, Abdel Basset Ben Mabrouk, was indicted in relation to the killing and the wounding of another protester in the Lafayette area in Tunis. The Tunis First Instance Military Tribunal convicted Mabrouk of premeditated murder and sentenced him to 12 years in prison, but the military appeals court later decided to reclassify the crime from deliberate killing with premeditation to manslaughter. It then reduced his sentence to three years in prison under article 208 of the penal code (violence resulting in death). In returning this verdict, the court found that there were no elements showing that the killings were premeditated because the accused had shot the two victims in non-vital parts of the body. Anis Farhani died soon after he arrived at a hospital with a bullet wound in his upper thigh. The court found that the degree of chaos in the La Fayette area, where some protesters had set car wheels, blocked streets, and thrown stones at police, had created a sense of danger among the anti-riot police and that Mabrouk had fired at Anis Farhani without premeditation. The court considered that “the conduct of the accused was a reaction from a soul filled with distress and anger that made him lose control of himself. This in turn does not constitute premeditation under the meaning of article 202 and is rather manslaughter under article 205 of the penal code.”⁴⁶

Inadequate Criminal Law on Command Responsibility

Tunisian law contains no provision defining command or superior responsibility for crimes. Article 32 of the penal code provides that a person can be held criminally accountable only if they directly commit a crime or are complicit in the commission of a crime.⁴⁷ Command or superior responsibility, as the concept is understood in international law, imputes liability to commanders or civilian superiors for crimes committed by subordinate members of armed forces or other persons under their control.⁴⁸ Under this principle, a commander can be held criminally liable even if he or she did not order the crimes committed if there is

⁴⁶ Appeals court judgment, page 1739, is on file with Human Rights Watch.

⁴⁷ The Code of Criminal Procedure, art.32.

⁴⁸ Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art.28.

evidence to prove three conditions: that an effective superior-subordinate relationship existed; that the commander knew or had reason to know that his subordinate was committing a crime; and that the commander failed to take all reasonable steps to prevent or punish such acts. This form of liability encompasses responsibility for failure to act.

The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions state: “Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts.”⁴⁹

Tunisian legislators should revise the country’s penal code to define a crime of command responsibility consistent with international legal concepts. Such a provision would not violate the principle of non-retroactivity so long as it complied with article 15.2 of the International Covenant on Civil and Political Rights (ICCPR), which asserts that this principle is not violated so long as the act or omission in question – whether or not domestic law criminalized it – “at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

The adoption of a law on command responsibility would enable the authorities to hold accountable senior political, military or security forces leaders for human rights crimes committed by officials acting under their command or direction, and prevent a repeat of the situation where those responsible for deploying security forces onto the streets during the 2011 uprising cannot be held accountable, through the concept of command responsibility, for the abuses that those forces committed against protesters. The principle of command responsibility is deemed part of customary international law and is cited widely in international jurisprudence. For example, the International Criminal Tribunal for Former Yugoslavia called it “a well-established principle of conventional and customary law.”

In addition, Tunisia’s membership in the International Criminal Court (ICC) requires it to adopt the principle of criminalizing command responsibility for genocide, war crimes, and

⁴⁹ UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, <http://www1.umn.edu/humanrts/instreet/i7pepi.htm> (accessed December 12, 2014).

crimes against humanity. The Rome Statute, which created the ICC, makes it clear that command responsibility imputes liability to the military commanders or civilian superiors for crimes committed by subordinate members of armed forces or others under their effective control. Tunisia ratified the Rome Statute on June 24, 2011.⁵⁰ Article 86 of the Rome Statute requests that, states parties implement its provisions into national law.

Implementing legislation is also important to ensure effective cooperation with the court. Far reaching reforms have been proposed since the ouster of Ben Ali, on January 14, 2011, but authorities have yet to adopt implementing legislation for the Rome Statute.

Paragraph 24 of the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides:

Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

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

Lack of Political Will to Obtain Ben Ali's Extradition

President Ben Ali took flight from Tunisia and fled to Saudi Arabia on January 14, 2011, where he remains. The new Tunisian authorities issued an international arrest warrant against him,⁵¹ but the Tunisian government has since made only perfunctory efforts to obtain its enforcement and his extradition from Saudi Arabia to stand trial in person in

⁵⁰ Christian Wenaweser, "Accession of Tunisia to the Rome Statute of the International Criminal Court" ICC, June 24 2011, http://www.icc-cpi.int/iccdocs/asp_docs/Statement/PASP-TUN-24062011-ENG.pdf (accessed December 1, 2014).

⁵¹ The arrest warrant against Ben Ali stems from another sentence issued by the First Instance Tribunal of Tunis, which condemned him on June 20, 2011, to 35 years in prison and \$65.6 million fines for theft and unlawful possession of money and jewelry.

Tunisia. Before visiting Saudi Arabia March 2014, Mehdi Jomaa, Tunisia's current caretaker prime minister, said in an interview that advancing Ben Ali's extradition would not be a "priority" in his discussions with Saudi officials.⁵² His predecessor, Hamadi Jebali, made a similar statement on February 17, 2012, the eve of his official visit to Saudi Arabia.

The failure of the Tunisian authorities to obtain the return of the former president and most senior of those accused in connection with the unlawful killings of demonstrators during the 2011 revolution had important implications for justice. It meant that the courts trying alleged perpetrators were denied the ability to take evidence from a key participant and witness to the actions taken by the then government in response to the 2011 protests, and to cross check the testimony of the former president with that of other defendants and witnesses. For example, the first instance tribunals were unable to question Ben Ali about key testimony provided by former Prime Minister Mohamed Ghannouchi that Ben Ali had told him that he was prepared to kill a thousand people, if necessary, to quell the protests.

On the basis of this testimony, the courts inferred the existence of an order by Ben Ali to his subordinates to kill protesters, which then trickled down via the interior minister and senior officials in charge of policing and security to their forces on the streets. The court was also unable to question Ben Ali about three key speeches that he had made as president during the time of the protests, in which he directed the security forces to meet the protests with utmost force. Ben Ali's absence from the trial court left a serious gap undermining the process of accountability.

⁵² Prime Minister Mehdi Jomaa interview, 14 March 2014, "Le dossier Ben Ali n'est pas une priorité" video clip, Youtube, <https://www.youtube.com/watch?v=pkbYAH-BJxQ> (accessed December 1, 2014).

III. Transitional Justice Law and Accountability for the Crimes of the Uprising

On December 24, 2013, the National Constituent Assembly adopted a Law on Establishing and Organizing Transitional Justice. This sets out a comprehensive approach to addressing past human rights violations and paved the way for the appointment of a 15 member Truth and Dignity Commission to uncover the truth about human rights violations committed by state authorities in Tunisia from July 1955, when Tunisia achieved independence, until the end of 2013. In addition, the law provided for the establishment of mechanisms to afford reparation to victims, implement institutional reform, vet civil servants with a view to removing those implicated in past human rights violations, and to foster national reconciliation. The law also created specialized chambers within the civil court system to try alleged perpetrators of grave abuses committed between July 1955 and December 2013.

According to the new law, the specialized chambers are to “have jurisdiction over widespread or systematic human rights violations, including deliberate killings, rape and sexual violence, torture, enforced disappearance, and execution without fair trial guarantees.” The law also gives the specialized chambers jurisdiction over certain types of cases that the Truth and Dignity Commission may refer to it, including cases of alleged election fraud, financial corruption, misuse of public funds, and cases against those accused of forcing people into political exile from Tunisia.

The Truth and Dignity Commission’s main tasks include establishing a reparation program for the victims, in which the Commission will determine the criteria to be met by those seeking reparation, and assisting victims in urgent need to access assistance, such as medical care or social services. The law also provides for the creation of a Fund for the Dignity and Rehabilitation for Victims of Tyranny, for use in assisting victims.

The law equipped the Commission with significant powers, including a right of access to state archives and to judicial files that are relevant to the documentation of past violations. It is empowered to summon individuals to testify before it, and to organize both public and confidential hearings. It also has powers to inspect private as well as public places, to request forensic examinations, and to take measures necessary to safeguard witnesses

and victims. Anyone who fails to respond to a summons from the Commission or obstructs its work faces punishment of up to six months in prison.

The Commission is also empowered to refer cases of gross human rights violations to the judiciary, including the specialized chambers, for possible criminal prosecution.

The commission is empowered also to mediate cases relating to gross violations of human rights, if the victim requests such mediation, or the alleged perpetrator requests it, so long as the victim approves. Any perpetrator who requests mediation must acknowledge his guilt and offer a clear apology. In cases of gross violations of human rights, mediation would not lead to a suspension of litigation before the judiciary, including the specialized chambers. However, the law states that the judiciary should take the commission's mediation into account when deciding penalties.

Following the public outcry sparked by the military appeals court's decision on April 12, 2014 to reduce the prison terms that the first instance military courts had imposed on the former interior minister and senior officials, the National Constituent Assembly enacted a new law on June 12, 2014 specifically addressing how the transitional justice mechanisms should tackle the human rights abuses committed during the uprising.⁵³ The law qualifies the killing or injuring of protesters during the 2010-2011 uprising as "gross violations of human rights" in the meaning of the transitional justice law. It further specifies that when the Truth and Dignity Commission decides to transfer cases of abuses committed during the uprising to the public prosecution office, the latter will automatically transfer them to the specialized chambers which will have primary jurisdiction to try those cases. Article 42 of the transitional justice law, states that the commission shall refer to the public prosecutor the cases in which the commission of gross human rights violations is proven, and in such cases, the invocation of *res judicata* – a matter already judged – shall not forestall prosecution.

⁵³ Provisions on transitional justice, June 12 2014, Law n° 2014-17, <http://www.legislation-securite.tn/fr/node/33786> (accessed December 1, 2014)

If the cases concerning human rights violations committed during the 2011 revolution were to be re-opened, it could serve to rectify the shortcomings of the accountability process to date and afford greater justice to the victims, but it would also have serious implications for the rights of the defendants.

The passage of the two laws cited above opens the possibility that those already tried by military courts and either convicted or acquitted of committing crimes could yet face trial again for the same alleged offenses before the specialized court chambers established under the Law on Establishing and Organizing Transitional Justice. This would contravene the prohibition of “double jeopardy” contained in article 14 of the ICCPR, which Tunisia has ratified. In its general comment no.32, the Human Rights Committee, the treaty monitoring body established under the ICCPR, has ruled that paragraph 7 of article 14 of the ICCPR, prohibits “bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal.”

International law allows two main exceptions to this prohibition of double jeopardy: when there are new and exceptional circumstances, such as the discovery of important new evidence, and when the previous proceedings lacked independence or impartiality in their conduct or were conducted with the purpose of shielding a defendant from criminal responsibility. For example, article 20 of the Rome Statute establishing the ICC states that no person may be tried before the ICC if they have previously been tried by another court for the proscribed acts, unless the proceedings in the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

These exceptions are not clearly spelled out in Tunisia’s transitional justice law. For the sake of respecting the rights of the defense, the law should specify clearly and explicitly in which cases the specialized chambers could prosecute a person who already underwent prosecution and trials based on the same facts.

It is quite possible that the Truth and Dignity Commission – with its broad access to archives and testimony – may discover new information of such significance that it would warrant a second prosecution of a particular defendant or group of defendants. The commission could also make a case by case evaluation of whether the trials so far undertaken satisfied the test that they were conducted independently and impartially with the intent to bring the person to justice rather than allowing impunity. In such circumstances the transitional justice mechanisms now established in Tunisia could close the accountability gap left open by the flawed trials of those accused of killings and serious human rights abuses during the Tunisian uprising.

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Appendix I: Table Summarizing the Trials

NAME OF THE ACCUSED	POSITION AT THE TIME OF THE UPRISING	CHARGE AND VERDICT FIRST INSTANCE TRIBUNALS	CHARGE AND VERDICT MILITARY APPEALS COURT FOR BOTH CASES
DEFENDANTS COMMON TO THE GROUP TRIALS IN LE KEF AND TUNIS MILITARY TRIBUNALS			
1. Zine el Abidine Ben Ali	President of Tunisia	Complicity in Murder Convicted to Life prison	Confirmed life sentence for both trials
2. Rafiq Haj Kacem	Minister of Interior until 12 January, 2011	Complicity in Murder Le Kef : 12 years; Tunis 15 years	3 years for “negligence”
3. Adel Tiouiri	Director General of National Security	Complicity in Murder Le Kef 10 years prison; Tunis: 10 years	3 years for “negligence”
4. Ali Seriati	Director of presidential guard	Complicity in Murder Le Kef: acquitted; Tunis: 20 years prison	3 years for “negligence”
5. Jalel Boudriga	Director of the anti-riot police, called Brigades de l’ordre public (BOP)	Complicity in Murder Le Kef: 10 years prison; Tunis: 10 years prison	3 years for “negligence”
6. Ahmed Friaa	Minister of interior from January 12 to 27, 2011	Complicity in Murder Acquitted in both tribunals	2 years suspended sentence
7. Lotfi Ben Ali Zouaoui	General director of public security	Complicity in Murder Le Kef: 10 years prison; Tunis: 10 years prison	3 years for “negligence”

NAME OF THE ACCUSED	POSITION AT THE TIME OF THE UPRISING	CHARGE AND VERDICT FIRST INSTANCE TRIBUNALS	CHARGE AND VERDICT MILITARY APPEALS COURT FOR BOTH CASES
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DEFENDANTS IN LE KEF TRIBUNAL

1. Youssef Ben Abdelaziz	Brigadier General Brigades de l'Ordre Public	10 years for murder	3 years for "negligence"
2. Moncef Laajimi	Colonel in BOP	Acquitted from murder	Manslaughter 2 years suspended
3. Nomaan Ben Mohamed el Ayeb	Major in BOP	Acquitted from murder	Manslaughter 1 year suspended
4. Ayech Ben Sousia	Captain in BOP	Acquitted from murder	Manslaughter 2 years suspended
5. Wissam Ben Taha al Quartatani	Director of police station in Kasserine	15 years for murder	5 years for murder
6. Bechir Bettibi	Lieutenant colonel BOP	8 years for murder	Manslaughter 2 years and 6 months
7. Moncef Krifa	General director presidential guard	Acquitted from murder	2 years suspended for "negligence"
8. Khaled Ben Hedi Al Marzouk	Major in BOP	Acquitted from murder	2 years suspended for "negligence"
9. Wael Ben Ali Al Mallouli	1 st Lieutenant BOP	Acquitted from murder	2 years suspended for "negligence"
10. Aymen Ben Abbas al Kouki	Inspector	1 year for murder	1 year suspended
11. Moujahid Belhoula	Captain BOP	5 years for murder	5 years
12. Hssine Zitoun	Director of Kasserine police	Acquitted from murder	2 years suspended

NAME OF THE ACCUSED	POSITION AT THE TIME OF THE UPRISING	CHARGE AND VERDICT FIRST INSTANCE TRIBUNALS	CHARGE AND VERDICT MILITARY APPEALS COURT FOR BOTH CASES
13. Khaled Ben Said	Director of special terrorist brigades	10 years for murder	2 years suspended
14. Dhahbi Abdi	Employee Ministry of interior	10 months for murder	Confirmed

DEFENDANTS TUNIS TRIBUNAL

1. Mohamed Amine el	Director general of national guard	10 years for complicity in murder	2 years suspended for “negligence”
2. Mohamed Zaitouni	Brigadier in the national guard	Acquitted from complicity in murder	2 years suspended for “negligence”
3. Mohamed Nasser Ben	Police governor	5 years for complicity in murder	2 years suspended for “negligence”
4. Mohamed Al Boughdiri	Assistant police officer	Acquitted from murder	Acquitted
5. Ali Ben Mansour	Police governor	Acquitted from murder	2 years suspended
6. Mohamed Arbi Krimi	Brigadier general	Acquitted from murder	2 years suspended sentence
7. Chedli Al Sahli	Police governor	Acquitted from murder	Acquitted
8. Rachid Ben Abid	General police governor	Acquitted from murder	Acquitted
9. Nasser al Ajimi	First corporal in national guard direction	20 years for murder	
10. Abdelbasset Ben Mabrouk	First lieutenant anti-riot police	12 years for murder	3 years in prison for violence resulting in death
11. Mongi Zouari	Police officer	5 years for murder	2 years suspended sentence for

NAME OF THE ACCUSED	POSITION AT THE TIME OF THE UPRISING	CHARGE AND VERDICT FIRST INSTANCE TRIBUNALS	CHARGE AND VERDICT MILITARY APPEALS COURT FOR BOTH CASES
			manslaughter
12. Salah Taj	Nadher security	5 years for murder	2 years suspended sentence for manslaughter
13. Ramzi Al Hajiri,	Police inspector	5 years for murder	2 years suspended sentence for manslaughter
14. Nabil Jabbali	Police officer	Acquitted from murder	2 years suspended sentence for manslaughter
15. Tarek Rouissi	Assistant police officer	5 years for murder	2 years suspended sentence for manslaughter
16. Lotfi Khemiri	Police officer	5 years for murder	2 years suspended sentence for manslaughter
17. Ousama Ben Chedli	Assistant police officer	Acquitted	Acquitted
18. Hichem Majri	Assistant police officer	Acquitted	Acquitted
19. Ali Harraq	Police lieutenant	Acquitted	Acquitted
20. Nouredine Hamrouni	Police officer	Acquitted	Acquitted
21. Khmaies Mathlouthi	Police inspector	Acquitted	Acquitted
22. Habib Ayachi	Police officer	Acquitted	Acquitted
23. Ahmed Chihi	Assistant police officer	Acquitted	Acquitted
24. Majdi Chaieb	Assistant police officer	Acquitted	Acquitted

NAME OF THE ACCUSED	POSITION AT THE TIME OF THE UPRISING	CHARGE AND VERDICT FIRST INSTANCE TRIBUNALS	CHARGE AND VERDICT MILITARY APPEALS COURT FOR BOTH CASES
25. Abdelkrim Ben Smail	Corporal national guard	15 years for murder	Confirmed on appeal
26. Mourad Riahi	Police governor	5 years for murder	Confirmed on appeal
27. Ghazi Thabet	Police officer	5 years for murder	1 year suspended sentence for damage to others under article 225 of the criminal code
28. Wissam Madiouni	Police officer	Acquitted	Acquitted
29. Slah Eddine Beji	Police inspector	Acquitted	2 years suspended sentence for manslaughter
30. Adel Hamdi	Captain national guard	1 year for murder	Suspended one year sentence for manslaughter
31. Lotfi Fatnassi	Police officer	Complicity in murder Acquitted	Acquitted
32. Kais Bouraoui	Assistant police officer	Manslaughter 1 years	Suspended 1 year sentence for manslaughter

DEFENDANTS SFAX TRIBUNAL

1. Omran Abdelali	Police officer	20 years for murder	10 years
2. Mohamed Said Khlouda	Police officer	20 years for murder	Acquitted
3. Bassem Akremi	Police officer	20 years for murder	8 years

FLAWED ACCOUNTABILITY

Shortcomings of Tunisia's Trials for Killings during the Uprising

During Tunisia's "jasmine uprising" from December 2010 to January 2011 that led to the toppling of President Zine el Abidine Ben Ali after more than 23 years in power, Tunisian security forces killed 132 protesters and injured hundreds. Subsequently, more than 50 former government officials, police officers and members of other security forces were charged in connection with the killings and put on trial. The trials, conducted before military courts, represented a historical opportunity to achieve accountability.

Based on an analysis of the written verdict and other court documents, and interviews with lawyers, victims and prosecutors, *Flawed Accountability; Shortcomings of Tunisia's Trials for killings during the Uprising*, assesses the trials and identifies key shortcomings that hampered the accountability process, and undermined its capacity to deliver justice for the victims. These included: the use of military courts; weak evidence gathering; flawed legal reasoning; lenient sentences; inadequate criminal law on command responsibility; and the failure to secure the extradition of Ben Ali from Saudi Arabia.

The report calls on the Tunisian authorities to ensure full accountability for past human rights abuses by officials and members of the security forces and outlines measures to address obstacles to achieving national transitional justice.



People hold up pictures of relatives who died in protests during the January 2011 revolution, at a demonstration outside a military court in Tunis June 26, 2012.

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