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Совет по правам человека
Шестнадцатая сессия
Пункт 3 повестки дня
Поощрение и защита всех прав человека, гражданских, политических, экономических, социальных и культурных прав, включая право на развитие

Доклад Специального докладчика по вопросу о поощрении и защите прав человека и основных свобод в условиях борьбы с терроризмом Мартина Шейнина

Добавление

Миссия в Тунис*

Резюме

22–26 января 2010 года по приглашению правительства Специальный докладчик по вопросу о поощрении и защите прав человека и основных свобод в условиях борьбы с терроризмом совершил поездку в Тунис. Он желает выразить признательность правительству за это приглашение и за эффективное взаимодействие с ним. В настоящем докладе Специальный докладчик анализирует нынешние террористические угрозы и правовые и институциональные рамки, которые формируют контекст для принимаемых в стране мер по борьбе с терроризмом. Он делает вывод о том, что нынешнее определение терроризма является расплывчатым и широким и в этой связи отступает от принципа законности и позволяет широко использовать на практике меры по борьбе с терроризмом. Поэтому он обсуждает вопрос о важности точного определения концепции терроризма в связи также с тем, что оно воздействует на другие правовые положения, касающиеся членства в террористических организациях/поддержки их деятельности и подстрекательства к терроризму. Он высказывает озабоченность в связи с тем, что применение некоторых из существующих положений может привести к ненадлежащему ограничению других прав человека, например свобод слова, религии и ассоциации.

* Настоящее резюме доклада о миссии распространяется на всех официальных языках. Сам доклад, содержащийся в приложении к резюме, распространяется на том языке, на котором он был представлен, и на французском языке.

Признавая, что, в принципе, законы предоставляют некоторые основные гарантии недопущения произвольного и тайного задержания, а также пыток и жестокого обращения, Специальный докладчик указывает на наличие значительного разрыва между правовыми рамками и тем, что встречается на практике в отношении арестов и задержания лиц, подозреваемых в совершении террористических актов. На основе собранных им сведений он установил существование практики тайных задержаний лиц, подозреваемых в совершении террористических актов. В период тайного содержания под стражей лицам, подозреваемым в совершении террористических актов, грозит большая опасность подвергнуться пыткам и жестокому обращению. Скрытность, которая окружает содержание под стражей и допросы, проводимые конкретным подразделением "уголовной полиции", которое занимается допросами лиц, подозреваемых в совершении террористических актов (обычно именуемое под его прежним названием "Управление государственной безопасности", УГБ), делает расследование злоупотреблений практически невозможным и, соответственно, ведет к отсутствию подотчетности и безнаказанности. Специальный докладчик далее делает вывод о том, что судебная система не предоставляет эффективных гарантий недопущения такой практики и что ограничения, касающиеся доступа к адвокатам в ходе содержания под стражей в полиции, усиливают его озабоченность.

И наконец, Специальный докладчик ссылается на международные аспекты участия страны в борьбе против терроризма и приветствует ее усилия по предупреждению терроризма путем осуществления многоступенчатой стратегии, которая предусматривает борьбу с бедностью и дискриминацией и осуществление мер в области образования, не отказываясь, однако, от констатации того, что эти, несомненно, позитивные действия могут легко сводиться на нет в результате нарушений закона, которые, как всегда, оказывают контрпродуктивное воздействие на борьбу с терроризмом.

Специальный докладчик делает ряд рекомендаций, которые помогут ликвидировать пробелы, установленные на правовом и политическом уровнях, в том числе с целью пересмотра определения терроризма, внесения поправок в ряд других положений закона о борьбе с терроризмом, относящихся к подстрекательству к терроризму, членству в террористических организациях и финансированию террористической деятельности, ликвидации практики тайного задержания и, тем самым, обеспечения эффективности гарантий, предоставления возможностей для проведения независимого контроля и создания эффективных механизмов подачи жалоб, повышения уровня подотчетности, укрепления независимости судебной системы и обеспечения права на справедливое судебное разбирательство.

Annex

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his mission to Tunisia (22–26 January 2010)

Contents

I. Introduction

1. Pursuant to his mandate, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism visited Tunisia from 22 to 26 January 2010, at the invitation of the Government. During his visit the Special Rapporteur met with the Minister of Foreign Affairs, the Minister for Justice and Human Rights, Ministry of Interior officials, judges, parliamentarians and the High Committee on Human Rights and Fundamental Liberties. He also benefited from meetings with representatives of the international community, lawyers, academics and non-governmental organizations, including human rights organizations and organizations of victims of terrorism. In addition, he visited the Bouchoucha police detention facility and the Mornaguia Prison, where he interviewed several persons suspected of, or convicted for, terrorist crimes. All this allowed him to learn about the situation in order to make an assessment of compliance with human rights in the context of counter-terrorism in Tunisia.

2. The Special Rapporteur expresses appreciation for the invitation and cooperation extended by Tunisia, including by granting him access to official detention facilities. He stresses that every State has the obligation to protect the life and integrity of its citizens and residents, including from threats emanating from terrorism. At the same time, international human rights norms have to be fully respected, including the rights of persons suspected of being involved in terrorist crimes. Tunisia has repeatedly made commitments to that effect, including by ratifying most international conventions related to human rights or to terrorism. He interprets the invitation extended to him as a significant step on the way to fulfilling these commitments. The Special Rapporteur thanks all his interlocutors, including victims of terrorist acts and their families, and detainees and their families, for speaking to him.

3. While Tunisian authorities in many respects operated in the spirit of transparency during the visit, despite repeated requests, the Special Rapporteur was not allowed access to the interrogation facilities of the Sub-directorate for Criminal Affairs of the “Police Judiciaire”, also known as “Directorate of State Security”, DSS. This is all the more troubling, as the overwhelming majority of the allegations of torture or ill-treatment received by the Special Rapporteur focus on the role of the “police judiciaire” in what happens prior to officially registered police custody, during investigation and interrogation, or when a detainee awaiting trial is taken out of the prison for further investigation

II. The context and legal framework for the fight against terrorism

A. Terrorist threats

4. In the late 1980s and early 1990s, in both Tunisia and neighbouring countries, Islamist movements which were perceived as threatening the concept of a secular state emerged and gained in popularity. A number of violent acts in 1990 and 1991 were attributed to Ennahda (Renaissance), although the leadership of Ennahda repeatedly condemned the use of violence. Many persons were sentenced to up to three years in prison in the early 1990s for membership of Ennahda. In 1992, 265 alleged organizers and leaders of the organization were tried in military courts on charges of plotting to overthrow the Government. Human rights organizations that observed the proceedings described the 1992 trials as unfair and concluded that the charges of a plotted coup had not been proven. Most of the

defendants in those trials were not convicted of carrying out any acts of violence.[1] Most have since been released, but some remain in prison, and even in isolation.

5. The Tunisian Combatant Group (TCG), also known as the Jama'a Combattante Tunisienne, was founded in 2000 and reportedly seeks to establish Islamist regime in Tunisia. Its members allegedly have links to Al-Qaida and radical Islamist networks in Western Europe. Belgian authorities arrested one of the founders in late 2001 and sentenced him to six years in prison in 2003 for his role in the assassination of an anti-Taliban commander in 2001. TCG was suspected of plotting, but not carrying out, attacks on the embassies of Algeria, Tunisia and the United States of America in Rome in December 2001. The organization was put on the Al-Qaida and Taliban Consolidated List of the United Nations Security Council's 1267 Sanctions Committee in October 2002.

6. Many of the official interlocutors of the Special Rapporteur, as well as the representatives of victims of terrorism heard by him, pointed out two past terrorist attacks within Tunisia, namely a bomb attack outside the Ghriba synagogue in Djerba in April 2002, which killed 21 people including several foreigners and for which Al-Qaida claimed responsibility; and secondly, in December 2006, a clash between security forces and an armed group later identified by the authorities as the Soldiers of Assad Ibn Fourat (aka the "Soliman Group"), in which 14 people died. According to the authorities, this group was linked to Al-Qaida in the Maghreb (AQIM), which "aimed to terrorize the population and provoke chaos". It was stressed by several of his interlocutors that AQIM remains a threat in the region. AQIM claimed responsibility for kidnapping two Austrian tourists in Tunisia in February 2008. The authorities also referred to the overall regional context and the terrorism threats and past acts of terrorism in neighbouring countries. The Special Rapporteur shares the concern about the threat of terrorism and is fully cognizant of the fact that any Government has to take decisive measures to prevent criminal acts endangering the life and physical and mental integrity of its population or parts of its population.

B. Legal framework

7. Tunisia has ratified a wide range of international treaties on counter-terrorism as well as in the human rights field. The Special Rapporteur also notes that article 1 of Law 2003-75 of 10 December 2003 refers to the need for international cooperation and explicitly proclaims that the fight against terrorism is to be conducted in the framework of international, regional and bilateral conventions ratified by Tunisia and by respecting constitutional provisions. However, in the Special Rapporteur's assessment, some of the current legal provisions do not comply with international human rights norms

1. The definition of terrorism and its scope of application

8. A first, extremely broad, definition of terrorism was included into Tunisian legislation in 1993, namely article 52 bis of the Penal Code, which read: "any crime relating to an individual or collective initiative ("enterprise") aimed at damaging persons or property for the purpose of intimidation or causing alarm shall be categorized as terrorist. Acts of incitement to hatred or racist or religious fanaticism shall also be dealt with as terrorist offences, whatever the means used." This provision was replaced by the definition contained in article 4 of Law 2003-75, which defines terrorism as "every crime, regardless of its motives, connected to an individual or collective initiative ("enterprise") aiming at terrorizing one person or a group of people and spreading fear among the population, for the purpose

[1] See Amnesty International, Tunisia: Heavy sentences after unfair trials (AI Index: MDE 30/23/92, September 1992) and Amnesty International, Tunisia: Rhetoric versus reality, the failure of a human rights bureaucracy (AI Index: MDE 30/01/94, January 1994).

of, among other things, influencing State policies and compelling it to act in a particular way or preventing it from so acting; or disturbing public order or international peace and security, or attacking people or facilities, damaging buildings housing diplomatic missions, prejudicing the environment, so as to endangering the life of its inhabitants, their health or jeopardizing vital resources, infrastructures, means of transport and communications, computer systems or public services."

9. Whereas the provision constituted an improvement over the previous definition, several issues arise:

(a) It does not fulfil the legality requirement contained in article 15 of the International Covenant on Civil and Political Rights or article 13 of the Tunisian Constitution which say that all elements of a crime need to be encapsulated in the law in explicit and precise terms. In particular, it fails to describe what "terrorizing people", "influencing State policies" or "harming public facilities" means in concrete terms of actions, and does not identify a threshold in relation to the damage resulting that would render the act a crime of terrorism;

(b) Deadly or otherwise serious physical violence against members of the general population or segments of it should be a central element of any definition of terrorism, as systematically emphasized by the Special Rapporteur. In Tunisia this is not the case as the law in its present shape does not limit the definition of the act to the use of violent means against human persons;

(c) In addition, due to the lack of a clear definition of the terms used, acts punishable under regular criminal law can easily be categorized as acts of "terrorism".

10. The current wide definition clearly carries the risk of broad application of counter-terrorism legislation, which in turn means that the term "terrorism" may become diluted and lose its distinguishing stigma. This may have possibly far-reaching consequences for the rights to freedoms of expression, association and assembly – an issue also raised by the Human Rights Committee in 2008. Despite certain changes made to the law (cf. infra) the concerns expressed by the Human Rights Committee remain valid: "The Committee is concerned at the lack of precision in the particularly broad definition of terrorist acts contained in the Terrorism and Money-laundering Act (Act No.2003-75) … The definition of terrorist acts should not lead to interpretations allowing the legitimate expression of rights enshrined in the Covenant [on Civil and Political Rights] to be violated under the cover of terrorist acts. The State party should ensure that the measures taken to combat terrorism are in conformity with the provisions of the Covenant (arts. 6, 7, 14)".[2]

11. The wide application of terrorism related charges was confirmed by the Special Rapporteur's observations in terms of arrests. When he visited the Bouchoucha police station in Tunis, through which terrorism suspects usually pass before being transferred to pre-trial detention, the custody record showed that, between 1 and 25 January 2010 alone, 25 persons had been registered as being in custody in connection with terrorist offenses. This frequency of one person per day supports the conclusion that counter-terrorism legislation does not only apply to a small group of very dangerous individuals but also to a considerable number of people.

12. The same applies to trials under the 2003 Law: the official statistics that the Special Rapporteur received during his visit on the number of cases under the 2003-75 Law show that overall 214 cases have been brought in the seven years since its adoption, in which 1,123 individuals were involved (see table).

[2] CCPR/C/TUN/CO/5, para. 15.

Statistics on cases under Law 2003-75

Years	*Number of cases*	*Numbers of individuals involved in those cases*
2004-05	6	20
2005-06	18	62
2006-07	59	308
2007-08	92	633
2008-09	39	100
Totals	214	1,123

13. Furthermore, the Special Rapporteur received information about a number of cases, where the main "crime" seems to have been to have visited certain countries or even mosques, downloaded or watched certain programmes online, having held prayers together, or having met with others to discuss religious issues.

2. Membership and support to terrorism

14. Article 13 of Law 2003-75, which seems to be the basis for many of the terrorism related convictions, provides for imprisonment for between 5 and 12 years for "adhering to an organization or entity, whichever their form and the number of its members, which has, even if coincidentally or incidentally, used terrorism as a means of action in the realization for its objectives". This formulation is of concern to the Special Rapporteur because the entities covered remain vaguely defined and the required "coincidentally or incidentally" link with terrorism – especially in the context of the wide terrorism definition – leaves too much leeway to the authorities when qualifying an organization as "terrorist". Furthermore, no proscription procedure for organizations is provided by law; therefore no remedies are available to challenge such a qualification of an organization. The article also does not include any requirement that the person must be aware of the terrorist nature of the group or must have had the intention to adhere to an organization which uses terrorism.

15. Article 22 criminalizes the failure, even where bound by professional secrecy, to notify immediately the competent authorities of any acts, information or instructions which may have emerged concerning a terrorist offence. Whereas close relatives are exempted, this provision fully applies to medical personnel, clergy and defence lawyers and may therefore have serious implications for the confidentiality requirement, which is key to the right to legal assistance during a fair trial and to the right to health care. As a minimum, this provision should therefore provide exceptions for lawyers, clergy and members of the medical profession.

16. Articles 14 to 18 of the Law 2003-75 criminalize acts related to terrorism, such as the preparation or commission of terrorist acts abroad, the procurement and supply of weapons, training of terrorists, the act of putting a meeting place at the disposal of terrorists, of housing or hiding them or of helping them to escape, or lending of one's expertise to a terrorist group. In combination with the overly broad definition of terrorism contained in article 4, these provisions allow for targeting as "terrorists" people who simply hold radical and unpalatable views without posing a real danger in terms of planning any violent acts. Article 18 does not specify any intent requirement on the part of the person who provides the support.

17. Article 68 of Law 2003-75 prohibits the provision of any form of direct or indirect support or financing for individuals, organizations or activities connected with terrorist offences or other illegal activities through any type of natural or legal entity, including not-for-profit organizations. Article 69 sets out a list of actions from which any moral person has to abstain, such as receiving donations or subsidies where the origin is unknown or which stems from illicit and unlawful acts or from any person or organization "notoriously involved in activities linked to terrorist offences"; donations or financial aid if it is not authorized by a special legal provision or, even if authorized by law, any funds coming from abroad if no official Tunisia-based intermediary is involved, etc. They carry the risk of placing the stigma of terrorism on lawful activities. In addition, according to article 45 of the Penal Code, the court may confiscate the financial assets of the accused, regarded as the product of the criminal action, even when those assets are in the hands of members of the family concerned, unless those prove otherwise. Unless carefully scrutinized by the judiciary, these provisions may lead to restrictions of freedom of association in the sense that they may be used to restrict foreign funding for entirely legitimate organizations.

18. Article 83 of the 2003 Law stipulates that the Tunisian Commission on Financial Analyses has to put in place a database on persons and legal entities suspected of having links with operations on financing relating to terrorism or money-laundering, declarations gathered that relate to suspect operations or transactions, demands for information that it has received from authorities responsible for the application of the law or its foreign counterparts and the follow-up to these." The breadth of this provision raises concerns in terms of the right to privacy, in particular since there does not seem to be any obligation to notify concerned persons. Moreover, the law does not seem to provide for judicial authorizations or for any oversight mechanism to ensure that the database is not abused or used for other purposes.

3. Incitement

19. The Special Rapporteur welcomes the legal amendments adopted in 2009 that eliminated the previous article 6 from Law 2003-75, a vaguely formulated provision regarding incitement, which conflated the propagation of racial hatred and the incitement of terrorism. However, he notes that article 11, criminalizing incitement, conspiring or intention to commit a terrorist act, and article 12, criminalizing calls to commit terrorist offences or to adhere to an organization or entity connected with terrorist offences, as well as using a name, a term, a symbol or any other sign to promote ("faire l'apologie") a terrorist organization, one of its members or its activities, are still not precise enough to meet the legality requirement of article 15 of the International Covenant for Civil and Political Rights. Especially with regard to the latter offence, the envisaged penalty of imprisonment for 5–12 years seems excessive. The criminalization of the mere use of names, terms, symbols and signs carries the risk of causing undue restrictions on freedom of expression.

C. Institutional framework

20. The Special Rapporteur regrets that Decree No. 246 of 15 August 2007, which clarifies the structure of the internal security forces under the Ministry of Interior, is not a public document. He was told that the main entity under the immediate authority of the Ministry of Interior, under which all counter-terrorism (and many other) activities fall is the "General Directorate for National Security" (Direction Générale de la sûreté nationale). Underneath it is the General Directorate for Public Security" linked directly to day-to-day activities, such as community policing, neighbourhood patrolling, traffic, etc. One entity under this General Directorate is called the Directorate of the "Police Judiciaire", the criminal police section tasked with judiciary matters and under supervision of the prosecutor's office. The "Police Judiciaire" has its own specialized structures, such as the police for minors and

a brigade for special inquiries and is inter alia in charge of crime investigation. One unit, the "Subdirectorate of Criminal Affairs" is closely linked to the Tunis Court of First Instance and in charge of investigating terrorism-related cases.

21. Elements rendering the practical operation of counter-terrorism policing opaque are the use of several common names for what appears to be the same entity, namely the Subdirectorate of Criminal Affairs, formerly known as "DSS", standing for the "Directorate of State Security" and the lack of publicly available information on its status and organization. Furthermore, there are two additional entities involved in counter-terrorism measures, with their tasks and organizational relationship to the "Police Judiciaire" remaining unclear, namely the "Directorate of Special Services" that supervises several structures such as the Directorate of General Intelligence, but does not make inquiries or launch criminal procedures; and the General Directorate for Terrorism. Although the Special Rapporteur has requested the authorities to provide him with the legislative basis for the relevant police structure, he has not received anything beyond a reference to Chapter I of the Criminal Procedure Code, which sets out the mandate and tasks of the "Police Judiciaire"

III. Detention and trial

A. Back-dating of arrest dates resulting in secret detention

22. Article 12 of the Constitution stipulates that "police custody shall be subject to judicial review and a court order shall be required for pretrial detention. No one may be placed arbitrarily in police custody or detention" Article 13bis of the Criminal Procedure Code details the safeguards available to any person in the custody of the "Police Judiciaire". They include: notifying a family member, informing the suspect about the reason for arrest and that he/she has the right to a medical examination during police custody, and issuing a detailed record ("procès verbal") including the exact date and time of the beginning of police custody. It is also laudable that legislative amendments adopted in 2008 rendered safeguards relating to the prolongation of the period of police custody more precise.

23. However, in the Special Rapporteur's assessment, these provisions are routinely disregarded. Numerous testimonies collected by him indicated – and it was admitted by the authorities – that dates of arrest are routinely post-dated, thereby circumventing the rules about the allowed length of police detention and taking detainees out of the protection framework. When the Special Rapporteur visited Bouchoucha, the police station in Tunis through which terrorism suspects pass before being transferred to pretrial detention, he discovered that all of the 25 detainees whose names were contained in the custody record in relation to terrorist crimes had been brought there by members of the "Police Judiciaire" in the late afternoon or evening and taken out once during the following night for an unspecified period (the officials present during the visit explained that such temporary transfers were indicated in pencil only and erased once the person returned) before finally being transferred before a judge in the morning of the next day. The recorded practice of very short official police custody in terrorism cases is in stark contradiction with reports by detainees and families about interrogations ranging from several days to a number of weeks before being brought before a judge. The police officers in Bouchoucha also denied knowing where the "Police Judiciaire" holds the suspects before bringing them to Bouchoucha for registration into official detention. This pattern appears to be compatible with the many allegations received by the Special Rapporteur that people under investigation are typically in terrorism cases first held in unacknowledged police custody.

24. The evidence brought to the attention of the Special Rapporteur indicated that suspected terrorists are routinely held in secret in a building of the Ministry of Interior in Tunis. Detainees allegedly sleep either on the ground floor in rudimentary conditions in a number of cells grouped around a larger room, or in smaller cells in the basement. Interrogations also take place on upper floors. No person from the outside has access to these premises, so detainees are at the mercy of their custodians, which, in itself, puts pressure on them and may constitute inhuman treatment. The authorities, however, continue to deny that the Ministry of Interior detains persons within or close to its official premises. Despite repeated requests, they did not allow the Special Rapporteur access to the interrogation facilities of the Ministry.

25. Practices of secret and unacknowledged detention are not only problematic because they give detainees the feeling that they are in a situation of total dependence on their interrogators, but also because by taking them out of the legal protection framework they render all the safeguards ineffective that they would enjoy if they were subject to official custody. Hence, the situation in high likelihood results in a culture of torture and impunity. The fact that the authorities deny that any person is held in unacknowledged premises makes any external monitoring impossible. Overall, the practices described above clearly constitute serious violations of the detainees' human rights.

26. Furthermore, the Special Rapporteur is very concerned at the impact of these practices on family members of the detainees. Secret detention has serious consequences for families, given the lack of knowledge of what happens to their loved one and the resulting fear for their physical and mental integrity and life.

B. Torture and the use of confessions obtained under torture

27. Tunisian law prohibits torture (articles 5 and 13 of the Constitution and articles 101 and 101 bis of the Penal Code), and Tunisia is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. The law provides for the possibility to file complaints either with officers of the "Police Judiciaire" or the Prosecutor (who supervises and carries the responsibility for the former). However, this means that, in cases of torture or ill-treatment, complaints would be addressed to the same body that is alleged to have perpetrated or condoned the ill-treatment. Therefore, the mechanisms will not appear credible to the victims. The Superior Committee on Human Rights and Fundamental Liberties indicated that, while in principle they could, they do not receive complaints about detention at the Ministry of Interior. Moreover, it appears that no provision in Tunisian legislation requires judges to open investigations ex officio into torture allegations presented in court, to motivate the rejection of a torture complaint or to exclude any evidence or statements obtained under torture. Theoretically a victim would also be able to file a complaint to other non-judicial bodies such as the human rights units of the Ministry of Justice and Human Rights and the Ministry of Interior and Local Development.

28. In practice, numerous cases of terrorism suspects brought to the Special Rapporteur's attention indicate that ill-treatment and/or torture is perpetrated during initial, unacknowledged police custody or interrogations by what is commonly referred to as "DSS", in particular if the suspects refuse to confess. The details of these accounts suggest that these practices occur under the direct control of the Ministry of Interior and possibly even within or next to the premises of the Ministry. According to consistent allegations, suspects are regularly subjected to severe beatings on different parts of the body, including genitals, with fists, cables and batons, kicking, slapping, often combined with stripping of their clothes and suspensions (including in the so-called *poulet rôti* ("roast chicken") position), even in ordinary offices of the Ministry. Some reports also described electroshocks and

mock-drowning taking place in one particular room in the basement, especially in cases, where suspects resisted to making confessions. Other methods used included extended periods of sleep deprivation, burning with cigarettes, threats with rape, threats to family members and anal rape. The treatment was allegedly perpetrated by plain-clothes officers of DSS.

29. The main purpose of the torture was to extract confessions, and sometimes testimonies about third persons. It normally stopped with the signing of papers that most suspects had not been allowed to read. However, the Special Rapporteur received allegations about instances of reprisals occurring in official places of detention in terms of beatings, threats and solitary confinement, for instance, for prisoners that had made calls for prayer or submitted complaints. In several cases, detainees were transferred from prisons back to the premises of the Ministry of Interior for interrogation and ill-treatment.

30. The testimonies also indicated that existing safeguards are ineffective in practice. Apart from the fact that the ill-treatment normally happens prior to the registration of police arrest, access to independent medical examinations, although provided for by law upon authorization by a judge, is practically never granted, and can therefore not be considered an effective safeguard. If at all, medical examinations take place months after the ill-treatment was perpetrated, and therefore fail to produce evidence that can be used in court. The resulting "lack of proof" is then used by prosecutors and judges to ignore claims about torture and ill-treatment and, on that basis to reject requests for investigations.

31. The Special Rapporteur notes that there have been several cases of prosecutions of officials involved in ill-treatment that the authorities have brought to his attention:

(a) On 6 March 2009, two policemen were sentenced by the Tunis Appeal Court to 20 years of imprisonment for injuries resulting from beatings leading to the death of a suspect; and two others to 15 and 10 years respectively;

(b) On 25 January 2002, three officers from the penitentiary administration were sentenced to four years of imprisonment for "use of force" (*voie de fait*) against a detainee;

(c) On 2 April 2002, one police officer was sentenced to 15 years of imprisonment for beatings resulting in injuries ;

(d) On 11 June 2009, two policemen were sentenced to two years of imprisonment for "use of force" against two citizens in the fulfilment of their functions (*voie de fait*).

32. While noting the importance of at least some trials and convictions, the Special Rapporteur considers that the number of prosecutions or other clear findings related to torture remains disturbingly low when compared to the frequency and severity of the allegations he received. He is concerned that there are remnants of a climate of impunity within law-enforcement structures. This is all the more troubling in light of allegations that confessions are frequently used as evidence in court. He is therefore concerned that the lack of effective investigations into allegations of torture may have led and continue to lead to unfair trials and illegitimate court judgements, on the basis of which persons may be deprived of their liberty – one of the most severe interferences with fundamental freedoms – for years, sometimes decades. He therefore calls upon the authorities to reopen cases where torture allegations have not been adequately addressed and to exclude questionable evidence from the proceedings in accordance with international human rights law.

C. Trials

1. Judiciary

33. Article 43 of the 2003 Law gives exclusive competence over investigations and prosecutions of terrorism-related cases in Tunisia to the "Police Judiciaire", under the public prosecutors and investigating judges attached to the Tunis Court of First Instance. The latter has the power to try people charged with such offences and, therefore, although it technically is not a specialized court, de facto operates as such. With regard to the legal framework relevant to fair trials, the Special Rapporteur welcomes some recent amendments, in particular the abolition of "faceless judges" (previous article 51 of Law 2003-75).

34. Overall, the Special Rapporteur is concerned that the judiciary appears to fail to act as an effective remedy when it comes to allegations of torture or ill-treatment. Numerous persons indicated that raising such allegations during trial practically never leads to any action by the judges. Unfortunately, the Special Rapporteur's meetings with judges of the Appeals Court in Tunis did not take away his concern of that protocols that mention torture allegations and other written submissions on the issue are routinely ignored by the court. This raises serious concerns in terms of the independence of the judiciary, guaranteed by article 65 of the Constitution and the Law No. 29 of 1967, exacerbated by indications that the Executive Branch, through the Supreme Council of the Judiciary (which is composed of the President, who is the Chairman, and the Minister of Justice as Vice-chairman, plus a majority of members either representing or appointed by the Executive Branch) controls many aspects of the judiciary, including appointments, promotions, transfers and disciplinary measures.

2. Military courts

35. Pursuant to article 123 of the Code of Military Justice of 1957 amended in 19794, which gives military courts jurisdiction over civilians charged with serving a terrorist organization that operates abroad, the military courts have dealt since the 1990s with a number of cases of Tunisians who were believed to be active in terrorist organizations abroad. Following the entry into force of the 2003 Counter-Terrorism Law, the focus of the military courts' terrorism-related cases changed to cases which had a link with 'international terrorism' or international money laundering. If alleged perpetrators of terrorist acts, sentenced in absentia by a military court, return to Tunisia from abroad, the retrials take place in front of military courts as well. About 15 such cases are still pending. The Special Rapporteur welcomes the fact that Tunisia has gradually limited its military justice system since 2000 through the transfer of jurisdiction to civilian courts, especially in relation to crimes that have no relation to military matters and in which the parties involved are not a part of the military.

36. Trials in military courts in Tunisia are conducted before a presiding judge, who is a civilian, and four counsellors, all of whom are serving military officers. Whereas the magistrates of the Military Court assured the Special Rapporteur that defendants enjoy the same safeguards as in ordinary courts, and pointed to article 40 of the Code of Military Justice to stress that all military court proceedings must be conducted in public, concern has been raised that, owing to the locations of military tribunals, public access may be de facto restricted. Moreover, defendants, if convicted, have no right of appeal other than to seek a review before the military Court of Cassation, which can annul a verdict only on the grounds of error in procedure or in application of the law without reconsidering the merits. This is incompatible with article 14, paragraph 5, of the International Covenant on Civil and Political Rights and the consistent jurisprudence by the Human Rights Committee.

3. Access to lawyers

37. The right to prompt access to a lawyer of one's choice is a vital component of any fair trial. The Special Rapporteur therefore is concerned that such access is not provided by the "safeguards" list in article 13 bis of the Criminal Procedure Code during the *garde à vue* (police custody) period. According to article 57, paragraph 2 of the Criminal Procedure Code, during the hearing before the *juge d'instruction* (investigating judge) (which, according to the law has to take place not later than six days after the beginning of the *garde à vue*), the suspect has the right to be assisted by a lawyer of his choice. An amendment to article 141 of the Code of Criminal Procedure of 2000 stipulates that a lawyer has to assist in cases of crime dealt with before the Court of First Instance and appeal courts. If the suspect does not designate a lawyer him/herself, the presiding judge assigns one. That means that lawyers are excluded from the first stage of police custody, where their presence would constitute an important safeguard against undue pressure, procedural violations or/and ill-treatment.

38. The Special Rapporteur received a number of allegations regarding obstruction of the work of defence lawyers, e.g. concerning restrictions on access to their clients and their clients' files, but also about harassment in more general terms, in particular vis-à-vis those who defend terrorism suspects. This can take the form of interference with their correspondence, non-issuance of passports for international travel, but also go further to not allowing them to enter certain places, pressuring family members, etc. Lawyers also referred to article 22 of Law 2003-75, indicating that it puts them at risk of being accused of being complicit with terrorist crimes. The Special Rapporteur notes that the Government has denied the existence of these practices.

D. Servicing of sentences

39. Many of the Special Rapporteur's interlocutors confirmed that, although overall prison conditions have improved over recent years, including in terms of infrastructure, overcrowding remains a problem. Detainees interviewed by the Special Rapporteur indicated that the regular visits by the International Committee of the Red Cross and their confidential interaction with the Government has resulted in piecemeal improvements of prison conditions. However, some problematic practices vis-à-vis persons detained in connection with alleged terrorist offences were reported in relation to corporal punishment; solitary confinement for prolonged periods and to restrictions on access to health care. The Special Rapporteur also received many reports about actual torture within prisons until up to 2007–2008.

40. Many of the witnesses, including family members, complained about frequent transfers between prisons, which are widely perceived as constituting an additional punishment and which punish families by making it impossible or difficult to visit their relatives in prison, since the distances may be considerable. An aggravating factor is that the food offered by the prison is largely considered insufficient and prisoners are therefore dependent on additional food supplied by their families.

41. Capital punishment is still foreseen in the county's Penal Code (article 5). However, a de-facto moratorium on executions has been in force since 1991, and generally death sentences are commuted after a decision of the official commutation commission, taking into account the time that has elapsed since the death sentence was pronounced.[3] The Special

[3] In its concluding observations in March 2008, the Human Rights Committee expressed concern regarding this procedure, which can take several years, and called on the Tunisian authorities to take the necessary measures to commute death sentences as soon as possible, with a view to abolishing the death penalty: CCPR/C/TUN/CO/5, para.14; Amnesty

Rapporteur is concerned that at least in one case a person who was sentenced to death was held in solitary confinement, which may last indefinitely for those whose sentences are not commuted. They are also denied contact with their family, which, according to one person sentenced to death and interviewed by the Special Rapporteur, makes the current moratorium worse than the execution of the death penalty.

42. Article 5(b) of the Penal Code also provides for administrative surveillance as a supplementary penalty. Article 23 specifies that this means that the administrative authority can determine and modify the place of residence of a convict following the completion of the prison term. According to the law, the period of administrative surveillance must not exceed 5 years in general, and 10 years in relation to the gravest crimes. Many of the terrorism convicts are sentenced to this supplementary penalty. What seems problematic is that the State Security Department officials with authority in the district to which a former prisoner is assigned, determine the frequency, often even the exact timing, of the reporting, which may, in some cases, mean several times per day. Such onerous requirements may prevent former prisoners from obtaining paid employment or continuing their studies, and therefore obstruct their reintegration into society. Also the refusal to issue passports, and restrictions on the freedom of movement may have a negative impact on former prisoners' ability to earn money, and in some cases even on their access to medical treatment. According to the Government these extra administrative surveillance measures can be contested on the basis of article 340 of the Code of Criminal Procedure in front of a court, but to the knowledge of the Government no legal challenge to these measures has ever been brought before a Court.

43. The Special Rapporteur wishes to underline that such measures, which constitute serious interferences with human rights, e.g. with the rights to privacy, freedom of movement or electoral rights, are unacceptable if they are not ordered by a judicial authority and subject to effective judicial review. In this context, the Special Rapporteur is very concerned at the economic and other effects of post-imprisonment surveillance and control. In particular, the effect that such measures have on obtaining paid employment may mean poverty and exclusion, not only for the former prisoner, but often also for his/her families.

IV. International cooperation in the combat against terrorism

A. Refoulement in Tunisian law

44. Under article 59 of Law 2003-75, terrorism is not considered a political offence, and a perpetrator may not, therefore, benefit from the right of asylum. Article 60 governs some technicalities concerning extradition. Domestic legislation does not include a counterpart to the strict non-refoulement clause of article 3 of the Convention against Torture, by which Tunisia is bound.

45. The Special Rapporteur is further concerned about the impact that articles 59 and 60 may have on the asylum procedures, in particular in view of the fact that, although the Tunisian Constitution (1959) prohibits the extradition of political refugees, no national refugee law has been enacted, no specific administrative measures have been established to govern asylum and refugees matters, and no national asylum system has been put in place.

International, Tunisia: Continuing abuses in the name of security, (London, Amnesty International Publications, 2009), p. 9.

B. Returns to Tunisia from other countries

46. The authorities of a number of other States continue to forcibly return terrorism suspects holding Tunisian nationality to Tunisia. Among the cases brought to the Special Rapporteur's attention, there were many who had been transferred to Tunisia from other countries, such as Libyan Arab Jamahiriya, Pakistan and the Syrian Arab Republic. While there are reports of many of them having been tortured before being returned to Tunisia, no rehabilitation seems to have been provided to them. It is also unclear what mechanisms are in place to ensure that evidence tainted by torture or ill-treatment is not used in proceedings within Tunisia.

47. Also a number of European countries returned Tunisians suspected of terrorist crimes to Tunisia, often requesting assurances against torture and other ill-treatment. In response, the Tunisian authorities repeatedly asserted that its domestic legislation and international human rights obligations provide for protection and safeguards against torture and other ill-treatment and therefore refused to give such diplomatic assurances.[4] Italy has been found to have violated the European Court of Human Rights by forcibly returning several Tunisian nationals by disregarding interim orders of protection issued by the European Court of Human Rights.[5]

48. According to non-governmental sources, most of the suspected terrorists who were forcibly returned from abroad were arrested upon arrival in Tunisia. They were then reportedly held up to several months, during which the detention was not acknowledged, or the fate or whereabouts of the detainee disclosed. Several of the returnees reported having been subjected to torture and other ill-treatment during that period, but none of their allegations are known to have been investigated by the Tunisian authorities.

49. Given the many reports of violations of the Convention against Torture and of article 7 of the International Covenant on Civil and Political Rights by Tunisian authorities, combined with the lack of transparency and independent monitoring, the Special Rapporteur urges Tunisia to starts fulfilling its international obligations in terms of effective investigations into allegations of torture and ill-treatment, exclusion from evidence of any information obtained by torture in Tunisia or elsewhere, prosecutions of alleged perpetrators and in allowing access to independent outside monitoring mandated to issue public reports.

C. The country's counter-terrorism efforts at the international level

50. At the prevention level, as the Tunisian authorities consider that terrorism poses a global threat which needs to be addressed collectively, they have called for the reinforcement of international cooperation and for devising a uniform international approach in order to harmonize the reaction of states when faced with certain threats. As in country's view any terrorism prevention strategy must be multi-dimensional and address issues such as political injustice, unresolved conflicts, economic disparities, exclusion and religious defamation, which lead to hatred and extremism and, ultimately, facilitate the recruitment to terrorism, it has launched calls for the consolidation of the international legal framework through the elaboration of an international convention that is to contain an action plan and provide for control and cooperation mechanisms, including on mutual information exchange and targeted technical cooperation. Tunisia has also suggested holding a world conference under United Nations auspices to elaborate a code of conduct to shed light on the

[4] See e.g. ECHR, Saadi v. Italy (Application No. 37201/06), 28 February 2008, para. 55.

[5] Sami Ben Khamais Essid in June 2008, Mourad Trabelsi in December 2008, Mehdi Ben Mohamed Khalaifia and Ziad Ben Mabrouk Ben Maftah in April 2009 and Ali Ben Sassi Toumi in August 2009.

points on which the international community converges. Over the years, Tunisia has launched a number of initiatives aimed at strengthening dialogue at the regional and international levels.[6]

51. Concerning Tunisia's participation in illegal forms of cooperation in counterterrorism, the Special Rapporteur has received allegations that Tunisian authorities were involved in holding a detainee sent to Tunisia by the United States' Central Intelligence Agency, who was then transferred to other countries. Laid Saidi was reportedly seized in the United Republic of Tanzania, transferred to Malawi, then rendered to Afghanistan and further to Tunisia, where he was held for 75 days before being returned to his home country Algeria (see A/HRC/13/42, para. 133). According to the Government however Laid Saidi had arrived with a "special flight" on the 9 June 2004, where he was presented by four foreign security officials to Tunisian authorities at the airport of Tunis Carthage under the name of Ramzi Ben Fredj. The Tunisian security services conducted an audit and concluded that the person had usurped the identity of the real Ramzi Ben Fredj. The person then acknowledged that he was actually Laid Saidi. The next day, on the 10 June 2004, Said was sent back with the same special flight to a "foreign country"; he was then still accompanied by the same foreign agents. Similarly, it has been alleged that Tunisian intelligence officials participated in interrogations of terrorist suspects in Afghanistan (see interview with Bisher Al-Rawi, A/HRC/13/42, annex II, case 4). The Special Rapporteur regrets that, according to his information, the Government of Tunisia has not started any investigation into these allegations.

V. Prevention of terrorism – The four pillar approach

52. In the framework of a multi-dimensional approach to combating terrorism, Tunisia has identified four principal areas to address terrorism at its roots:

53. The so-called "political pillar" has at its centre a national pact, according to which different political formations spread a message categorically rejecting any violence and racial, cultural or religious discrimination, and political parties commit themselves to ban any form of violence, fanaticism, racism and discrimination. Further, parties based fundamentally on one religion, one language, one race, one sex or one region are prohibited.[7]

54. The so-called "socio-cultural pillar" embraces the educational sphere, as defined by the Law on Education and School Training of 2002, which should root in the pupils the "values shared by Tunisians", founded on the "primary role of knowledge, work, solidarity, tolerance and moderation" and on the most noble universal values, including dialogue and cultural, civilizational and religious open-mindedness. School education is a legitimate right for all Tunisians, obligatory and free of charge. In line with these principles, human rights education has been widely introduced, including through human rights curricula at all levels of education and professional training and through the revision of manuals. Training and re-training of judges, lawyers, law-enforcement personnel, prison staff, health staff etc

[6] For instance the 2001 Tunis Appeal for Dialogue among Civilizations; the introduction of international prizes for Islamic studies to encourage enlightened reflection and for Solidarity in 2003/4; the establishment of the Tunis Forum for Peace of 2005; the 2006 International Symposium on Human Civilizations and Cultures: from Dialogue to Alliance; the 2007 conference under United Nations auspices on "Terrorism: dimensions, threats and counter-measures"; and an international workshop on "Youth and the Future: current challenges, the development of capacities and participation mechanisms" in January 2010, which culminated in the Tunis Declaration.

[7] Article 8 of the Constitution and article 17 of the Organic Law n 88-32 of 3 May 1988 on the organization of political parties.

integrates the "culture of human rights". Religious manuals, in particular those targeting pupils of the second cycle, stress topics such as how to avoid religious conflicts, knowledge as a "wall" against fanaticism, etc.

55. The "human development pillar" is based on the premises that marginalization, exclusion and poverty may cause feelings of injustice and despair and, consequently, a tendency towards radicalization and extremist reactions. Tunisia has therefore actively sought to respond to the essential needs of the person and to eradicate poverty along two main lines: priority treatment to strengthen economic growth with the aim of integrating vulnerable populations in the production cycle, and measures in the social sphere to assure that the poorest benefit from special assistance. These policies have led to a reduction in the level of poverty (to 3.8 per cent in 2009). These remaining 3.8 percent benefit from direct State assistance. In addition, vulnerable categories have access to free or subsidized health care.

56. Moreover, the National Solidarity Fund 26-26, created in 1993 has the task of promoting zones that do not directly benefit from economic reforms and thereby allows their inhabitants to gain access to housing, sanitary infrastructure, education, communication, electricity and drinking water, and helps them create revenue channels. Between 1993 and 2009, more than 255, 000 families (more than 1.3 million persons) in 1,800 localities benefited from the Fund. Similarly, the Tunisian Solidarity Bank (created in 1997) manages a system of microcredits (since 1999) and the National Employment Fund, established in 1999, helps to create employment opportunities for people with higher education. As a result of these efforts, the human development index has improved – at 6 years, 99 per cent of all children attend school; and the middle class now represents more than 81 percent of the population. Almost 90 percent of the population is covered by social insurance and life expectancy is now more than 74 years. In parallel, being conscious that real progress is tied to the promotion of women's rights, Tunisia has invested in improving women's lives, inter alia through legal measures eliminating the discrimination of women in all spheres.

57. The legal pillar functions along four main axes: combating terrorism; combating money-laundering; the creation of special judicial mechanisms to combat terrorism through the centralization of prosecutions and trials related to terrorism, and reinforced cooperation between the various counter-terrorism bodies; and, counter-terrorism through respect for human rights, in particular the presumption of innocence, the right to a lawyer and a the right to a fair trial.

58. Without being able fully to assess the impact of the four pillars, the Special Rapporteur is convinced that the multi-dimensional approach to preventing terrorism through social, educational and anti-discrimination measures is a good example that is worth further exploring. However, many of the areas of prevention described above raise sensitive issues, in terms of human rights (freedom of religion, freedom of expression, freedom of association, electoral rights, etc). In this regard, the Special Rapporteur recalls that, in accordance with international law, all state interference with these freedoms must always be tested against the proportionality and necessity requirements.

VI. Conclusions and recommendations

A. Conclusions

59. **The Special Rapporteur appreciates the cooperation extended by the Government of Tunisia. He welcomes that Tunisia has repeatedly made commitments to upholding human rights in the context of counter-terrorism, including by ratifying most international conventions related to human rights or to terrorism. The Special Rap-**

porteur regards these commitments, together with the invitation to him as significant steps on the way to fulfilling international human obligations.

60. **In the view of the Special Rapporteur, it appears that the scope of application of the terrorism provisions in the law has grown too wide and should be reduced. Any anti-terrorism law that is not properly confined to the countering of terrorism within the limits of human rights law is problematic, not only because an overly expansive scope of such a law weakens its own legitimacy and ultimately may prove to be counter-productive, but particularly because it may unjustifiably restrict the enjoyment of human rights pertaining to the exercise of peaceful activities, including dissent and political opposition through legitimate associations. The Special Rapporteur identified the danger of a "slippery slope" which not only results in persons being convicted of "terrorism" who do not deserve that stigma, but also endangers the effectiveness of the fight against terrorism by trivializing the phenomenon.**

61. **While recognizing some progress when it comes to the legal framework relating to countering terrorism, the Special Rapporteur has identified a number of important shortcomings, most of which flow from the vague and overly broad definition of terrorism in force, which violates the legality requirement under international human rights law and allows for very wide usage of counter-terrorism measures in practice. The same concern regarding a lack of precision holds true for some of the provisions on incitement to, and financing of, terrorism.**

62. **Recognizing that, in principle, the law provides for some basic safeguards against arbitrary and secret detention as well as against torture and ill-treatment, the Special Rapporteur has identified considerable gaps between these provisions and what happens in reality in relation to arrest and detention of terrorist suspects. On the basis of the evidence gathered, he observed a pattern of unacknowledged detention, operating in the city of Tunis under the interrogation authority of the Ministry of Interior, being used to detain terrorist suspects. During this period that precedes detainees' official registration in police custody, they are also routinely subjected to torture and ill-treatment and denied access to a lawyer. Owing to the secrecy that surrounds custody by "DSS", these activities occur outside any legal protection framework, render investigations improbable and, consequently, lead to a lack of accountability, with very few exceptions. The Special Rapporteur further concludes that the judiciary has not stood up as a safeguard against these practices.**

63. **He also welcomes the multi-dimensional approach to preventing terrorism through social, educational and anti-discrimination measures, which, in his view, may constitute a best practice. However, whenever such measures interfere with human rights, they must be necessary and proportionate. Furthermore, he wishes to stress that the fruits of these doubtlessly positive policies are easily undermined by violations of the law which, as always, have a counterproductive effect in the fight against terrorism.**

B. Recommendations

64. **In a spirit of cooperation, the Special Rapporteur wishes to make the following recommendations to the Government of Tunisia:**

(a) Revise the definition of terrorism in Law 2003-75, so that it complies with the requirement of legality enshrined in article 15 of the International Covenant on Civil and Political Rights, which requires that all elements of a crime need to be encapsulated in legal definitions in explicit and precise terms, and secures that deadly

or otherwise serious physical violence against members of the general population or segments of it becomes the central element of any definition of terrorism;

(b) Ensure that legal provisions relating to membership in terrorist groups, incitement to and financing of terrorism are defined in precise terms and that, if they result in restrictions of other human rights, such as freedoms of expression, association, religion, etc., such restrictions comply with the requirements of necessity and proportionality;

(c) End immediately the practice of secret police custody, which takes the concerned detainees outside the legal protection framework and puts them in a situation of total dependence on their custodians;

(d) In order to strengthen the safeguards against torture and ill-treatment, allow to any detainee access to a lawyer immediately after apprehension, and the presence of a lawyer from the very first interrogation; ensure prompt access to independent medical examination; video-tape any interrogations before suspects are transferred to the prison; and establish an independent and accessible complaints mechanism, including the conduct of adequate and thorough ex-officio investigations whenever there are reasonable grounds to believe that human rights violations have occurred;

(e) Allow for independent monitoring of all places where people are deprived of their liberty, including all facilities of the Ministry of Interior; in this context, ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which measure, in addition to strengthening independent domestic and international control mechanisms over domestic detention facilities, would also contribute to the country's unhindered counter-terrorism cooperation at the international level;

(f) Many of the problems identified by the Special Rapporteur are linked to a lack of transparency, e.g. the anonymity of law-enforcement officials. Therefore, all officials who engage in arresting or detaining suspected terrorists should be carrying identification tags at all times while on duty, and statistics on the number of arrests and cases under consideration should be regularly published;

(g) Scrupulously respect the principle of non-refoulement;

(h) Ensure that evidence obtained under torture is excluded from all proceedings in accordance with the Convention against Torture;

(i) Ensure that all cases involving terrorism are tried in strict compliance with each of the guarantees spelled out in article 14 of the International Covenant on Civil and Political Rights, including full respect for the presumption of innocence at all stages;

(j) Strengthen the independence of the judiciary;

(k) Order retrials through proceedings that meet international fair trial standards in all cases where evidence obtained by means of torture or other ill-treatment was admitted in the proceedings (except as evidence against a person accused of torture), or where evidence was obtained by torture or other ill-treatment were summarily or otherwise improperly dismissed; and

(l) Continue to pursue terrorism prevention efforts in various spheres, and document their impact in terms of preventing terrorism.

65. **The Special Rapporteur recommends that the international community will assist Tunisia in these endeavours, on the basis of an on-going evaluation of progress in terms of revising the legal framework, in particular in reformulating the definition of terrorism in accordance with international norms, increasing transparency in the implementation of counter-terrorism measures, investigating human rights violations and fighting impunity, and strengthening the independence of the judiciary.**