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TUNISIA

MILITARY COURTS THAT SENTENCED ISLAMIST LEADERS VIOLATED BASIC FAIR-TRIAL NORMS

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Middle East Watch is a division of Human Rights Watch, a nongovernmental organization which is also composed of Africa Watch, Americas Watch, Asia Watch, the Fund for Free Expression and Helsinki Watch. The chair of Human Rights Watch is Robert L. Bernstein, the vice chair is Adrian W. DeWind, the executive director is Aryeh Neier, the deputy director is Kenneth Roth, the Washington director is Holly J. Burkhalter, and the press director is Susan Osnos.

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The International Human Rights Law Group is a nongovernmental organization devoted to promoting the understanding and observance of the Rule of Law and the legal protection of human rights around the world. Based in Washington, D.C. the Law Group has consultative status with the U.N. Economic and Social Council and the Organization of African Unity, and is an affiliate of the International Commission of Jurists in Geneva, Switzerland. Its chair is Robert Herzstein and its executive director is Reed Brody.

Introduction

At the end of August, Tunisian military courts pronounced verdicts against 279 Islamists in the most closely watched trials to take place since 1987, when many of the same persons had been put on trial. The 1992 trials were seen as a test of the government's commitment to human rights at a time of growing repression that has affected not only the Islamist opposition, but much of civil society.

The trials at Bouchoucha and Bab Sa´doun military courts in Tunis ended in life sentences for 46 members of the Nahdha (Renaissance) party, 219 sentences of between 1 and 24 years, and 14 acquittals. The central charges were attempting to assassinate the president and overthrow the government. At the end of September, the *cour de cassation* confirmed all of the verdicts. (See Appendix B for a chronology of the trials.)

As human rights conditions have deteriorated in Tunisia, the government has grown increasingly vocal in proclaiming its adherence to international human rights standards. This paradox was very much in evidence when Middle East Watch (hereinafter MEW) and the International Human Rights Law Group (the Law Group) sent an observer to attend the Nahdha trials. Between court sessions, the observer found himself sought after by senior government officials eager to explain the fairness of the trial and the government's commitment to human rights. During the observer's stay in Tunisia, President Ben Ali, Prime Minister Hamed Karoui, and secretary general of the ruling party Chedi Neffati all gave widely publicized major speeches extolling human rights values and initiatives in the country. A presidential commission issued a cautiously critical human rights report, with much fanfare about the openness of the government.

But at the trials themselves, evidence of human rights abuses was ample. The rights of the defendants were violated in numerous and sometimes flagrant ways, and accusations of systematic torture in police custody hung over the proceedings. Plainclothes police kept a visible watch on the trial observers, their presence clearly deterring some Tunisians from discussing the case with observers.

The minister of justice, Sadok Chaabane, among other officials, expressed to MEW and the Law Group the view that once the Nahdha trial were over Tunisia would make great strides in human rights. While mistakes may have been made in the past, a new era was about to begin.

But the Nahdha trials were a relapse, not an aberration. They were the third mass trial of Islamist leaders since 1981, when the Islamic Tendency Movement (*Mouvement de la Tendance Islamique*, or MTI) was founded and began a still unsuccessful quest for legal recognition from the Tunisian government. The founder and chief of the movement, Rachid Ghannouchi, was convicted and sentenced to prison in all three trials, the last time in absentia (he currently lives in exile in London).

In the 1981 case, more than 90 Islamists were tried for membership in an unauthorized organization, defamation of the head of state, and disseminating false information. Most were convicted and given sentences of between six months suspended and 11 years real imprisonment. Ghannouchi received a ten-year sentence, but was amnestied in 1984.

In the summer of 1987, following a period of violent demonstrations involving Islamists on campuses and in the streets, some 90 suspected members of the MTI were brought before the State

Security Court on charges that included plotting to overthrow the government. The court acquitted 14 defendants and pronounced stiff penalties for most of the others, including the death penalty for seven MTI members found to have participated in violent incidents, including hotel bombings, that caused injuries. Two of the death penalties were promptly carried out.

The government's stern handling of the case and the prospect of additional executions prompted fears of a popular backlash, and is said to have contributed to the decision by Prime Minister Zine al-Abidine Ben Ali, a retired army general, to oust President-for-Life Habib Bourguiba in November 1987 and assume the presidency.

As president, Ben Ali announced a new era in democracy and human rights. Among other measures, he commuted the death sentences and amnestied many other Islamists convicted under Bourguiba, including Rachid Ghannouchi. His government abolished the State Security Court and shortened the maximum length of incommunicado investigative (*garde à vue*) detention. On the first anniversary of his presidency Ben Ali got the country's legal political parties, trade unions and the MTI to sign a "National Pact" he had formulated as a statement of political consensus. The vaguely worded document called on its signatories to work together in a spirit of tolerance and democracy.

But it was not long before the government and the Islamist movement were back on a collision course. Despite its initiatives to promote democracy and basic rights, the government continued to refuse legal recognition to the Islamist movement, which in 1988 had renamed itself an-Nahdha. Later, officials were to claim that during this period, an-Nahdha had been exploiting Ben Ali's amnesties and political opening to rebuild the movement and prepare an armed insurrection.[1]

The lack of legal status did not prevent an-Nahdha from out-polling all legal opposition parties in the April 1989 parliamentary elections. Nahdha candidates running as independents won about 14 percent of the total vote. However, Tunisia's winner-take-all electoral system awarded all 141 seats to the ruling Constitutional Democratic Rally (***Rassemblement Constitutionnel Démocratique***, or RCD).

The election results energized an-Nahdha and alarmed the government. In July 1989, with the party attracting larger crowds and recruiting new activists, the government again refused it legal recognition. Tunisia had no place for a party that mixed religion and politics, Ben Ali declared in a speech in November.

The crackdown began in the fall of 1990, after a series of pro-Islamist demonstrations on university campuses erupted into violence. The government announced the discovery of terrorist cells

[1] See the text of the charge sheet against the defendants in the trial at Bouchoucha, printed in ***Le Temps***, July 10, 1992. Also, during the trials, the Secretary of State for Information, Fathi Houidi, explained to a reporter that,

> less than two months after [the Islamist leaders'] release and rescue from the gallows, the leaders of the so-called Ennahdha movement began to conspire against Tunisia and its people by planning and carrying out a number of terrorist operations with a view to terrifying people, undermining state security, and wrecking its institutions in preparation for seizing power stealthily and by force.

Interview with ***al-Hawadith*** newspaper (London), July 24, 1992, as reported by Foreign Broadcast Information Service, July 29, 1992.

and rounded up hundreds of young men. During this period, allegations of torture and illegally prolonged incommunicado detention became increasingly common.

In February 1991, the government indefinitely closed an-Nahdha's newspaper, *al-Fajr*, and in March the suspended the activities of the pro-Nahdha General Union of Tunisian Students. But the arrests and closures did not stop the sometimes violent demonstrations by Islamists, especially on campuses.

The government's accusations against an-Nahdha continued to escalate in severity. In late 1990 the government said it had uncovered evidence that the supposedly nonviolent movement had links to an underground terrorism network set up in 1988.[2] In May 1991, Interior Minister Abdallah Kallel announced the discovery of a five-stage plot by an-Nahdha to overthrow the government and establish an Islamic state. He also said that 300 Islamists, including about one hundred members of the military, had been arrested. In September 1991, the government announced an even more dramatic discovery: since the exposure of the conspiracy in May, an-Nahdha had hatched an alternate scheme for insurrection that included assassinating Ben Ali by firing a Stinger missile at the presidential plane.[3] Authorities made further arrests and displayed weapons caches allegedly seized from the plotters.

Since the round-ups began in September 1990, at least 8,000 suspected members of an-Nahdha had been arrested, Amnesty International reported in March 1992.[4] Torture of these suspects during interrogation had become pervasive, according to both Amnesty International and the Tunisian League for Human Rights (see below).

While cracking down on an-Nahdha, the government also pressured civil society at large, allowing no genuinely free multiparty elections and harassing and intimidating Tunisia's independent press into ever-greater self-censorship.[5] On March 24, 1992 the single-party parliament passed an amendment to the law on associations that prompted the 15-year-old Tunisian League for Human Rights to dissolve itself rather than cede any control over its own decisions about admitting members and selecting office-holders.[6]

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[2] On December 27, 1990 then-Secretary of State for Information Hédi Grioui announced that the investigation into a clandestine armed group called the Vanguards of Sacrifice (*Tala'i al-Fida'*) revealed that the group had secret links to an-Nahdha. (Agence France-Presse bulletin, December 27, 1990, and Tunis Domestic Service in Arabic, December 27, 1990, as reported by Foreign Broadcast Information Service, December 28, 1990.) An-Nahdha immediately denied having any links with the armed group. (Agence France-Presse bulletin, December 28, 1990.)

[3] Tunis Tunisian Republic Radio in Arabic, September 28, 1991, as reported by Foreign Broadcast Information Service, October 1, 1991; and "Major Revelations Disclosed in Tunisia about the Involvement of "Ennahdha" in Terrorist Activities," Embassy of Tunisia, Washington, D.C., October 1, 1991.

[4] Amnesty International, "Tunisia: Prolonged Incommunicado Detention and Torture," MDE 30/04/92, March 1992, p. 8.

[5] See Article 19 (London), "Tunisia: Attacks on the Press and Government Critics," August 1991.

[6] The amended law prevents associations of a general character -- such as the League -- from refusing membership to any person who accepts its principles and decisions. It also bars individuals from simultaneously

In this climate, there was suspicion that the trial of 279 known and alleged an-Nahdha members was a ploy to use the courts to eliminate the country's Islamist opposition. As in the 1987 trial, the mostly civilian defendants would be tried *en masse* before a court of exception, this time a military court rather than the now-abolished State Security Court. The central charge in both cases was a conspiracy to overthrow the government, for which the prosecutors in both cases demanded death penalties. Some of the same Nahdha leaders were on trial, including Rachid Ghannouchi and Ali Laaridh.

To its credit, the government announced that observers from international organizations and foreign embassies could attend the Nahdha trial. In July, MEW and the Law Group sent David Matas, a French-speaking Canadian lawyer and experienced trial observer to observe the proceedings. Matas stayed in Tunisia from July 19 to July 29, attending the last two days of the *interrogatoire* (the court's questioning of the defendants) at Bouchoucha on July 20 and 21 and the first two days of the *interrogatoire* at Bab Sa´doun, on July 27 and 28. This report is based partly on information he collected during his stay.

On July 25, during Mr. Matas' observation of the trial, MEW, the Law Group, and the New York-based Lawyers Committee for Human Rights issued a joint statement urging that the trials be halted until the court addressed several irregularities in the proceedings. Two days later the governmental External Communication Agency issued a rebuttal to the statement (see Appendix A). Following the announcement of verdicts in the Bouchoucha trial on August 28, MEW issued a second statement, charging that the concerns raised in the initial statement had not been addressed adequately by the court. MEW called the trials "unfair" and urged that the verdicts be set aside. This report describes how the violations of international norms for a fair trial that occurred tainted the entire process.

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holding leadership positions in an association and in a political party. See the MEW news release of June 19, 1992 and the reply of the Tunisian Ministry of Foreign Affairs, July 3, 1992; and Caryle Murphy, "Tunisian Human Rights League Folds," *Washington Post,* June 16, 1992.

The Trial: Conclusions and Recommendations

When taken together, the irregularities in the trials of 279 Islamists at Bouchoucha and Bab Sa´doun military courts in July and August 1992 denied the defendants the right to "a fair and public hearing by a competent, independent and impartial tribunal," as provided by the International Covenant of Civil and Political Rights (ICCPR), which Tunisia ratified in 1983. The most serious flaw was the courts' failure to investigate thoroughly and impartially most defendants' claims that their confessions to the police, which formed the bulk of the prosecution's evidence and which the defendants later repudiated before the court, had been extracted through torture.

Several other violations of the right to due process occurred. Defense lawyers were not given timely and complete access to case dossiers. Defendants were not permitted to attend all phases of their own trial, owing partly to the arbitrary division of the case, which concerned a single alleged conspiracy, into two parallel trials. Defense rights were further compromised by the assignment of the case to a military court despite the fact that only a minority of the defendants were army personnel and none of the major charges was a violation of the Code of Military Justice. Public access to the courtroom was sharply restricted, although international observers were permitted to attend.

Justice was also tainted by the conduct of Chief Judge Habib ben Youssef at Bab Sa´doun court. During at least part of the *interrogatoire*, Judge Youssef repeatedly interrupted, ridiculed and harangued the accused. In response to one defendant's claims of having been tortured, he went so far as to ask, "You tried to overthrow the government and you complain about being hit?" Judge Youssef's behavior, as witnessed by the MEW/Law Group observer, lacked even the pretense of being a search for the truth.

MEW and the Law Group call on the government of Tunisia to recognize these violations of due process rights by setting aside the verdicts. At the very least, thorough and impartial forensic medical examinations should be conducted on those defendants who requested them. If evidence of torture is found, the pertinent verdicts should be voided and the defendants should be released or, if other evidence warrants, given a new trial; and those responsible for acts of torture should be punished.

In making these recommendations, MEW and the Law Group take no position on the facts of the case, concerning an alleged conspiracy by an-Nahdha to overthrow the government. Authorities characterize an-Nahdha as an organization dedicated to employing all means, including violence, to install an Islamic regime that would trample on citizens' rights.[7] An-Nahdha's leaders state that they are committed to using only democratic and nonviolent means to achieving a democratic and tolerant Islamic state.[8]

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[7] See, for example, "Un entretien avec le président tunisien," *Le Monde*, July 12, 1991; and an interview with Ben Ali in the July 1992 issue of the Moroccan magazine *Maghreb* that was translated into English and distributed by the Tunisian Information Office, Washington, D.C.

[8] See, for example, the leaflet "The Governing Principles of the An-Nahdha Movement in Tunisia," available from the American Muslim Council, Washington, D.C.

MEW and the Law Group are aware that Islamists in Tunisia have committed acts of violence and intimidation in recent years. In a February 1991 incident, an-Nahdha members set fire to a branch office in Tunis of the ruling party, causing the death of one watchman and the grave injury of a second. (Three men were sentenced to death and executed for their role in the attack.)[9] Party supporters were implicated in numerous incidents of violence on campuses; the Tunisian League for Human Rights charged in a May 18, 1991 communiqué that "groups of students belonging to the Nahdha movement committed in a deliberate and organized manner a series of acts of serious violence, such as the burning of education institutions...in order to paralyze the university and take it hostage, all in the framework of a wide-scale confrontation with the regime."

Such acts of violence, however deplorable, and regardless of whether they are sanctioned by the party directorate, do not necessarily add up to a plot to violently overthrow the government, the capital offense that was on trial in the summer of 1992. The conspiracy charge would have to be proven by the evidence presented in court. Because of the trial irregularities described in this report, MEW and the Law Group found that the trial did not demonstrate persuasively the existence of such a conspiracy.

Trial Conditions Impinging on Defendants' Due-Process Rights

The case was divided into two trials running concurrently at Bouchoucha and Bab Sa´doun military courts in Tunis. The charges in the two trials stem from a single alleged conspiracy to assassinate the president and overthrow the government. The government's rationale for splitting the case into two trials was that it involved two distinct groups of defendants. The 171 men on trial at Bouchoucha were alleged to be Nahdha "leaders and activists" who were involved in the larger conspiracy, while the 108 at Bab Sa´doun were allegedly involved in the military aspects of the conspiracy as members of the Vanguards of Sacrifice organization. (See below for a critique of this division of the case.)

According to the prosecution, the Vanguards of Sacrifice began as a separate organization but was "gradually absorbed by an-Nahdha, which transformed it into its own military branch, as well as an agency for collecting intelligence and infiltrating the army." Ali Laaridh, the former spokesperson of an-Nahdha, denied all links between the two groups during his testimony at Bab Sa´doun on August 1.[10]

The main charges in the two cases were:

- participating in a plot against state security with the purpose of overthrowing the government (article 72 of the Criminal Code);
- assisting in a plot against state security with the purpose of overthrowing the government;

[9] Nahdha leaders denied having authorized the attack on Bab Souiqa, although they often described it as an understandable response to state repression. On July 21, during the trial at Bouchoucha military court, one party leader, Ajmi Lourimi, said, "We regretted the incident at Bab Souiqa. It was desperation that pushed young members of the Islamist movement to commit such acts of violence." *Le Temps,* July 22, 1992.

[10] Agence France-Presse dispatch, August 1, 1992.

- attempt on the life of the president (article 63 of the Criminal Code);
- membership in an unauthorized organization;
- possession of arms, explosives, and ammunition;
- falsification and theft of documents;
- revealing professional secrets;
- crossing the national borders without passports; and
- assuming false identities.

The first three charges, which carry the death penalty, were not made against all 279 defendants.

All the accused, however, faced the charge of belonging to an unauthorized organization. Except for the defendants who were members of the security forces, the defendants at Bouchoucha all acknowledged belonging to an-Nahdha. However, they all pleaded innocent to plotting an insurrection.

Membership in an unauthorized organization is a charge that should not have been laid. Tunisia's Islamist movement has sought legal recognition unsuccessfully for a decade. The ground for the refusal, at least in recent years, is that an-Nahdha is a party based on religion. Article 3 of the 1988 law on political parties prohibits parties that rely in their principles, activities and program on a religion, language, race, sex, or region. It also provides in article 8 that no political party can engage in activities without authorization from the Minister of the Interior. This law, at least its application to an-Nahdha, violates the right to freedom of association, which is enshrined in the ICCPR.

Openness of the Trial

The government's boast that the trials were public and open is only half-true. The gap between the practice and the reality reflected the tension within the government between a police-state mentality and an eagerness to appear well-disposed toward human rights.

Both trials were held in heavily guarded military barracks. Persons authorized to attend were issued photo identification cards. Members of the public could not simply walk in. International observers were permitted to attend, but they were barred from bringing interpreters, and local journalists and lawyers in the courtroom were discouraged from explaining to them the Arabic-language proceedings. Even families of the defendants were restricted in entry: each defendant was allowed no more than one family member.

Article 14(1) of the ICCPR states with regard to the openness of a trial:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Human Rights Committee established under the ICCPR[11] has said of this obligation:

> The publicity of hearings is an important safeguard in the interests of the individual and society at large. At the same time article 14 paragraph 1 acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons.[12]

Government officials refused to admit interpreters on the ground that there was no space. In fact, both courtrooms had plenty of empty seats, and would have been half-empty were it not for the heavy presence of secret service agents.

Even if the contrary were true, overcrowding is not one of the listed grounds of exception in the ICCPR. Although there is no international case law on the subject, the comment by the Human Rights Committee would suggest that the ICCPR exceptions were meant to be exhaustive, and that excluding interpreters meant excluding a particular category of persons, in violation of the Human Rights Committee's prohibition of such discrimination.

The MEW/Law Group observer made several efforts to secure permission to bring an interpreter. He made this request during a meeting with Justice Minister Chaabane. The minister made a phone call and said that he had made arrangements for a Tunisian journalist to interpret for the observer. But the Tunisian journalist never materialized.

On July 27, the MEW/Law Group the observer met with Slah Maaoui, Director of the External Communication Agency, and renewed his request for permission to bring an interpreter to court. Maaoui said that the court room was not big enough to accommodate an interpreter for each observer, but that if the observer provided the names of three or four people who wanted an interpreter, Maaoui would allow one for the group. Later that day, the observer produced the names of six people who wanted an interpreter, and provided the name of an interpreter. Still, permission did not materialize.

Despite the lack of an interpreter, the MEW/Law Group observer was able to follow the proceedings with the assistance of journalists, defense lawyers, and other observers. But some of those present were afraid to speak with him; one lawyer told him that he had been told by government officials that the three booklets it had issued on the trials provided sufficient information for the observers, and that the lawyers need not give them more. (Prior to, and during the trial, the government promoted its case outside the courtroom. The External Communication Agency produced three booklets, each in French, English and Arabic, explaining the case and the safeguards in place for the rights of the accused. They were entitled, "The Military Court Examines the Case of the Plot against

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[11] Under the ICCPR, the states parties elect an 18-member committee of experts which reviews states' compliance reports, hears individual petitions against states which have given it this authority, and delivers authoritative "general comments" on the covenant's provisions.

[12] General Comment 13/21, U.N. Document A/39/40, pp. 143-147.

Internal State Security," "The Guarantees for Those to be Tried in Military Courts in Tunisia," and "Major Acts of Violence Perpetrated by Ennahdha.")

While several defense lawyers were willing to speak with the observer, he was rebuffed completely in his efforts to meet with prosecution lawyers. It was the first trial he had attended as an observer in which none of the prosecution team would speak to him. When he tried to join Jill Heine, Amnesty International's trial observer, in a meeting with the Bouchoucha prosecutor, Col. Maj. Mohammed Guezguez, he was barred from the meeting on the ground that he had not made a prior request. He then filled in a request form, but the request was never answered. He tried to meet with the prosecutor at the trial at Bab Sa´doun, Col. Mohamed Ben Abdallah, but was refused on the ground that if he was to meet with a prosecutor it had to be with his boss, Col. Maj. Guezguez.

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The openness of the trial can be measured not only in terms of access to the public and observers, but also in terms of the political climate outside the courtroom, in such indicators as the freedom of the local press to report critically on the trial, and the freedom of citizens to discuss it. As noted by the Human Rights Committee, the publicity of hearings serves the interest not only of the defendants, but of society at large. The European Court of Human Rights has pointed out that "by rendering the administration of justice visible, publicity contributes to the achievement ... of a fair trial."

In Tunisia, fear is pervasive. Lawyers who were willing to speak to the MEW/Law Group observer seemed to do so with reservations. One insisted that the observer come personally to the office to make an appointment rather than make the appointment over the phone. Another promised the observer documents but urged him not to discuss them on the phone. A third invited the observer to his home to discuss the case but insisted he not record many of the remarks he made. He refused to say anything at all about the military tribunals which were trying the cases, on the ground that a colleague, Mohammed Nouri, had been sentenced in January 1991 by a military court to six months in prison for writing an article in the Nahdha newspaper *al-Fajr* criticizing military justice.[13] Outside his home, the lawyer would say nothing to the observer about the case.

Security agents were much in evidence at both the Bouchoucha and Bab Sa´doun courthouses, taking up more room than the lawyers or the defendants' families. Whenever the MEW/Law Group monitor stepped outside the courtroom to talk to a lawyer, a security agent would accompany them, stand nearby and eavesdrop on the conversation. This caused some lawyers to change the subject or break off the conversation altogether.

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[13] Nouri was convicted on charges of "defaming a judicial institution," under Tunisia's Press Code, for his article, "When Will Military Courts, Serving as Special Courts, Be Abolished?" *Al-Fajr*, October 27, 1990. In March 1991, the sentence was upheld by the *cour de cassation* (a court that conducts judicial reviews of verdicts). *Al-Fajr* editor and an-Nahdha executive council member Hamadi Jebali received a one-year sentence for publishing the article.

Nouri remained in prison after the expiration of his sentence for investigation in connection with the alleged Nahdha armed conspiracy. He was released without charge in April 1992. Jebali was not released. He was charged in the conspiracy trial and sentenced by the military court at Bouchoucha to fifteen years in prison.

One month before the trials opened, the Lawyers Committee for Human Rights sent a delegation to Tunisia. The delegation reported in a July 14 statement that police agents followed them while in Tunisia and monitored their phone calls.

The Tunisian press has been intimidated into passivity over the last two years by arrests of journalists and subtler forms of government pressure. The local government-controlled and independent newspapers regularly covered the trials but did not report the testimony of torture in any detail. When defendants graphically described the injuries allegedly inflicted on them and the techniques employed, the press would report at most that the defendants claimed torture, or that they had given their statements to the police under pressure. The independent French-language daily *Le Temps* provided verbatim coverage, but was highly selective in the sections it chose to print. A more one-sided version of the trials was put forth by *La Presse*, a government newspaper, and *Le Renouveau*, organ of the ruling RCD party. Their coverage resembled prosecution summations.

Inappropriateness of the Military Tribunal

Why was the trial taking place in a military court? The accused were, by and large, civilians. Their alleged leaders were all civilians. The most serious charges were offenses under the Tunisian Criminal Code rather than the Code of Military Justice.

The 108 defendants at Bab Sa´doun included about 30 members of the military and the police. At Bouchoucha, an even smaller portion of the 171 accused were members of the security forces. The only military offenses facing the military defendants at Bouchoucha were violating the prohibition against military personnel belonging to a political association and inciting another member of the military to join a political association, under article 128 of the Code of Military Justice. At Bab Sa´doun too the offenses charged were virtually all offenses of non-military laws. The charge of treason, which is found in the Code of Military Justice, was not made.

The government defended the assignment of the case to military court. It denied that the military tribunal was a court of exception, explaining that it handles every case in which military personnel are charged, and its jurisdiction extends to all civilians involved with the military in the same case.[14]

Submitting civilians to military justice is discouraged by the international law of human rights. The Human Rights Committee established under the ICCPR issued the following warning in 1984:

> The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories

[14] "Guarantees Offered to the Defendant before the Military Jurisdiction in Tunisia," Embassy of Tunisia, Washington, D.C., July 8, 1992. See article 8 of the Code of Military Justice.

> of courts, nonetheless, the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 [the fair trial article in the Covenant].[15]

The Human Rights Committee stresses that the military courts should be used only in exceptional circumstances. This principle was violated by the decision to bring hundreds of civilians into a military court to be tried for non-military offenses simply because a few military co-defendants played minor roles in the conspiracy.

All of the dangers against which the Human Rights Committee warns — violations of impartiality, independence and equity — arose at Bab Sa´doun and Bouchoucha.

Impartiality and independence were obvious problems, despite the guarantee of judicial independence in article 65 of Tunisia's constitution. Each military court panel consists of five judges. The chief judge (*président*) must be a civilian judge, while the other four judges (*conseillers*) are military officers. The chief judge is nominated by the ministers of defense and of justice, and is confirmed by an executive decree. According to article 11 of the Code of Military Justice, the chief judge holds the position for a renewable one-year term.

The four military judges are chosen by the Minister of Defense. According to the Code of Military Justice, at least one and preferably two military judges in a panel should be chosen from the law officers in the military.

The *juges d'instruction*[16] for the military courts are also chosen by executive decree, in this case upon nomination by the defense minister alone. These judges must be chosen from the law officers in the military, according to article 14 of the Code of Military Justice. Thus, the minister of defense alone nominates the *juges d'instruction*, chooses the four military officer judges on each trial panel; and, together with the minister of justice nominates the chief judge of the panel.

The minister is also in charge of the prosecution. According to article 21 of the Code of Military Justice, only the minister can launch prosecutions in military court. He is represented in court by a prosecutor who is a military officer.

A judiciary appointed by the prosecution does not provide a reasonable appearance of independence and impartiality, especially when the appointees lack security of tenure. The judges who are military officers have no statutory fixed term of office, while the civilian chief judge serves terms of only one year.

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[15] U.N. Document A/39/40, Annex VI, page 144, paragraph 4.

[16] The *juge d'instruction*, or examining magistrate, has the task of questioning the suspect at the end of the period of investigative detention. He studies the suspect's statements (*procès verbal*) to the police, questions him and elicits a second signed statement (also called a *procès verbal*) for eventual submission to the trial court.

The problem, however, goes beyond security of tenure and the selection of judges by one of the parties. The minister of defense, who chooses the judges, is the command superior of the judges who are military officers. They have a duty as officers to follow the orders of the minister. If they do not, they violate military law.

Some codes of military justice contain specific provisions to negate command influence. For instance, the United States Code of Military Justice forbids officers from attempting to pressure a court martial or its members to reach a particular conclusion, and from later censuring or punishing the court martial or its members for the rulings they make.[17] Tunisia's Code of Military Justice does not touch on the issue of command influence.

The assignment of the Nahdha case to the military court also violates the precept of equal treatment before the law. Tunisian authorities have argued misleadingly that defendants lose no protections by being judged by a military court, pointing to similarities in the procedures of the military and civilian courts. They have pointed out that military *juges d'instruction* are, according to article 24 of the Code of Military Justice, to follow the civilian Code of Criminal Procedure. Charges laid by a military *juge d'instruction* are reviewed by the Indictment Division (*chambre d'accusation*) of the Court of Appeal, as are charges laid by civilian *juges d'instruction*.

At the trial phase as well, military courts are supposed to follow the Code of Criminal Procedure, according to article 38 of the Code of Military Justice. Military court verdicts, like civilian court verdicts, can be submitted to the *cour de cassation* for judicial review. If the *cour de cassation* rules that lower court has overstepped or lacks jurisdiction, or has committed errors of law, it can quash a verdict or send it back for a retrial.

There are, nevertheless, key differences in procedure that deprive defendants before military courts of safeguards they would enjoy before a civilian court. Foremost is that a conviction in a military court is not subject to appeal, only to a jurisdictional and procedural review by the *cour de cassation*. (Moreover, for military verdicts, one of the three judges on the *cassation* panel is an officer designated for a one-year term by the minister of defense, in accordance with article 29 of the Code of Military Justice.) A defendant convicted in a civilian criminal court, on the other hand, can appeal both to the *cour de cassation* for judicial review and to the Court of Appeal to overturn the verdict because of an error of fact. Thus, a defendant convicted in military court has no opportunity to appeal on the merits of the case.

Violations of the Right to Counsel and to a Prompt Trial

In a sense, the accused were brought to court both too slowly and too quickly. They were brought too slowly in the sense that there was an inordinate delay between their detention and their trials. They were brought too quickly in the sense that when the court did proceed, the defendants and their lawyers were not given adequate time to prepare.

[17] 8 U.S.C. 837.

These two problems were reflections of the same basic problem: it took much too long for the state to inform the accused and their lawyers of the charges that they had to answer.

Many of the accused had been held for well over a year before the trial began. Abdallah Ben Salah M'Sahli testified on July 28 at Bab Sa´doun that he was arrested May 4, 1991 (*Le Temps*, July 29, 1992). Ahmed Amara at Bouchoucha on July 18, testified he was arrested on May 18, 1991. Abdellatif Mekki said at Bouchoucha on July 20 he was arrested in May 1991, not in July 1991, as the government claimed (*Le Temps*, July 21, 1992). Ali Chniter, a 34-year-old architect, testified at Bouchoucha on July 21 that he was arrested on April 13, 1991 (*Le Temps*, July 22, 1992).

The ICCPR guarantees to every accused the right to be tried "without undue delay" (article 14(3)(c)). International law dictates no specific time frame that is reasonable for all cases. Rather, what is undue delay depends on such criteria as whether the accused is released before his trial. In cases in which the defendants are denied bail and ordered held until the conclusion of the trial, as was the case for all of the defendants in this case who were not at large, there is a special obligation to bring the suspects to trial in an expeditious manner.[18] Given that many of the defendants on trial at Bouchoucha and Bab Sa´doun had been in detention for more than one year, their right to trial within a reasonable time was vi´olated.

The trials finally got under way in the middle of July 1992. Ordinarily, Tunisia's courts recess for the summer. These trials were an exception, proceeding through the vacation period, six days a week. (The 1981 and 1987 mass trials of Islamists were also held during the summer.) Sessions opened as early as 8:30 in the morning and continued as late as midnight. Lawyers sat gowned, as they had to be, sweltering in chambers that had only token air conditioning. They put on their gowns at the last possible moment, leaving them unbuttoned in spite of the bedraggled appearance that gave, and removed them as soon as they could.

Why this forced march of bar and bench through the vacation period, through the heat of summer, after a long regular court season? For government officials, the answer was easy. A conspiracy to overthrow the regime is a most grave matter. The defense, on the other hand, viewed the timing with skepticism. For them, the government had put together a case that would fall apart if examined too closely.

Forcing lawyers to proceed with the cases during their vacation period, while not a violation *per se* of due-process rights, was symptomatic of problems that pervaded the entire case with regard to the right to counsel.

These problems began when the defendants were first arrested. Detainees in Tunisia do not have a right to prompt access to a lawyer. Article 13bis of the Code of Criminal Procedure law allows the police to hold a suspect in investigative detention for ten days before bringing the suspect before a judge. During this ten-day period, suspects have no right to legal counsel. If a lawyer on his or her own initiative comes to the police station and asks to see the client, access will be refused.

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[18] ***Wemhoff v. F.R.G.*** (1968) 1 E.H.R.R. 55.

The United Nations Standard Minimum Rules for the Treatment of Prisoners affirms the right of an untried prisoner to counsel:

> For the purposes of his defense, an untried prisoner shall be allowed to apply for free legal aid where such aid is available and to receive visits from his legal adviser with a view to his defense and to prepare and hand to him confidential instructions. (Article 93)

The U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in principle 15, provides that "communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days." The U.N. Basic Principles on the Role of Lawyers is more specific in its principle 7:

> Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

Suspects in Tunisia have a right to a lawyer only after ten days in police custody, earlier if they have been transferred from police custody to the *juge d'instruction*. Article 72 of the Code of Criminal Procedure guarantees the right to a lawyer before the *juge d'instruction* unless it is expressly waived.

The suspects in the Nahdha case, according to the notes taken by the *juges d'instruction*, were consistently asked if they wanted a lawyer during the *instruction* phase, and they replied no. At the trial, the defendants consistently denied that they were ever asked during the *instruction* whether they wanted a lawyer. Those who claimed that they had asked for a lawyer said that their requests were either ignored or dismissed. For instance, Noureddine Amdouni, on July 10, 1992 at Bouchoucha court testified that there was no lawyer for him when he appeared before the *juge d'instruction* (*Le Temps*, July 12, 1992). Amdouni had asked to be represented by attorney Noureddine Bhiri,[19] but to no avail. His *instruction* proceeded without a lawyer. Mohieddine Ferjani, on July 10 at Bouchoucha, testified that he had asked for a lawyer when he was before the *juge d'instruction*. The *juge* told him that if he had indeed requested a lawyer, the lawyer would have been there. Ferjani's *instruction* proceeded without a lawyer.

It would seem odd for suspects accused of capital offenses to waive their right to a lawyer. Yet, at the same time, suspects face disincentives during the *instruction* to request a lawyer or do anything that would delay their transfer from police detention to an ordinary prison. Defendants said that suspects who tried to insist on having a lawyer during the *instruction* were informed that the *instruction* would be postponed until the lawyers were ready to proceed with the case, and that in the meantime they would be returned to custody at the police station — the site where suspects claimed to have been tortured. On the other hand, by completing the *instruction* phase, a suspect would be transferred from police detention to an ordinary prison, where he could receive family visits and food brought during the visits. In police jails, neither family visits nor food from outside is permitted.

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[19] Bhiri, a lawyer known for his defense of Islamists, was himself arrested in February 1991 and held in incommunicado preventive detention for 24 days and then released without charge, according to Amnesty International. See AI's Urgent Action MDE 30/10/91, March 13, 1991, and Urgent Action MDE 30/12/91, March 19, 1991.

For suspects who did bring lawyers with them to the hearings before the *juge d'instruction*, there were other problems. Article 72 of the Code of Criminal Procedure states that the file of the suspect is to be put at the disposal of the lawyer the day before the hearing. Lawyers complained that for the Bouchoucha and Bab Sa¸doun suspects this provision was interpreted as restrictively as possible. The one-day requirement was meant to be a minimum, but was treated by the court as a maximum. To complicate matters, the defense lawyers were not allowed to make copies of the files. They were only allowed to read the files on the court premises.

Irregularities during the *instruction* phase, including the *de facto* denial of the right to counsel, were the subject of an attempted complaint to the *cour de cassation*. However, according to article 294 of the Code of Criminal Procedure, such a complaint can be heard by the court only if it is brought by the government. The defense had asked the government to bring the alleged irregularities before the court, but the government did nothing. Thus the alleged irregularities went unchallenged.

After the *juge d'instruction* lays the charges against the suspects, there is an automatic appeal to the Indictment Division of the Court of Appeal. However, according to article 116 of the Code of Criminal Procedure, the Court of Appeal is mandated to look only at whether the charges laid by the *juge d'instruction* are in conformity with the law and are justified by the evidence before the *juge d'instruction.* It lacks the broad supervisory jurisdiction of the *cour de cassation* to examine such irregularities as denial of the right to counsel.

In this case, the Court of Appeal confirmed the charges that the *juges d'instruction* had laid against the suspects, and on June 13, 1992 referred the cases to the military court.

After the *juge d'instruction* has laid the charges, the accused can either be released or kept in preventive detention pending trial. All of the suspects in the Nahdha conspiracy case were placed in preventive detention.

In theory, the accused had access to their lawyers while in preventive detention. In practice, they did not. Lawyers could visit clients only with difficulty. They were subjected to long waits, and then limited to visits lasting no more than a few minutes. For instance, as the trial opened at Bouchoucha on July 9, one of the defendants told the court: "I was allowed to see a lawyer for two minutes only. After that a prison guard interrupted us."

The lawyer-client consultations were not private but rather were overheard by the authorities, the lawyers claimed. This contradicts the U.N. Standard Minimum Rules for the Treatment of Prisoners, which states in article 93 that "Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official." A similar provision is found in principle 8 of the U.N. Basic Principles on the Role of Lawyers.

The problems of legal representation continued during the trial. In theory, defendants in Tunisia have more than just a right to a lawyer. The law obliges them to have legal representation. The Code of Criminal Procedure provides in article 141 that if a defendant does not have a lawyer, the court will designate one for him.

However, Tunisia has no legal-aid style scheme to furnish and pay lawyers to represent

defendants who do not have the means to hire counsel. Rather, the Tunisian bar association (***conseil de l'ordre des avocats***) operates a rotational system that assigns lawyers to represent clients on an unpaid basis (*commis d'office*). About four-fifths of the defense lawyers in the Nahdha conspiracy trials were assigned by the bar association in this fashion, according to *Jeune Afrique* magazine.[20]

Lawyers assigned to clients in the Nahdha trial faced enormous burdens in doing their job properly. They would have had to spend weeks without pay on a case divided into two trials involving 279 co-accused, and pore over cartons of documents and truckloads of physical evidence. Not surprisingly, the less committed of the designated lawyers tended to attend the proceedings only when their own clients were being questioned.

In an interview with MEW and the Law Group, Justice Minister Chaabane criticized the defense lawyers as politicized and self-promoting. Such criticism is disturbing for reasons that may not be obvious: in Tunisia the government is a major employer of legal services. In the past, lawyers active in representing dissidents reportedly were passed over for state-funded work. In business terms, the defense team for the Islamists had a lot more to lose than gain by mounting a vigorous defense.

The ICCPR gives an accused individual the right

> to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it. (Article 14(3)(d))

The Human Rights Committee established under the ICCPR has expressed the view that, in order to give substance to the right to free counsel, adequate compensation must be provided to the assigned lawyers:

> The Committee considers that in cases involving capital punishment in particular legal aid should enable counsel to prepare his client's defense in circumstances that can ensure justice. This does include provision for adequate remuneration from legal aid.[21]

The lack of remuneration for lawyers assigned to some of the Nahdha defendants may have contributed to the defendants receiving inadequate counsel.

The ICCPR provides in article 14(3)(b) that a defendant shall be entitled to "adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." The Human Rights Committee has expressed the opinion that this obligation implies a right to receive adequate legal assistance.[22] This right was violated in several respects during the Nahdha trial.

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[20] Samir Gharbi, "Le sens d'un verdict," *Jeune Afrique*, September 3, 1992.

[21] ***Reid v. Jamaica***, U.N. document A/45/40, annex IX (J), paragraph 13.

[22] ***Vasiliskis v. Uruguay***, U.N. document A/38/40, Annex XXV, paragraphs 2.5 and 11.

Sometimes, the lawyers, rather than standing up for their clients, became part of the system against the accused. For instance, defendant Mohamed Ben Aoun, at Bouchoucha court on July 11, requested to consult with a lawyer about the transcript of the statement that Aoun gave to the *juge d'instruction*. This was a reasonable request that would assist Aoun in the preparation of his defense. However, Aoun's lawyer urged Aoun to drop the request and testify, saying before the court: "I ask my client to answer the questions of the judge." "I thank the court for insisting that my client speak, and beg him to obey." "The court will go on without you if you do not answer." Aoun eventually succumbed and testified without having discussed with his lawyer the transcript of his statement before the *juge d'instruction*.

Because of the way that the state handled pre-trial matters, the defendants' lawyers, both those hired by the defendants and those assigned to them, faced too much work in too little time. At the end of June, the state delivered to the bar 25 cartons of documents relating to the two cases. The bar photocopied the documents for distribution to lawyers on the case. The photocopying was not completed until July 6, only three days before the opening of the trial at Bouchoucha. Some lawyers were not given the court files on their clients until the very last moment, as they were walking into court.

The U.N. Basic Principles on the Role of Lawyers (principle 21) states:

> It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

The Human Rights Committee has stated that three days notice is not sufficient to allow the accused to prepare his defense, and violates the obligation in the ICCPR to provide to an accused adequate time to prepare his defense.[23]

The Bouchoucha case began on July 9. The court, after reading the charges, wanted to launch straight into the questioning of the accused (*interrogatoire*). The defense asked for an adjournment so that they could familiarize themselves with the files and meet with their clients. The court, after much argument from counsel, granted an adjournment of just one day. The questioning of the accused began on the afternoon of July 10.

The Bouchoucha case continued without halt until July 21, when the *interrogatoire* was completed. The chief judge then agreed to a nine-day adjournment to give the defense lawyers time to prepare for the *plaidoirie* (oral pleading of their clients' cases.) The case at Bab Sa´doun began with the reading of the charges on July 10. The *interrogatoire* was then put off to July 27.

The delay at Bab Sa´doun was no real respite for the lawyers, since many were representing clients in both courts. In reality, the two cases were one case, arbitrarily split in two by the prosecution. To perform their jobs properly lawyers representing any one of the accused had to attend the

[23] *Mbenge v. Zaire*, U.N. document A/38/40, Annex X, paragraph 14(2).

proceedings in both courtrooms.

When called upon to testify, many defendants complained that their lawyers had not met with them before the trial. The lawyers responded, reasonably, that it would have been pointless for them to visit the clients until they had the files in hand to go over with the clients. When some of the lawyers finally received their files, it was too late to visit the accused because the case was already in court. As one lawyer at Bouchoucha said on July 9:

> I would have liked to visit my client. But for me that was absolutely impossible because of the fact that we were asking for the transcripts of the questioning of the accused. We did not want to visit the accused just to say hello. We wanted to visit them in order to present to them their statements and obtain their opinions on what they had confessed to (*Le Temps*, July 10, 1992; the newspaper did not identify the lawyer).

The court was not interested in these protestations. It just wanted to proceed. Some accused, under court pressure, went ahead with their testimony, even though they had not had the benefit of legal advice. Others refused to testify until they had spoken to their lawyers.

For instance, Noureddine Arfaoui, at Bouchoucha on July 10, asked to see his lawyer before he testified. Chief Judge Béchir Kdous chastised him for his opposition to the court. So he went ahead and testified without benefit of counsel. Noureddine Amdouni, on the other hand, the same day, the same place, resisted. He refused to testify without having spoken to his lawyer. The chief judge said at the time that if he persisted in his refusal the court would rely on what was already in the file, and do without his testimony.

There were altogether six people at the Bouchoucha court who, like Amdouni, refused to testify as long as they could not consult their lawyers. Later, after they were able to meet with their lawyers, they asked the court for another opportunity to testify. The court relented and the six testified on July 21. Thus, in the end, the losers were not so much the ones who refused to testify before conferring with their counsel as those who succumbed to court pressure to testify and were thus, in effect, denied the right to counsel.

The court showed insensitivity toward this right. At one point, Judge Kdous at Bouchoucha asked a defendant who was insisting on seeing his lawyer: "Do you want a lawyer so that he can prompt your answers for you?" (*Le Temps*, July 10, 1992.) The lawyers felt compelled to remind the judge that defendants have a right to know the case against them, to organize their defense, and to be advised on the law.

The purpose of the right to counsel is not merely to allow the accused to be represented in court. It is also to allow the accused to be informed of his rights and obligations under the law, and to obtain advice as to how to exercise those rights. For the right to counsel to be effective, the accused must have access to legal advice before he is called by the court to testify.

There were also some very particular problems. Saïda Akremi is a lawyer who wears the head covering favored by some observant Muslim women. Akremi represented some of the accused at both the Bouchoucha and Bab Sa´doun trials. According to her, when she tried to visit her clients, prison

officials insisted that she remove the head covering. Because she refused she could not visit her clients. The same rule applied to female relatives who wished to visit the accused in prison, she said.

Another apparent violation of the right to counsel occurred when the government refused to honor regional agreements that allow lawyers from one country to practice in the courts of the other. Three Algerian lawyers attempted to invoke an agreement between Tunisia and Algeria on July 20 and gain access to the courtroom at Bouchoucha. According to *Le Temps* of July 21, Chief Judge Kdous refused them entry on the grounds that they had arrived in the middle of a session and had not paid him a courtesy visit before the opening of the session. The judge said he would reconsider the request during a recess. In the end, the Algerian lawyers were not granted access to the court. A Moroccan lawyer, Ramid el-Mostafa, tried to enter Bab Sa´doun court on July 27 by invoking a Tunisian-Moroccan agreement. He too was refused. Eventually he was admitted as an observer at Bab Sa´doun but was prevented from participating in the defense team.

Violation of the Defendants' Right to Know the Case Against Themselves

Another difficulty confronting lawyers and the accused was incomplete disclosure. The Human Rights Committee has stated that the obligation under the ICCPR to provide the accused with adequate facilities for the preparation of his defense must include access to documents and other evidence which the accused requires to prepare his case.[24] Access to clients and documents were general problems encountered by most of the defense team.

When the government gave over files to the defense before the opening of the trial, documents were missing. At Bouchoucha, the first notice both lawyers and the accused had of the missing documents was in court, when Judge Kdous made reference to them.

For instance, Judge Kdous, when questioning defendant Mohamed Ben Aoun on July 10, referred to the transcript of testimony implicating Ben Aoun that a co-defendant had given before the ***juge d'instruction***. But the transcript was not in the file given to Aoun's lawyer. In the case of Mohamed Ben Nejma, who testified July 14 at Bouchoucha, Judge Kdous questioned the accused about a statement he had made to the ***juge d'instruction***. This statement was not in the file given to his lawyer. In the case of Hédi Kemmi, July 14 at Bouchoucha, Judge Kdous referred to a document showing that there was an arrest warrant out for the accused. But that too was not in the file given to the lawyer.

Defendants also faced obstacles to obtaining the statements they had signed at the police stations or before the ***juges d'instruction***. These were critical documents, since the only evidence against most of the defendants was their own statements and the statements of co-defendants.

With few exceptions, the accused said that the original statements to the police were signed unread after torture. According to their account of the standard procedure, the accused would be warned, either by the police or by the ***juge d'instruction***, that if their statements to the ***juge d'instruction*** did not match the statements they had given to the police they would be returned to police custody. This

[24] U.N. Document A/39/40, Annex VI, paragraph 9.

prompted defendants to sign statements before the *juge d'instruction* without looking at them. Once signed, these statements were not made available to them until the trial.

In both courtrooms, the defendants were questioned on the contents of these statements. They answered that they wanted to know what the statements contained. Even as they appeared before the court they still had not received copies of the statements. The statements had generally been provided to lawyers on such short notice that the lawyers had been hard-pressed to show them to their clients before the clients were questioned in court.

One defendant after another, when asked if he agreed with his previous statements, replied that he had no idea what was in these statements. For instance, Lamine Thamri was asked at Bab Sa´doun on July 28 by the chief judge how he could say in court that he had no link with a political organization when in his statements to the police and to *juge d'instruction* he had said the opposite. Thamri replied, "I do not know what is in those statements."

Aissa Amri testified at Bouchoucha on July 13 that his testimony to the *juge d'instruction* was motivated by fear of being returned to police custody. Sahbi Atig on July 21 at Bouchoucha asked the judge to read the statements he had signed both at the police station and before the *juge d'instruction*. Atig, a 32-year old religion teacher, said he had signed the police statement without being aware of its contents. Abdallah Messaoudi testified on July 27 at Bab Sa´doun, "I was told that if I do not say to the *juge d'instruction* what I said to the police, the *juge* will send me back to the police." Mohamed al-Hédi Dridi testified at Bab Sa´doun on July 28, "the *juge d'instruction* told me, `say what you said at the police or I will have you returned to the Ministry of the Interior.'"

Not disposed to adjourning the case so that lawyers could show the statements to their clients, the judge proceeded to read out the statements in court. Judge Kdous at Bouchoucha asked Karim Harouni on July 21, "Do you know what is in your statements to the police and to the *juge d'instruction*?" Harouni replied, "I know nothing about them." The judge proceeded to read Harouni's statement to the court. Hamed Hamouda at Bouchoucha on July 16 said he knew nothing of his file. The judge read him the transcript of his statement. Ali Harrabi on July 20 at Bouchoucha said he had not seen his file. The judge read to him from it.

The MEW/Law Group observer heard several such readings. They were unnecessarily time-consuming. The defendants should all have been provided with their statements well before the trial began. It is hard to imagine a more dramatic violation of the obligation in the ICCPR to give an accused adequate time for the preparation of his defense. One minute, a defendant had the case against him read out in court. The next minute, he was asked to respond.

There were also medical documents that turned up in the courts' copies of the defendants' files but not in the files given to the defense lawyers. A number of accused had received medical treatment in prison. They claimed that the treatment was necessitated by the torture they had suffered while under police interrogation. The doctors who treated them issued medical reports on their state of health and the treatment that was given. These medical reports were not in the files given to the lawyers.

For example, a prison doctor had examined defendant Ajmi Lourimi, a thirty-year-old schoolteacher, who testified at Bouchoucha on July 20. The doctor had written a report that had not been given to Lourimi's lawyer but was in the possession of the chief judge, who referred to it in open court as being part of the file.

The courts' handling of the physical evidence also violated the defendants' right to know the case against them. Perhaps what most struck observers entering the courtrooms at Bouchoucha and Bab Sa´doun were the piles of weapons on display. At Bouchoucha a small arsenal sat in front of the judges' bench, containing rifles, pistols, machine guns, molotov cocktails, grenades, and bullets. There were also military uniforms, binoculars, duffel bags, walkie-talkies, cameras, megaphones, containers of gasoline, cans of paint, balaclavas, a computer, banners, pamphlets and portrait drawings. There was enough material piled up to fill several pickup trucks. Similar material was on display in the courtroom at Bab Sa´doun.

The prosecution contended that the material in the courtroom had been seized from the defendants. But nothing happened in court to show that to be so. The defendants were asked if they recognized any of the arms that were allegedly seized. One said he did, a pair of family pistols. The more typical response was, "Show me what was seized from me." But no one showed them. The court just moved on. For instance, the lawyer for Hachemi Dhibi, a 26-year-old teacher, noted at Bouchoucha on July 16 that the report of the *juge d'instruction* said that objects had been seized from Dhibi. The lawyer asked, "Where are these objects? Would someone please show them to me?" The lawyer for Amara Ben Jellab at Bouchoucha on July 17 made the same request. So did the lawyer for Mohamed Ezzeddine Jemaiel at Bab Sa´doun on July 28 (*Le Temps*, July 29, 1992).

On July 20, Mohamed Chakroun, as spokesman for the defense bar, presented toward the end of the *interrogatoire* at Bouchoucha a list of unanswered defense requests to match the inventories of seizures with the goods seized. The files for various defendants listed inventories of material seized, but the accused were never shown the goods that were allegedly captured from them.

The Code of Criminal Procedure says that the *juge d'instruction* is to seize anything capable of demonstrating the truth in a case. Article 97 requires him to make an inventory of the goods seized, whenever possible, in the presence of the accused or of anyone else in whose possession the seized goods are found.

According to the defense lawyers, these procedures often were not followed for the defendants at Bab Sa´doun and Bouchoucha. Many of the defendants were already in detention when the alleged seizures took place. They were conducted neither in the presence of the accused nor of any of his relatives or neighbors. The defendants commonly denied any possession or even knowledge of what was allegedly seized from them.

The courts did not, during the questioning of defendants, accede to any request for matching the actual arms with the inventories of arms seized. Several such requests were refused on the grounds that since the accused denied having the arms there was no point in the matching. For instance at Bab Sa´doun on July 27, the lawyer for Mohamed Lahbib Lassoued, a 34-year-old engineer and the alleged leader of the Vanguards of Sacrifice, wanted to see the arms alleged to have been in Lassoued's

possession. Judge Youssef refused on the ground that the defendant had denied ever having them (*Le Temps*, July 28, 1992).

If the court was prepared to accept the denial of the accused at face value, then there was indeed little point in showing the accused the arms seized. However, that was not the court's position. Rather, the court was holding that it was inconsistent of the defense to both ask to see the arms and deny their possession. Defendants who denied possession of the arms were in effect forfeiting their right to see the arms they were accused of possessing.

By this logic, the only defendant with a right to know the case against him is one who pleads guilty. Conversely, defendants, like those at Bab Sa´doun and Bouchoucha, who plead innocent are not entitled to know the case against them.

Failure to Investigate Claims that Confessions Were Extracted Through Torture

The most serious flaw in the trials was the courts' failure to investigate the claims made by most defendants that their confessions to the police had been extracted through torture. Virtually all of the defendants repudiated in court the statements they had made in police custody and before the *juge d'instruction*. If the statements made then had been truly voluntary, why were they being so systematically denied at trial? The defense's attempt to challenge the voluntariness and truthfulness of the confessions struck at the heart of the prosecution's case because, without these earlier confessions, the evidence of a plot against the regime became flimsy.

There was *prima facie* evidence that the accused had been tortured. Defendants would limp on and off the court stage. Some could not stand during their testimony. That was true, for instance, of Jalel al-Mabrouk at Bouchoucha on July 13 and Mohamed Habib Ayashi at Bab Sa´doun on July 28.

The accused would show their wounds to the court, sometimes rolling up sleeves and trouser legs to display scars and discolorations. They described torture and the sequelae of torture. Abdullah Ben Salah M'Salhi said at Bab Sa´doun on July 28, "After my (police) detention my health was precarious." Ahmed Amara, testified on July 18 at Bouchoucha, "the *juge d'instruction* had commented on the deterioration of my health."

Many of the accused seemed depressed in court. Hédi Rabhi, a sergeant-major in the army, testified July 28 at Bab Sa´doun, that during the *instruction* "I was in a difficult psychological state." During his testimony his whole body began to shake. Judge Youssef asked him to leave the courtroom to collect himself (*Le Temps*, July 29, 1992). Rachid Trimeche, an army captain, testified on July 18 at Bouchoucha, "Because of a severe psychological crisis, I attempted suicide three times during my detention." (*Le Temps*, July 19, 1992.)

The claims of torture are consistent with Amnesty International's finding that in Tunisia,

> Torture has been practiced systematically not only in police and national guard stations throughout the country but also in detention centers in Tunis, including at the Bouchoucha

police station, at the national guard center at al-Aouina and in the Ministry of the Interior. Detainees have died in custody in suspicious circumstances. Allegations of torture or ill-treatment are rarely investigated by police or judicial authorities. Deaths in custody remain unresolved. The evidence that the above violations are condoned at the highest level is compelling.[25]

The independent Tunisian League for Human Rights also denounced abuses in detention before its dissolution in June 1992. In a communiqué issued on June 14, 1991, the League noted "the serious abuses that have accompanied the security operations during the most recent confrontation between the authorities and an-Nahdha, which violated in a grave manner the fundamental rights of the accused and their families." The League said it would investigate cases of Islamists who had died recently in detention in suspicious circumstances.[26] After additional deaths in detention, the League called in December 1991 for an official investigation into "the high number of suspicious deaths in police stations that may be linked to torture."[27]

A central issue at the trials was what, if anything, the courts were going to do about the allegations of torture. They did little.

Despite the *prima facie* evidence that many defendants in this case had been mistreated, the prosecutor argued that because a separate complaints procedure existed to handle such allegations the court should decide on the merits of the case. This position seems to violate the prosecutor's duty pursuant to the U.N. Guidelines on the Role of Prosecutors to refuse to use such tainted evidence.

The prosecutor's position was absurd for two reasons. One was that the complaints procedure to which he referred is non-functional. Amnesty International reports: "None of the numerous complainants interviewed by Amnesty International had ever received responses to their complaint or requests for medical examinations or further information."[28]

The second reason is that the court has a duty to determine admissibility of evidence. It has a duty to prevent the admission into evidence of confessions obtained through torture. The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Tunisia ratified in 1988, provides in article 15:

> Each state party shall ensure that any statement which is established to have been made as the result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

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[25] "Prolonged Incommunicado Detention," p. 1.

[26] See Michel Deuré, "La ligue des droits de l'homme dénonce les `bavures' dont auraient été victimes des `comploteurs' islamistes," *Le Monde*, June 16, 1991.

[27] Agence France-Presse bulletin, December 13, 1991.

[28] "Prolonged Incommunicado Detention," p. 12.

Indeed, the convention requires in article 12 that a prompt and impartial investigation be conducted when there is reasonable ground to believe that torture has been committed.

The Tunisian Code of Criminal Procedure also speaks to the matter, in article 199:

> All acts or decisions contrary to public order, fundamental rules of procedure and the legitimate interests of the defense are null and void.

The effect of this article is arguably to invalidate any charges laid after consideration of a statement made to the police or the *juge d'instruction*, when it is established that the statement is the result of torture — even where other evidence might support the charge. That would be the practical result in the Bab Sa´doun and Bouchoucha trials in any case. For most accused, the only evidence against them was their own statements and statements of other accused. If the statements of all the accused who claimed torture were removed from evidence, there would be virtually no case left, at least on the main charge of attempting to change the regime by force.

Article 13bis of the Code of Criminal Procedure provides that anyone in investigative detention, or his spouse or a close relative, can ask for a medical examination. When transferred to the *instruction*, the *juge d'instruction* has the discretion to grant a detainee's request for a medical examination, but is under no obligation to do so, according to article 54(2) of the code.

There were reports of medical examinations on file for some of the defendants, such as Jalel al-Mabrouk, who testified at Bouchoucha on July 13, and Abdelhamid Jelassi, who testified at Bouchoucha on July 21. The critical point, however, is that these examinations were not forensic medical examinations intended to determine sequelae of torture. They were, rather, ordinary clinical reports by physicians who were treating what may have been the consequences of torture.

Some of the accused at the Bab Sa´doun and Bouchoucha trials testified that requests for medical examinations made to the police while they were in detention or to the *juge d'instruction* were ignored. The government replied that few such requests were in fact made and that when they were made, they had been granted.

Whether these requests were made is to a certain extent academic, because the accused were often not aware of their right to make the request. Some did not have access to the one person who could tell them of this right, their lawyer, until after the *instruction* stage. Mohieddine Ferjani, a former air traffic controller, testified at Bouchoucha on July 14 to this effect. Ferjani said he had been unable to contact a lawyer before or during the *instruction*, and therefore did not know he had had the right to ask for a medical examination (*Le Temps*, July 15, 1992).

At the trial, as at the *instruction* stage, the accused could request a medical examination but did not have a statutory right to have one. Virtually every accused at both Bab Sa´doun and Bouchoucha courts claimed to have been tortured and asked to be examined. (A few of the accused did not claim torture. For instance, Habib Ellouze testified at Bouchoucha on July 18 that he was not mistreated when in police detention. *Le Temps*, July 19, 1992.)

At the beginning, the courts neither accepted nor rejected most requests for medical examinations, but simply recorded them and moved on. (There were exceptions. On July 14, Judge Kdous at Bouchoucha granted a medical examination to Mohieddine Ferjani.)

The defense wanted specialists to perform the medical examinations. But in those few cases where the dossiers contained medical reports, Judge Kdous at Bouchoucha seemed to think they sufficed, even though the attending physicians were not specialists. On July 13, he asked Jalel al-Mabrouk, "Is not the doctor from the prison a doctor?" For Mabrouk, it was not enough. His lawyer wanted more than just an examination for prescribing treatment, but an examination to determine the degree of incapacity from which Mabrouk suffered (*Le Temps*, July 14, 1992).

Ajmi Lourimi testified at Bouchoucha on July 10 that he had requested before the *juge d'instruction* to be examined by a psychiatrist but had been checked instead by a psychologist (*Le Temps*, July 12, 1992). When he reiterated his demand for a psychiatrist the prosecutor replied that a psychologist's exam was sufficient, and it was superfluous for Lourimi to be examined by a psychiatrist as well.

In August, the courts responded to the defendants' demands. The Bouchoucha court ordered doctors to examine 69 defendants. The Bab Sa´doun court ordered 40 exams. The resulting reports, while significant in quantity, were deficient in quality. Although one third of the reports showed physical injuries, they concluded that none of the defendants displayed "concrete signs that could be attributed to acts of violence or torture." According to a government statement, "tissue examination did not reveal any signs of injury or of `a change or disruption' in the normal bodily functions of the defendants." The defendants were found to be "in good general health."[29]

There are both physical and psychological sequelae of torture that, long after the act, will be noticeable to a specialist but may elude a physician who is not specially trained.[30] Detailed protocols have been drawn up for establishing whether a person has been tortured. All defendants who claimed torture should have been entitled to an examination by a specialist familiar with the methodology. In this important respect the court-ordered reports were unsatisfactory.

The state's weak follow-through on evidence of torture was shown also by the failure of the courts to scrutinize the findings of a major government report on human rights abuses that was released during the trials. The so-called Driss report was the output of a commission appointed by President Ben Ali on June 20, 1991 and chaired by Rached Driss, a former ambassador to the U.S and to the U.N. The commission's initial report, submitted to the president on September 11, 1991, was published only in summary form. The commission then prepared a second report gauging the extent to which its recommendations had been implemented.

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[29] An undated government statement made available to MEW on October 1, 1992.

[30] See Glenn R. Randall and Ellen L. Lutz, *Serving Survivors of Torture: A Practical Manual for Health Professionals and Other Service Providers*, American Associaton for the Advancement of Science, 1991.

That report, issued on July 13, 1992, was more than a whitewash but far less than a full and open disclosure of human rights violations in Tunisia.[31] It avoids the word "torture," preferring such phrases as "bad treatment" and "deaths under suspicious circumstances." It states that 116 police officers have been implicated in 105 cases involving various abuses, but gives few details about the cases. The commission visited several prisons but skipped the holding unit of the Ministry of the Interior in downtown Tunis, where many Islamists were allegedly tortured.

The commission must have collected a lot of hard data: names, dates, places, types of injuries, and so on. Its report contains some details on those who died suspiciously, but nothing is said about those who are still alive: who they are, who administered the "bad treatment" and where, what the bad treatment was or whether it was inflicted to extort confessions.

The commission held no public hearings and issued no invitations to the public to comment or make submissions. The only publicity surrounding the commission's work was what the tightly controlled press chose to give it. There was enough coverage to prompt some families of detainees to come forward to complain to the commission that a detained family member had been tortured. But those who were in prison were unable to approach the commission; MEW and the Law Group received testimony that some detainees who asked prison authorities for permission to meet Driss were prevented from doing so.

One defendant at Bouchoucha, Abdellatif Mekki, testified on July 20 that Driss had visited him in prison. What did Driss learn? MEW asked Driss in a meeting on July 24 how the courts could receive any information he had gathered relevant to the defendants on trial at Bouchoucha and Bab Sa´doun. Driss replied that any decision about releasing such information was in the hands of President Ben Ali. It was not released.

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At the Bab Sa´doun court, the obstacles to obtaining a fair hearing into allegations of torture were compounded by the erratic and inappropriate behavior of Chief Judge Youssef. On July 27, the first day of the *interrogatoire*, the MEW/Law Group observer watched Youssef repeatedly cut off the accused when they talked of torture, ejecting them from the courtroom if they persisted. (The two defendants who were ejected when the MEW/Law Group observer was in the courtroom were eventually allowed to come back after remonstrations from their lawyers.)

Judge Youssef ridiculed claims of torture. He asked defendant Saber Ben Abdallah, "You tried to overthrow the government and you complain about being hit?" He asked another defendant, "You may be injured, but how do I know you got your injury from torture? There may have been an accident." To another he remarked, "Torture is not enough of a reason to sign a statement if it is not true."

Many of the accused, besides requesting medical examinations, asked that police station registers be produced in court. Their intent was to draw attention to their claims that they had been held well beyond the legal limit of ten days for investigative detention.

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[31] "Report to the President of the Republic on the Implementation of the Recommendations of the Commission of Enquiry," Higher Committee for Human Rights and Basic Freedoms, July 13, 1992, available from the Embassy of Tunisia, Washington, D.C.

Salem Bouzana testified on July 16 at Bouchoucha that he was held 50 days at the Ministry of the Interior before being brought to the *juge d'instruction*. Ahmed Amara testified on July 18 at Bouchoucha that he was arrested on May 18, 1991 and brought before the *juge d'instruction* on June 25, 1991. Abdellatif Mekki testified on June 20 at Bouchoucha that he was arrested in May but that court records show a July date of arrest for him. Mounir Letaïef testified on July 11 at Bouchoucha that he spent twenty days at the Ministry of the Interior before seeing the *juge d'instruction* (*Le Temps*, July 12, 1992).

According to article 13bis of the Code of Criminal Procedure, the police must record the date of arrest. However, according to Amnesty International, the police "systematically" falsify the true dates of arrest so that the period of investigative detention period appears, according to the police register, to be within the legal limits. This subterfuge allows time for the most visible traces of torture to fade before the suspects are brought before the *juge d'instruction*. Some suspected Nahdha activists have been held in investigative detention for as long as five months, Amnesty International reported.[32]

Although aware that the dates may have been altered, defendants at the Bouchoucha trial asked that the police registers be inspected by the court. Judge Kdous assigned a magistrate to look at one register to see if the date of arrest recorded in the register coincided with the date in the case dossier. The judge informed the court that this investigation had disclosed no irregularity. The other requests to examine the police registers were put off by the court and eventually refused.

Justice Minister Chaabane told MEW and the Law Group that the supposed discrepancy between actual and recorded dates of arrest was a fabrication of an-Nahdha. He said that when one member of a Nahdha cell did not show up for a meeting because of an arrest, the rest fled without telling their families. When they were later arrested they claimed that their arrests occurred on the date of their flight. This explanation, however, does not account for cases where witnesses saw the arrest and can vouch for the date that it actually took place (see the Amnesty International report for examples).

The dispute over the actual length of detention obscures one important point: ten days incommunicado detention is legal and common in Tunisia, yet it is far longer than international standards permit. The U.N. Standard Minimum Rules for the Treatment of Prisoners provides in article 92:

> An untried prisoner shall be allowed to inform *immediately* his family of his detention and shall be given reasonable facilities for communicating with his family and friends and for receiving visits from them, subject only to such restrictions and supervision as are necessary to the interests of the administration of justice and of the security and good order of the institution. [emphasis added.]

Under no circumstances can ten days be considered immediate. Such a period also violates the detainee's right to be given an effective and prompt opportunity to challenge his detention. The ICCPR states in article 9(3), "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...."

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[32] See "Prolonged Incommunicado Detention," summary and pp. 29-31.

Ten days is not prompt. The European Court of Human Rights held in a 1986 case from the Netherlands interpreting the identical provision in the European Convention on Human Rights, that an accused is not brought promptly to court after arrest where there is a delay of *six* days between arrest and court appearance.[33] In 1988, the same court held in a case from the United Kingdom that an accused is not brought promptly to court where there is a delay of *four days and six hours* between arrest and court appearance.[34] In many countries, two days is the maximum permissible period. The ten-day provision should not be in Tunisian law at all.

Judicial and Prosecutorial Impropriety

The proceedings at Bab Sa´doun were in marked contrast to the proceedings at Bouchoucha. Judge Kdous at Bouchoucha allowed the defendants to talk of their torture, which he should have done, and even of their political and religious convictions, which he need not have done, and this virtually without interruption. At Bab Sa´doun, Judge Youssef's questioning of the accused lacked even the pretense of being a search for the truth. It seemed more like a search for any evidence that might lead the court to find the accused guilty.

On the first day of the *interrogatoire* at Bab Sa´doun on July 27, Judge Youssef behaved in a wholly improper manner, haranguing, harassing, ridiculing and interrupting the defendants. All day long, for twelve-hour sessions, the witnesses said virtually nothing and the judge did nearly all the talking. Judge Youssef would ask the accused a long sequence of inculpatory leading questions. All he seemed to want as answers was yes or no, preferably yes. The only time he seemed willing to allow the accused to expand on their answers was when their answers were inculpatory.[35]

There were whole areas, such as torture, that Judge Youssef would not let the accused discuss at all. This became a subject of intricate negotiations between the bench and the bar. In the end, while continuing to prevent the defendants from talking about torture, the judge said he would record each complaint, and asked the accused to proceed.

Judge Youssef made statements from the bench which indicated that he had made up his mind about the facts of the case. He said to one defendant, "Your explanation is unlikely to be true, that you did not know what was going on. It is unsatisfactory." He said to another, "Your answer is not convincing. Answer convincingly." He admonished one defendant who had just answered a question, "Tell the truth," implying that the judge believed the defendant had not already done so. When another defendant said, in response to a question from the judge, "I do not know," the judge replied, "You must know." The judge would ask a defendant the same question over and over again. The implication was

[33] ***De Jong v. the Netherlands*** (1986) 8 E.H.R.R. 20 at paragraph 53.

[34] ***Brogan v. U.K.*** (1988) 11 E.H.R.R. 117.

[35] The coverage in ***Le Temps*** of the day's session did not convey the judge's deplorable conduct. It comes across, however, in ***Le Monde***'s July 29 story by Michel Deuré.

clear that the judge did not accept the answer that was given.

One accused tried to stop the harangues of Judge Youssef by haranguing him back, matching word for word. That did not stop the judge, who just kept on talking. For quite some time both the accused and the judge talked simultaneously.

Judge Youssef sometimes put words into the mouths of defendants. He remarked to one, "You say you want to overthrow the regime." The accused replied, "I did not say that." The judge attempted to trick several defendants into inculpatory statements, picking out insignificant details from previous declarations and asking if the accused agreed with those details. When the accused said he did, the judge would say, "So you agree that your past statements are correct?" The lawyers objected that agreements on points of detail did not signify agreement with the inculpatory statements in the declarations.

Judge Youssef brought the accused into court not one by one, but in bunches of four to six. There was nothing intrinsically wrong about this; indeed, all of the defendants should have been in the courtroom together. But the bunching of the defendants had no logic to it; the judge simply found it quicker to question the defendants in this fashion than to delay the proceedings while one defendant was ushered into the court and another was ushered out.

Judge Youssef's conduct in court prompted a walk-out by defense lawyers. Some left on the spot to protest the judge's constant interruptions of the defendants and his rejection of the defense's legal motions. Others signed a petition of withdrawal but intended not to file it until after the court's questioning of the accused, so that the lawyers would not leave their clients defenseless before the judge. One lawyer who walked out then tried to visit his client to explain the reasons for his withdrawal. But Judge Youssef cancelled the lawyer's visiting privileges after he walked out.

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As a general principle, the function of the prosecution is to assist the court in rendering justice, especially in civil-law systems such as the one in Tunisia. The U.N. Guidelines on the Role of Prosecutors states that "Prosecutors shall ... respect and protect human dignity and uphold human rights." (guideline 12)

In their comments before the court, the prosecutors at both Bouchoucha and Bab Sa´doun disregarded their obligation to look after the rights of the defendants. For instance, at Bouchoucha on July 9, when the defense was complaining about difficulties of access to clients in prison, the prosecutor said, "all lawyers have a right to visit the prison," (*Le Temps*, July 10, 1992) as if the theoretical right to visit was a real answer to the practical difficulties lawyers faced. When a lawyer at Bouchoucha complained about not having the file of his client in time, the prosecutor at Bouchoucha said, "this lawyer complains he cannot have the file of his client, but other lawyers have had the files of their clients for four or five months". The implication of the prosecutor was the files were available for months and if a lawyer did not have a client's file, it was the lawyer's fault. Abdelwahab Béhi, the president (*bâtonnier*) of the bar association, who served as an intermediary between the defense bar and the court, responded that some but by no means all of the files had been available to the defense four or five months before the trial at Bouchoucha started.

Both at Bab Sa´doun and Bouchoucha, defense counsel requested that the judge ask the defendants if they had pressed for lawyers during their *instruction*. Defense counsel presented these questions to the court even in cases where the report of the *juge d'instruction* stated that the accused had been asked if he wanted a lawyer and had refused. The prosecutor said that the lawyers' request, with its suggestion that the *juges d'instruction* had filed false reports, constituted a crime against the court, and asked that the defense lawyers be punished. The court declined to discipline the defense lawyers, but it also refused to put the question to the defendants.

Violation of the Right to Examine Witnesses

The ICCPR, in article 14(3)(3), gives every defendant the right to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. That obligation was violated in several ways.

Confrontations, the convocation of two witnesses who had given apparently conflicting statements, were routinely requested by the defense and just as routinely put off, unanswered. The confrontations observed by the MEW/Law Group observer took place not necessarily because the accused had asked for them, but because the court, on its own initiative, thought that they might be useful.

Confrontation is a procedure that exists in civil-law systems but not in common-law systems. It involves the court's convoking two witnesses at the same time in order to confront each one with the conflicting statement of the other and ask for comment. There then follows a back and forth between the two witnesses, under the judge's guidance, until the conflict is either resolved or clarified. A confrontation is not a debate between two witnesses but rather an effort by the court to obtain fuller disclosure in the face of apparent contradictions in the file.

In general, defense requests for confrontation were eventually withdrawn, because the impetus for the request—a contradiction between a defendant's testimony and inculpatory statements made by other defendants to the police or the *juge d'instruction*—vanished when those other defendants repudiated their earlier statements. The earlier statements to the police and the *juges d'instruction* generally affirmed the insurrectional plot while later statements by the same defendants during the trials denied the plot.

The defendants had their own witnesses, typically alibi witnesses, whom they were prevented from calling. For instance, Hachemi Dhibi, at Bouchoucha court on July 16, was accused of committing arson at an office of the ruling RCD party. Dhibi's lawyer asked that the director of the school where Dhibi worked be allowed to testify. The lawyer indicated that the director would testify that Dhibi was at work the day of the fire. This request, like most of the defense requests, was never approved by the court.

On July 18, the prosecution at Bouchoucha called a witness, Abdelkader Jedidi. The witness was introduced during the questioning of defendant Habib Ellouze. Ellouze was accused of having advocated during a Nahdha meeting violence against the state as a means of action. He denied the accusation.

Abdelkader Jedidi was called to testify without notice to the defense. Jedidi testified that he had been at the meeting, and heard Ellouze call for violence. Ellouze acknowledged that Jedidi had attended the meeting, but denied Jedidi's account of it (*Le Temps*, July 19, 1992).

Jedidi had a recent record of anti-Nahdha activities, including publishing articles critical of the party in the press.[36] It would have been legitimate to cross-examine him about that history. But the defense was not allowed to ask Jedidi any questions, either then or subsequently.

[36] See, for example, "Abdelkader al-Jedidi tells *Haqa ʿiq*: Choosing Violence is the Path to Suicide," (in Arabic) *Haqa ʿiq/Réalités* magazine (Tunis), July 10, 1992.

Violation of the Right to Attend One's Trial

There should have been 135 defendants in the courtroom at Bouchoucha, the 171 who were in custody minus the 36 being tried in absentia. At Bab Sa´doun there should have been 87 defendants present, the 108 in custody minus 21 in absentia. During the two days of the *interrogatoire* at Bouchoucha that the MEW/Law Group observer attended, there was only one defendant in court at a time. At Bab Sa´doun, the greatest number of defendants that the MEW/Law Group observer saw in court at any one time was six. The defendants would be brought to court in turn, escorted to the front of the court, questioned by the chief judge, and escorted out.

The ICCPR states in article 14(d) that a defendant has a right "to be tried in his presence." Tunisian domestic law also asserts this right.

MEW and the Law Group heard three explanations why the accused were not in court together for much of the proceedings. One was offered by Minister of Justice Chaabane. He told the MEW/Law Group observer that when the case began at Bouchoucha on July 9 and the accused were brought in together for the reading of the charges, the assembled defendants proceeded to sing the national anthem and chant the Quran for three hours without halt. The Court could not interrupt the accused, he claimed, because custom prohibits the interruption of someone who is reciting the Quran. So, simply in order to allow the trial to proceed, the panel of judges decided to keep the accused out of the courtroom. This would accord with the Tunisian Code of Criminal Procedure, which provides in article 147 that an accused who disturbs the court by his behavior can be removed from the court.

But the events of July 9 were not as Minister Chaabane characterized them. Both lawyers and journalists who were present at Bouchoucha that day said that the singing of the national anthem and the recitation of the Quran lasted only a few minutes. The Agence France-Presse report of the session described the interruption as lasting "five solid minutes." *Le Monde* of July 11 reported that the judges, after their arrival, permitted the chanting to go on "five solid minutes longer" before calling out the names of the accused and reading the charges against them.

Neither at the time of the interruption nor afterwards did Judge Kdous make any comment on the impropriety of the behavior of the accused in court, according to everyone present to whom the MEW/Law Group observer spoke later. If defendants are to be evicted for causing a disturbance, they should be warned before it happens. In this case, the accused were given no warning. Nor were they or their lawyers ever told afterwards that they had been barred because of improper behavior.

A second government justification for bringing the accused before the court individually is that this conforms with Tunisian law. Judge Youssef told the defense lawyers at the opening of the trial at Bab Sa´doun, "There is nothing in the law that requires the presence of all the accused." (*Le Temps*, July 10, 1992.) The External Communication Agency stated in its July 27 rebuttal to the July 25 statement issued by the three U.S.-based human rights groups,

> [T]he individual trial of the defendants ... is stipulated by the Penal [Criminal] Procedure Code....The court has also the right to call to the stand any defendant for the purpose of confronting any particular testimony....The court did not deny any defendant the right to defend

himself and to request to be confronted by any defendant in order to reject any accusation.

In any case, the presence of all defendants is mandatory during the presentation of the charges by the court, the presentation by the prosecution of its case and during the announcement of the sentences.

The Tunisian government here is invoking domestic law that does not meet international standards regarding the right of defendants to be present at their own trial. As a signatory to the ICCPR, Tunisia, in accordance with article 2(2), is obliged to bring its law into conformity with the principles enshrined in the covenant.

The External Communication Agency claimed that the accused were not harmed by their absence from court when others were testifying. They could ask for a confrontation whenever there was a conflict between the testimony of two defendants. During a confrontation, both defendants would be present in court to hear each other's testimony.

This reply is flawed in many respects. A defendant is entitled to be present for his whole trial, not just for that part of the trial where his testimony is contradicted. Secondly, once a defendant is absent from court, he learns of contrary testimony only if someone else brings it to his attention. The defendants' lawyers could not be relied to do this because, rightly or wrongly, not all of them attended the entire trials at Bab Sa´doun and Bouchoucha.

Furthermore, the government's response makes no sense unless requests for confrontation were actually granted. The press release correctly states that none of the requests for confrontation had been refused so far. But neither had they been granted. They had merely been recorded without decision. In the end, most of the requests for confrontation were withdrawn because, as explained earlier, they turned out to be moot.

A Single Case Arbitrarily Split in Two

The right of a defendant to be tried in his presence was violated also by the arbitrary splitting in two of the trial. A single conspiracy had been chopped into two pieces, one that was on trial at Bouchoucha, the other at Bab Sa´doun.

International human rights law says little about joinder and severance of charges. There is no general principle that all co-conspirators must be tried at the same trial. It quite often happens that co-conspirators want separate trials, so that those on the fringes of the conspiracy do not have their defense prejudiced by evidence against more central conspirators, and so that verdicts of defendants will not be influenced by evidence deemed admissible for other defendants but inadmissible for themselves.

In this case the defense demanded a joint trial, and claimed Tunisian law required it. The court insisted on separate trials on the ground that the facts in the two trials were "temporally distinct."[37] The

[37] Agence France-Presse dispatch, July 10, 1992.

government maintained that there were two distinct groups of defendants.[38] Those before the Bouchoucha court were activists of an-Nahdha, while those at Bab Sa´doun were accused of belonging to the Vanguards of Sacrifice and the Salvation Group, allegedly violent organizations that had been "co-opted" by an-Nahdha. In other words, the Bouchoucha court was to try the planners and the lay operatives of the attempted insurrection, while the Bab Sa´doun trial prosecuted the armed wing.

The prosecution described the insurrection plot as consisting of five stages (*Le Temps*, July 10, 1992):

(1) informing the people: psychologically preparing supporters of the movement and mobilizing their efforts, by the dissemination of anti-regime tracts and graffiti;

(2) taking to the streets: violent marches and demonstrations that would put the movement in charge of the streets and show that the security forces were not capable of protecting the public order;

(3) sabotage and escalating the violence: attacking police posts, offices of the ruling RCD party, security force members, and all who oppose the movement;

(4) armed insurrection and civil disobedience: calling on the rank and file to take control of the streets, by erecting barricades together with their wives and children, in order to provoke authorities to respond by calling out the army;

(5) assault by the military wing of the movement: once the army intervenes, the military wing of the movement is to join forces with the insurgents in order to overthrow the regime and proclaim an Islamic Republic.

To protect the defendants' rights when a case is divided into multiple trials, the defense must be able to prevent leakage of inculpatory evidence from one trial to the other, and be able to introduce exculpatory evidence from one trial into the other. But these principles were violated. At one courtroom, for example, weapons were on display that had allegedly been seized from defendants in the other trial.

Defense lawyers were unable to pursue their chosen strategy because of the splitting of the case. Their basic contention was that there simply was no conspiracy to overthrow the regime by force. The best way to attack the prosecution's case was to scrutinize its own evidence, illogicality and inherent contradictions. But if the prosecution's evidence in one case contradicted the prosecution evidence in the other, how could the defense bring that contradiction to the attention of the court? The defense was not, after all, going to introduce prosecution evidence from one case into another.

The first four stages of the conspiracy were the subject of the trial at Bouchoucha. The final stage was on trial at Bab Sa´doun. An acquittal of all defendants in one trial and a conviction of all defendants in the other trial would have been inconsistent verdicts. It would be nonsense to say that the first four stages of the plan of insurrection existed but the fifth did not, or vice versa. Yet that would

[38] See, for example, the July 27, 1992 statement by the External Communication Agency.

have been the conclusion to be drawn if one court acquitted everyone and the other convicted everyone.

The arbitrary division of the case meant in effect that the accused were not present at all of their own trial, since one element of the offense charged against them, in each case, was being tried elsewhere.

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APPENDIX B

Chronology of the Islamist Trials
July 9 - August 30, 1992

July 9: The trial of 171 defendants, including 36 in absentia, opens in Bouchoucha military court with the reading of the charges (*acte d'accusation*) against them. The defendants include some 15 army officers.

July 10: The trial of 108 defendants, including 21 in absentia, opens at Bab Sa´doun military court. About thirty of the defendants are members of the army or the police. After the reading of the charges, the trial is postponed until July 27 at the request of the defense. Lawyers said they need more time to examine the dossiers and meet with their clients. Some also argue that since they have clients at both trials they cannot represent them if the trials run concurrently.

Also on July 10, the questioning of the defendants *(interrogatoire*) begins in the Bouchoucha case and continues until July 21. During the *interrogatoire*, the defendants are invited to comment on the charges and request witnesses on their behalf.

July 21: The *interrogatoire* is completed in the Bouchoucha case, and the court adjourns until July 30, in order to permit the defense to study the dossiers.

July 27: The *interrogatoire* in the Bab Sa´doun case begins.

July 30: The Bouchoucha case resumes for the start of the *plaidoirie* (oral submissions by the prosecutor and the defense lawyers), but after a brief session is adjourned until August 3 in order to give the defense more time to prepare their cases.

August 1: The *interrogatoire* at Bab Sa´doun is completed.

August 3: The Bouchoucha case resumes but then adjourns to August 10 at the request of the defense.

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Chronology of Trial
Continued

August 7: The Bab Sa´doun trial resumes. After a brief session, the court decides to postpone the trial until August 17, to permit the defense lawyers more time with the dossiers.

August 10 : The *plaidoirie* opens in Bouchoucha case with the prosecutor requesting the death penalty for 19 of the defendants.

August 17: The *plaidoirie* opens in Bab Sa´doun. The prosecutor, Col. Mohamed Ben Abdallah, asks for nine death penalties.

August 20: The *plaidoirie* concludes at Bouchoucha, and the court decides to put off for one week the closing statements of the defendants.

August 26: The *plaidoirie* ends at Bab Sa´doun, and a final session is scheduled for August 29.

August 27: The Bouchoucha court completes its sessions and begins deliberation.

August 28: The Bouchoucha court announces verdicts and sentences: no death penalties, but 35 life sentences, of which 16 are against persons at large, 127 sentences of between one and 24 years, and nine acquittals. Only five of those acquitted, including four members of the military, will be released because the others are serving sentences imposed by other courts.

August 29: The Bab Sa´doun court hears the closing statements by defendants, and the court goes into deliberation.

August 30: The Bab Sa´doun court announces verdicts and sentences: 11 life sentences, 92 sentences of between one and twenty years in prison, and 5 acquittals.

Late September: The *cour de cassation* confirms the convictions in both courts, ruling that the trials conformed with the law and legal procedures.