

**ILF-Tunisia Case Notes****January-April 2017**

Welcome to the first edition of the ILF-Tunisia Case Notes. Established in 2015, the International Legal Foundation-Tunisia (ILF-Tunisia) is a nongovernmental provider of criminal legal aid services to indigent men, women and children charged with criminal offenses in Tunisia. ILF-Tunisia contracts with skilled Tunisian lawyers who receive day-to-day, case-by-case mentoring from international experts in criminal defense, increasing their capacity to proactively and effectively defend the rights of the accused and drive systematic change.

ILF-Tunisia strives to ensure unencumbered access to counsel for all accused persons from the moment of arrest, and works to bring about sustainable changes in the criminal justice system by challenging violations of the rights of suspects and accused persons in court and demanding that they be addressed in accordance with the laws and Constitution of Tunisia. This litigation not only secures more positive outcomes for individual clients, but also increases awareness of rights violations among justice sector actors. This increased awareness ultimately leads to greater implementation of laws which protect the rights of the accused.

These Case Notes will be published every four months and will provide readers with an overview of changes in criminal defense practices that ILF-Tunisia is pioneering, and their impact both on individual clients and the justice system as a whole. We hope you will find them useful. This first edition deals with three key issues: (1) a successful challenge to the illegal pretrial detention practices of Tunisian authorities; (2) the impact of defense investigations in criminal cases; and (3) the impact of early access to legal aid on detainees' custody status and case outcome.

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*In the following case, the ILF-Tunisia lawyer successfully argued before the Appeals Court in Tunis for the dismissal of her client's case due to his unlawful pretrial detention. This case shows the impact that ILF-Tunisia's appellate practice is beginning to have in compelling police and prosecutors to abide by the law and protecting the rights of Tunisians.*

*ILF-Tunisia is innovating criminal defense practice in Tunisia by introducing pretrial motions practice to challenge the illegal and arbitrary actions of authorities, and by challenging the courts to dismiss cases when the police and prosecution violate the law. When ILF-Tunisia lawyers encounter illegal actions by police or prosecutors, they begin by challenging those violations in the First Instance Court and filing motions for dismissal. If the First Instance Court fails to accept ILF-Tunisia lawyers' arguments, they then appeal the case and move for dismissal based not only on the illegal procedure conducted by the police or prosecutor, but also on the lower court's error in not recognizing the violation of law and dismissing the case. As the courts begin to accept these arguments, ILF-Tunisia lawyers are making concrete the power of the Court to provide a prophylactic and legal remedy to the violation of individuals' legal rights.*

*This case is one of several ILF-Tunisia cases concerning a violation of the newly amended procedural rules for initial investigative detention. The gap between the law and the actual*

*practice of Tunisian authorities reflects both a lack of knowledge of the new laws and a general disregard for the proper implementation of the law. By challenging the illegal application (or non-implementation) of the new procedural laws, ILF-Tunisia is fighting for people's fundamental human right to be free from arbitrary or illegal detention, as well as their right to access to legal representation during the early and critical stages of pretrial detention.*

**In the matter of A.W. (ILF 150, Consultant Attorney Hanen Fathallah)**

The client in this case, A.W., is a 30-year-old man with a primary school education. His father died when he was young, and he lives at home with his mother and sister (his brother is serving a lengthy prison sentence). As an adult, he has struggled with drug abuse and unemployment.

A.W. was arrested on suspicion of both the possession and consumption of *zatla*, or hashish. Possession and consumption of *zatla* are both misdemeanor offenses as defined by the Tunisian Code of Criminal Procedure (Article 122). Until May 2017, under strict Tunisian drug laws, convictions for possession and consumption of even a small quantity of an illegal drug carried a mandatory minimum of one-year incarceration and a maximum of five years, and the two charges could be run consecutively, meaning that the client faced a maximum of ten years in prison.

After A.W. was arrested and brought to the police station, he was subjected to an initial 24 hours of detention for interrogation and confrontation, in accordance with the law. The prosecutor then authorized an extension of his detention by 48 hours to complete the investigation. However, under recent amendments to the Criminal Procedure Code, which introduced new protections during the initial detention and investigation period, the prosecutor can only extend the initial detention for one 24-hour period in misdemeanor cases and one 48-hour period in felony cases. Therefore, the extension of A.W.'s detention for 48 hours for a misdemeanor offense was unlawful.

ILF-Tunisia consultant lawyer Hanen Fathallah argued at A.W.'s First Instance Court pleading that the extension of detention was illegal, and that therefore the pre-trial procedures must be nullified and the case should be dismissed. The prosecutor argued that, since the charges had not yet been confirmed at the time when he extended the detention, the charge could have been a felony, and that therefore he was authorized to extend the detention by 48 hours. The First Instance Court accepted the prosecutor's argument, the case proceeded, and the client was convicted and sentenced to two years' incarceration (one year on each charge, consecutive).

Ms. Fathallah then appealed the client's case to the Appeals Court, challenging both the prosecutor's argument and the court's decision. She argued that the detention report clearly stated that the arrest was for possession and consumption of a small amount of *zatla*, that both were misdemeanors, and that there was no reading of the facts that could have allowed for a determination that the charge was possibly a felony (e.g. possession with intent to sell/traffic).

Further, Attorney Fathallah asserted that the lower court had erred in its decision when it failed to address the issue of the investigative detention, thereby allowing the unlawful action of the prosecutor and police to continue. The Court, she argued, has a Constitutional responsibility to protect the rights of its citizens, and the First Instance Court should have nullified the procedures and dismissed the case due to the clear violation of A.W.'s rights.

The Appellate Court agreed with Ms. Fathallah, reversed the First Instance Court's decision, and

dismissed the case, sending a strong message to the lower court and to the prosecutor and police regarding the consequences of unlawful actions during the investigation period.

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*The following cases show the positive impact that prompt and thorough case investigation can have on the defense lawyer's understanding of the facts of the case, and on case outcomes. The ILF's attorney performance standards state that defense investigation is necessary to ensure quality, effective legal representation, and that it should be conducted regardless of the client's admissions or statements of facts constituting guilt. This investigation should include, but is not limited to, conducting interviews with and taking statements from complainants, witnesses and police officers; visiting and photographing the scene of the incident; documenting any injuries to the client or damage to property; collecting evidence and viewing evidence in the possession of the government; and consulting with experts about facts and evidence pertaining to the case.*

*Investigation is not a part of the typical defense practice in Tunisia. However, as ILF-Tunisia's consultant lawyers have continued to receive mentorship on proper investigation techniques from the ILF's International Fellows, they have developed an understanding of proactive defense investigation as a critical part of their practice in every case, no matter how clear the case may seem or how much information is ostensibly contained in the court file.*

**In the matter of H.A. (ILF 51, Consultant Attorney Hanen Fathallah)**

The client in this case, H.A. is 36 years old, single, and lives at home. He struggles as a day laborer to help support his large family, as neither of his parents has a steady job.

During a public riot early in 2016, a local Carrefour Supermarket was broken into and over 125 Thousand Dinar (approx. \$53,000) in goods and cash were stolen. Shortly after the riot, the police searched H.A.'s house and found a small amount of items believed to have been stolen from the Carrefour in H.A.'s bedroom (juice, shampoo and shower gel).

H.A. was arrested and charged with theft, property damage, and possession of stolen property. Four co-defendants were also charged in the looting of the Carrefour.

H.A. denied taking part in the break-in and claimed to have found the items on the street, and none of the prosecution witnesses put H.A. at the scene of the crime during the riot or subsequent break-in. Attorney Hanen Fathallah examined the prosecution's case file and could not identify any evidence directly implicating the client in the break-in, with the possible exception of surveillance footage from the Carrefour from the time of the crime, which the Carrefour had handed over to the court. Ms. Fathallah demanded to see the surveillance footage through both written and oral requests, in order to determine whether or not her client appeared in the video.

The judge agreed that defense counsel has a right to see the evidence, but because the court lacked the proper equipment for playing the video, it was not possible to view the video in the courthouse. Ms. Fathallah requested that defense counsel, the prosecutor and the court clerk go to the Carrefour to watch the video on their equipment. This request was denied by the court. She then requested a copy of the video, so that she could view it herself. This request was also denied.

Ultimately, after weeks of unsuccessful attempts by Ms. Fathallah to view the video, the case proceeded to trial. Ms. Fathallah argued that it was the prosecution's burden to prove the case,

and that the fact that neither she nor the court were able to view the video should disqualify its use as evidence, particularly given her extensive efforts to try and view it. She further argued that the prosecution had presented no evidence placing the client at the scene of the break-in.

The court acquitted H.A. of the felony theft and property damage charges against him. Based on the items discovered in his room, he was convicted of a misdemeanor possession of stolen property charge, and was given a time-served sentence and released. The other four co-defendants, none of whom had lawyers who pursued investigation demands, were all convicted of the felony charges, and were sentenced to between 4 and 7 years' imprisonment.

**In the matter of S.B.F. (ILF 139, Consultant Attorney Chiraz Bejaoui)**

The client in this case, S.B.F. is 22 years old. One of four brothers, S.B.F. lost one brother after the Revolution, while another of his brothers is in prison and his third brother is mentally ill and unable to work. S.B.F. also suffers from mental health issues, including self-harm. He lives at home with his mother, father and brother, and picks up odd jobs to help support his family.

The complainant in the case alleged that someone broke into his house during the day by breaking the iron gate and stole several large-scale items, including a flat-screen TV. Three fingerprints were allegedly found on a cardboard box and a jewelry box at the scene of the crime, and a fingerprint report stated that the prints were a match to S.B.F. Based solely on the fingerprint report, S.B.F. was called into the police station for questioning. During S.B.F.'s interrogation by the police and the prosecutor, S.B.F. consistently denied the charges. Besides the fingerprint report, there was no other evidence connecting S.B.F. to the crime.

Attorney Chiraz Bejaoui, with the assistance of an ILF-Tunisia paralegal and an International Fellow, conducted extensive investigation in this case, including consulting experts and visiting the scene of the alleged crime. Based on this, they were able to identify several major flaws in the prosecution's case. Firstly, Ms. Bejaoui conducted research and spoke with experienced lawyers on the forensic science of fingerprint evidence so that she could properly interpret the fingerprint report, as well as investigating Tunisian procedural law regarding fingerprinting. Based on this investigation, she concluded that the report was fundamentally flawed. The 'report' contained no scientific analysis or description of any procedures for analysis. As Ms. Bejaoui learned and later argued before the court, a certain number of "matches" must be found between the latent print and the individual's print in order to have any modicum of reliability. No such analysis was included in the report, which provided no basis for the conclusion that the prints were that of S.B.F. The lack of description of the procedures also meant that there was no way to rule out possible contamination of the sample. Moreover, the report contained no indication of who conducted the test. According to Tunisian procedural law, the police are not authorized to take the fingerprints or conduct fingerprint tests, and both stages must be conducted by an expert.

In addition to her investigation into the fingerprint report, Ms. Bejaoui visited the scene of the alleged crime. She discovered that the home was in a large and crowded apartment building surrounded by many shops, and that the iron gate in question would have required a large tool to break or bore a hole in. These facts, along with the fact that the crime was allegedly committed during the day and the fact that multiple large items including a flat screen TV were alleged to have been stolen, led Ms. Bejaoui to question the veracity of the complainant's story. She attempted to speak to the complainant, but was unable to, and also attempted to canvass the

apartment building for witnesses, but could not find anyone who said they had witnessed the alleged crime. Ms. Bejaoui documented her investigation and took pictures of the scene.

In court, Ms. Bejaoui argued that the court should not adopt the fingerprint report as evidence, and that the lack of any clear basis for the identification of the fingerprints as S.B.F.'s, along with the lack of information about who conducted the analysis, violated S.B.F.'s Constitutional rights to have a fair trial and to present a defense, since S.B.F. could not know the full extent of the evidence against him or challenge the results of the test or the authority or expertise of the person who conducted it. She also presented her argument that the claimant's version of events was inconsistent with the facts she had observed while visiting the crime scene.

Despite these novel arguments challenging fingerprint evidence, the court found S.B.F. guilty and sentenced him to six years' imprisonment. ILF-Tunisia is currently appealing this case, and will argue that the lower court made its judgment based on flawed evidence.

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*The following cases illustrate the positive impact of access to defense counsel at the police station. Early representation is critical to protect individuals from coercive interrogation tactics and ensure that they are not unlawfully detained. Representation during the investigation phase allows defense counsel to advocate against pre-trial detention, which not only serves the interests of the client but also helps impact the outcome of the case. Additionally, early representation means that defense counsel is better equipped to develop a defense and provide quality representation.*

*While the Tunisian Constitution provides for the right to early access to counsel, and recent procedural amendments to Tunisian law support the right of every person to a lawyer during the initial interrogation and confrontation, these rights have not been meaningfully implemented, and lawyers generally only begin providing representation after their clients have been charged with crimes. To address this gap between law and practice, ILF-Tunisia recently launched a groundbreaking project at a National Guard Station in Manouba Governorate, under which ILF-Tunisia consultant lawyers are called to represent clients who have been arrested or brought to the station for questioning on misdemeanor offenses. By providing legal representation promptly at the earliest stage of the case, the ILF-Tunisia consultant lawyers are able to protect their clients' Constitutional rights to counsel, to a fair trial, and to equal protection.*

**In the matter of M.A. and B.A.\* (ILF 177/181, Consultant Attorney Hanen Fathallah)**

*\*Note: ILF-Tunisia does not normally represent co-defendants or two people accused of the same crime in the same case. However, after explaining the conflict of interest to the clients and obtaining their consent to waive any potential conflict, such representation may occur if the interests of justice require.*

The clients, M.A. and B.A., and the complainant are all brothers. According to the complainant, the three brothers worked together, and M.A. and B.A. owed him 800 TND, which they kept refusing to pay. The complainant alleged that during a heated argument with M.A. and B.A. about the money, B.A. tripped him and M.A. hit him with a stick, injuring his hand and arm.

When M.A. and B.A. were invited to the police station for questioning, Attorney Hanen Fathallah was called to represent them as per an agreement between ILF-Tunisia and the police

station to facilitate early access to legal aid services. At the police station, Ms. Fathallah interviewed the clients and participated in the confrontation with the complainant, and was able to uncover information which contradicted the complainant's story and undermined his credibility. She also ensured that this information was included in the police investigation report.

Based on information given to her by the clients, she asked police to verify prior reports of violence filed by the clients against the complainant, and she highlighted the fact that neither client had a criminal history, while the complainant had a lengthy criminal history. In addition, during the confrontation with the complainant, she asked questions of the complainant that led to him making an important contradictory statement, switching which brother it was who hit him from his original statement. She also confirmed that the complainant could not provide any witnesses to the alleged altercation. Furthermore, she noted for the record that the police had violated M.A. and B.A.'s rights when they subjected them to an interrogation. Under the new procedural code, the police do not have a right to 'interrogate' detainees; they can only 'hear' them.

Based on the ILF Consultant Lawyer's advocacy and the inconsistencies she uncovered during the investigation, the prosecutor declined to detain the clients at the police station. However, he did decide to press charges against the clients, and the case proceeded to court.

During the pre-trial period, Ms. Fathallah was able to investigate the case and develop a defense based on her investigations. After speaking with the clients and other members of the family and community who corroborated their story, she learned that the complainant was engaged in an ongoing campaign of violent harassment against M.A. and B.A. orchestrated by their mother. The clients had been the main providers for their family once their father died (the complainant was very young at the time). They were successful financially for some time, and built a home for their mother and younger siblings that allowed them to earn rental income from additional units. When they began to earn less money, M.A. and B.A. stated that their mother became demanding, even suing them for alimony, and turned their younger siblings against them. At one point, the complainant came to the clients' job looking to attack them with a knife and neighbors had to intervene. The mother and the complainant also physically assaulted the wife of one of the clients, as they believed that the client was giving his wife money instead of giving it to the family. The clients had previously pressed charges against the complainant for these incidents, as well as against their younger sister for verbally insulting them.

In addition to this background, Ms. Fathallah learned that the complainant has a long criminal history and frequently gets into fights. Using the documentation in the case file, she investigated the complainant's alleged injury and discovered that it was consistent with a Bennett fracture, which is commonly associated with boxers hurting themselves while throwing punches.

When M.A. and B.A. were interrogated by the judge in their initial hearing, Attorney Fathallah made an oral pre-trial motion to dismiss the case. She explained the background of the feud between the complainant and her clients, her clients' lack of criminal history vs. the complainant's extensive criminal history, the fact that no alleged witnesses were invited to the police station and the lack of corroboration for the complainant's story, the inconsistencies in the complainant's story, and the fact that the complainant's alleged injury was consistent with the

complainant, who is known for fighting, throwing a punch rather than being hit with a stick. The judge issued an immediate decision acquitting the clients and dismissing the case.

**In the matter of H.T. (ILF 171, Consultant Attorney Hanen Fathallah)**

The client, H.T., is a 23-year-old man who is disabled in his right leg and has limited mobility after a recent surgery. He is not married, lives at home and works when he can as a day laborer.

The client was called to the police station for questioning regarding an alleged break-in and theft at a local kiosk. The complainant alleged that 5000 TND cash, 2000 TND worth of cigarettes, and some documents, including his passport, had been stolen. The police report stated that there were no signs of forced entry, and that the kiosk was secured only by a piece of plywood covering the opening. The complainant originally stated that he suspected his landlord committed the theft due to a prior dispute. However, the police invited H.T. to the station for questioning based on information received from a third party that H.T. may have been involved.

As per the early access agreement with the police department, Attorney Hanen Fathallah was notified of H.T.'s presence at the station, and she immediately went to represent him. At the police station, she interviewed her client and posed questions to the third party and the complainant over the telephone through the officers (neither party was present at the station) and uncovered various inconsistencies, which were then documented in the case file. For example, when police spoke to the third party, he recalled telling the complainant of H.T.'s alleged involvement, but after Ms. Fathallah asked for clarification, the third party admitted that in fact he had merely overheard someone talking about the crime and the possibility that someone with the same nickname as H.T. may have been involved. He was not a witness and he had no firsthand knowledge of the theft.

During the phone conversation with the complainant, the complainant claimed that the 5000 TND alleged to have been stolen had been earned from selling telephone cards. However, when asked by Ms. Fathallah if he could produce the receipts for those cards, the complainant stated that he could provide only two receipts, which were from May and June of 2016 and only reflected 500 TND of sales. He had no receipts at all for the 2000 TND worth of cigarettes that he claimed were stolen. The complainant refused to come down for an in person confrontation.

Ms. Fathallah also observed that her client's lack of physical mobility made him physically incapable of committing the alleged crime, as entering the kiosk would have required scaling a high counter after removing the plywood. Ms. Fathallah therefore requested that the police order a medical examination for the client, as provided for under the Code of Criminal Procedure.

Ms. Fathallah then advocated for the prosecutor to release her client, and the prosecutor agreed. The client was invited to be heard by the prosecutor four days later, and again he was not detained. Six days after that, the case against H.T. was dropped, as the Prosecutor declined to prosecute.

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*For additional information about The International Legal Foundation, its work in Tunisia, its lawyers, and its mission, please visit the ILF website at [www.theilf.org](http://www.theilf.org).*

**-Holly Hobart, ILF Deputy Program Director**