

Position Paper

Tunisia's Law on Counter-Terrorism in light of international law and standards

6 August 2015

Following a series of attacks against members of the security forces and the army and the Bardo Museum attack of 18 March 2015, which killed 23 people, mostly foreign tourists, the Tunisian government has brought forward or revived various legislative initiatives, including a bill on the "Repression of Attacks against Armed Forces" and a Law on Counter-Terrorism and Suppression of Money Laundering (*Loi organique N°22/2015 relative à la lutte contre le terrorisme et la répression du blanchiment d'argent*, hereinafter the Counter-Terrorism Law). The review of the former has been put on hold following concerns expressed by lawyers and human rights organisations, including the International Commission of Jurists¹ (ICJ) that some of its provisions violate Tunisia's obligations under international law. However, following the attack that killed 38 tourists in Sousse on 26 June and the subsequent declaration of a 30-day state of emergency on 4 July 2015 by the Tunisian President, the adoption process of the Counter-Terrorism Law has been accelerated. The General Legislation Commission (GLC) of the Assembly of the People's Representatives (ARP) amended and submitted the revised Counter-Terrorism Law to the ARP on 21 July 2015. The Assembly started examining it two days later and adopted it on 25 July 2015.² The Counter-Terrorism Law was referred to the Tunisian constitutional commission (*Instance Provisoire du contrôle de la constitutionnalité des projets de lois*) with the view to assessing its conformity with the Constitution.

Pursuant to its obligations under international law, Tunisia must protect persons within its jurisdiction against acts of terrorism. However, measures undertaken to ensure such protection must not erode the rule of law and must be in full conformity with international human rights law and standards.

The ICJ believes that while the Counter-Terrorism Law provides for some human rights guarantees and safeguards, including by ensuring reparation for victims (article 78) and reaffirming the principle of non-refoulement (article 84), it does not fully comply with Tunisia's obligations under international law, including under the International Covenant on Civil and Political Rights (ICCPR), to which Tunisia is a Party.³ Most if not all of the relevant rights and safeguards of international law are also explicitly or implicitly reflected in the 2014 Constitution, raising similarly serious questions about the Law's constitutional validity. The ICJ notes that the Constitution provides that it is superior to international law. This should not prevent the Constitution from being interpreted to the maximum extent possible in a manner consistent with international law and it should also be recognised that from the point

¹ Joint Statement, Tunisia: amend or drop security bill, 13 May 2015, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/05/Tunisia-Security-Bill-joint-statement-News-Press-releases-2015-ENG.pdf>

² The ICJ was unable to obtain the official version of the Counter-Terrorism Law as adopted by the ARP. It however used the official version of the Draft Law as submitted by the GLC in its report to the ARP on 21 July 2015 (available at: http://www.chambre-dep.tn/site/servlet/Fichier?code_obj=90338&code_exp=1&langue=1), last visited on 22 July 2015) and cross-referenced it with the official Twitter account of the ARP (available at: <https://twitter.com/ARPttn>) to reflect the relevant amendments.

³ Tunisia acceded to the ICCPR on 18 March 1969.

of view of international law, a State is not permitted to invoke the provisions of its internal law as justification for its failure to perform a treaty obligation.⁴

The ICJ is particularly concerned by the overbroad and in some aspects imprecise definitions of terrorism and terrorism-related acts in the Counter-Terrorism Law. Such definitions could potentially have the effect, whether unintentionally or otherwise, of criminalizing the lawful and peaceful exercise of fundamental rights and freedoms, including the right to freedom of expression. Such provisions must be more precisely circumscribed in order to ensure that terror offence provisions cover only activities that are truly terrorist in character, in full compliance with the principle of legality, and to prevent arbitrary use or interpretations of the provisions that might undermine the enjoyment and exercise of fundamental rights and freedoms.

The ICJ is also deeply concerned by provisions of the Counter-Terrorism Law that appear to shield members of the security forces from criminal liability when using lethal force in the context of combatting terrorism, even in some circumstances when the use of force may be in violation of the internationally-protected right to life. In addition, the Counter-Terrorism Law raises serious concerns as to the respect for procedural guarantees enshrined in the right to a fair trial that should be maintained, even in the context of combatting terrorism, as well as with regard to compliance with the right to liberty and the right to privacy.

Under international law, some human rights may be subject to restrictions, or even to derogation, during an officially-proclaimed emergency that is so grave that it threatens the life of the nation. However, any such derogation or restriction must comply with strict standards, including that it must be provided for by law, pursue a legitimate aim and be strictly necessary and proportionate to the aim sought. The ICJ is concerned that many of the provisions of the Counter-Terrorism Law, including those relating to the broad surveillance measures, fall short of these requirements, particularly as regards necessity and proportionality, under international law. Many of these requirements are also reflected in article 49 of the Constitution.

Further, the ICJ regrets that a number of offences in the Counter-Terrorism Law are still punishable by death. The ICJ opposes the use of the death penalty in all circumstances as a violation of the right to life and a form of cruel, inhuman and degrading punishment.

The ICJ therefore calls on the Tunisian President to refrain from promulgating the Counter-Terrorism Law. It urges the Tunisian authorities to amend it through a transparent and inclusive process with a view to ensuring its full compliance with Tunisia's obligations under international law, as well as the 2014 Constitution. In so doing, the Tunisian authorities should take into account recommendations for amendments and reform formulated in this position paper. This paper analyses the Counter-Terrorism Law in light of Tunisia's obligations under international law. The analysis focuses on terrorism-related offences and the principle of legality, fair trial, liberty and privacy rights, and the protection of lawyers' professional secrecy.

⁴ Vienna Convention on the Law of Treaties, 1969, article 27. Tunisia acceded to the Vienna Convention in 1971 and it came into force in 1980. See also, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 460, para. 113.

1. Terrorism-related offences, the principle of legality and overbreadth

Article 13 of the Counter-Terrorism Law is a stand-alone provision that sets out the primary definition of a "terrorist offence". To commit the offence, a person must deliberately commit (by any means, alone or with others), one of several listed acts contained in article 13 bis, "aimed by its nature or context, to spread terror among the population or to unduly compel a State or an international organization to do what it is not obliged to do or refrain from doing what it is obliged to do".

Article 13 bis lists the following acts as terrorist offences:

- Killing a person;
- Injuring, assaulting, or other forms of violence contemplated by articles 218 and 319 of the Penal Code;
- Causing other forms of injury, assault or violence;
- Damaging the buildings of diplomatic or consular missions, or international organisations;
- Causing harm to food security and to the environment in a way that unbalances ecosystems, or natural resources or puts the life or health of its inhabitants in danger;
- Intentionally opening flood discharge from dams or pouring chemicals or biological materials into those dams or into water facilities to cause harm to inhabitants;
- Causing harm to public or private property, vital resources or infrastructure or means of transport or communication means or computer systems or public services;
- Takfir or calling for it, or incitement of or calling for hatred or loathing among races, religions and faiths.⁵

The principle of legality is recognised by Article 28 of the 2014 Constitution. Under international law, this principle requires criminal offences to be clearly and precisely defined so that an individual can know from the wording of the provision, as interpreted by the courts, what acts and/or omissions would make him or her criminally liable.⁶ The principle of legality is absolute and non-derogable, even in times of emergency.⁷ Furthermore, in order to respect this principle, every element of the crime as defined in national law must be capable of being properly proven by evidence in court.⁸ A related issue is whether a criminal provision is overbroad, in that it would cover conduct protected by international human rights law in a disproportionate or otherwise unjustified manner that is incompatible with the limited scope for restriction of such rights.

With respect to terrorist offences, the UN Human Rights Committee has found, when examining states' periodic reports under the ICCPR, that domestic laws containing

⁵ Takfir refers to the pronouncement of unbelief against someone. Under various interpretations of Islamic law a kafer (the individual declared as an unbeliever) may be, among others, an apostate, a person who abandons Islam and adopts another religion, or a non-believer (this last act in the list was not in the original draft but was added by the GLC).

⁶ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, E/CN.4/2006/98, 28 December 2005, para 46. The principle of legality is embodied in article 15 of the International Covenant on Civil and Political Rights (ICCPR); article 7.2 of the African Charter on Human and Peoples' Rights (ACHPR) and article 15 of the Arab Charter on Human Rights (ACHR) (although Tunisia is only a signatory and not yet a party to the Arab Charter at this time).

⁷ The ICCPR, article 4.2; the ACHR article 4(b); Human Rights Committee, General Comment No. 29, Article 4 (Derogations during a State of emergency) CCPR/C/21/Rev.1/Add.11, para. 7.

⁸ Human Rights Committee, *David Michael Nicholas v. Australia*, Communication N° 1080/2002, CCPR/C/80/D/1080/2002, 24 March 2004, para. 7.5.

imprecise or otherwise overbroad definitions of terrorist acts are incompatible with the Covenant.⁹ The United Nations Working Group on Arbitrary Detention has also warned against “extremely vague and broad definitions of terrorism in national legislation.”¹⁰

As the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has said:¹¹

Counter-terrorism laws, policies and practices must be limited to the countering of terrorism, as properly defined. The approach taken by most States is to link terrorist offences to a stand-alone definition of “terrorism”, a “terrorist act”, “terrorist activity” or similar terms. Such definitions are very often also linked to the listing of proscribed organizations (either in conjunction with, or as a supplement to, the Consolidated List of the United Nations); powers of arrest, questioning and investigation; alterations in the rules concerning detention and trial; and administrative measures, such as deportation procedures and the forfeiture of property. The adoption of overly broad definitions of terrorism ... carries the potential for deliberate misuse of the term ... as well as unintended human rights abuses.

Failure to restrict counter-terrorism laws and implementing measures to the countering of conduct which is truly terrorist in nature also poses the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction on human rights.

... Properly defined, “terrorism” and associated offences are also accessible, formulated with precision, non-discriminatory and non-retroactive. ...

The Special Rapporteur takes the view that a definition of terrorism that goes beyond the following would be problematic from a human rights perspective, and therefore formulates the definition of terrorism below as a best practice in the fight against terrorism.

...

Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;

and

2. The action is done or attempted with the intention of:

⁹ Human Rights Committee, Concluding Observations on Canada, CCPR/C/CAN/CO/5, 20 April 2006, para 12; Monaco, CCPR/C/MCO/CO/2, 28 October 2008, para 11.

¹⁰ The Working Group on Arbitrary Detention noted: “In the absence of a definition of the offence or when the description of the acts or omissions with which someone is charged is inadequate ... the requirement of a precise definition of the crimes - the key to the whole modern penal system - is not fulfilled and that the principle of lawfulness is thus violated, with the attendant risk to the legitimate exercise of fundamental freedoms” (Report of the Working Group on Arbitrary Detention, E/CN.4/2004/3, 15 December 2003, para 65).

¹¹ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/16/51 (2010), paras. 26-28.

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something;

and

3. The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (b) All elements of a serious crime defined by national law.

The Special Rapporteur's definition recognises that on the one hand, not every act intended to spread fear in the population or to affect the behaviour of governments or international organizations necessarily constitutes "terrorism" if it does not involve or aim at killing or seriously injuring people; and on the other hand, not every act of violence will necessarily constitute "terrorism" if the element of spreading fear or coercing governments is absent. The Special Rapporteur does not exclude, obviously, that such acts might be properly criminalized as very serious ordinary criminal offences. His point is that only certain acts qualify as "terrorist" in character. This is important because as is the case with the Tunisian Counter-Terrorism Law, characterising an offence as "terrorist" in character often triggers a series of exceptions to ordinary criminal law and procedures that may be justified, if at all, only in relation to the particularly grave threat posed by terrorism as properly defined.

The "terrorist offence" defined in articles 13 and 13 bis goes beyond the elements outlined by the Special Rapporteur, in ways that risk introducing vagueness and imprecision and violating protected human rights. It is not restricted to hostage-taking, acts intended to cause death or serious bodily harm, and lethal or serious violence.

The provisions on damage to buildings, and on Takfir and incitement to hatred and loathing additionally give rise to concerns with respect to the precision and overbreadth of these parts of article 13 bis. For example, the Counter-Terrorism Law does not define the elements that would need to be proven to establish an act of "Takfir" to the criminal standard, nor does it provide for a list of acts that might amount to it, creating concerns about the compatibility of this provision with the precision requirement of legality.

The "incitement to hatred or loathing" provision in the Counter-Terrorism Law is also undefined and vague, raising similar concerns. It appears to be considerably broader than the "advocacy of hatred" provision in article 20(2) of the ICCPR, which refers instead to "incitement to discrimination, hostility or violence". The Human Rights Committee has emphasised that the freedom to express oneself non-violently, even in potentially offensive ways and in ways captured by article 20(2), may not be restricted unless the restriction enacted is legally precise, demonstrably necessary and proportionate, and non-discriminatory.¹² The ICJ is concerned that an insufficient evidentiary justification has been presented for the necessity and proportionality of the broad, imprecise and drastic criminalization of "incitement to hatred and loathing"

¹² Human Rights Committee, General Comment No. 34, Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34, paras 11, 22-36, 48.

in the present circumstances, particularly saying that such an act in itself can constitute an act of terrorism.

Furthermore, the ICJ is concerned at the impact of the overly broad (and in certain respects imprecise) definition of articles 13 and 13 bis on other acts classified as terrorist offences in the following articles of the Counter-Terrorism Law. This is particularly true with regard to ancillary offences that depend on the principal definition of a "terrorist offence", such as the prohibition of membership in an organised terrorist group or receiving training with a view to committing terrorist offences (article 31 in combination with the definitions in article 13), conspiracy, travel for purposes of committing terrorist offences, inciting such offences, or receiving training (article 32) and so on. Because these provisions are dependent on the definition in article 13, defects in the definition in article 13 also taint these other provisions.

The ICJ notes that other provisions in the Counter-Terrorism Law raise particular concerns in that they could also undermine the lawful and peaceful exercise of fundamental rights and freedoms, notably the right to freedom of expression.

Under article 5 of the Counter-Terrorism Law whoever "incites by whatever means", others to commit terrorist crimes will be charged with the corresponding terrorist offences and punished with half the punishments provided for those crimes if the act of incitement, "by its nature or context causes a danger that such terrorist crimes may eventually be committed". The ICJ is mindful that under UN Security Council resolutions States have the obligation of prohibiting, by law, "incitement to commit a terrorist act or acts".¹³ However international standards require that incitement to commit terrorism should only be criminalized where there is a subjective intent to incite acts of violence. The ICJ considers that such offences should also be restricted to circumstances where the speech concerned actually causes the commission of an act of terrorism or an imminent risk of such an act.¹⁴ Article 5 does not contain any explicit requirement of subjective intent to incite acts of terrorism, and the provision is further tainted by the fact that the definitions of terrorist offences to which article 5 refers are not limited to acts of violence. Nor does article 5 require that the incitement in fact lead directly to violence or the imminent risk of violence. Thus the ICJ is concerned that in the absence of subjective intent and imminence requirements, there is nothing in the law to prevent article 5 eventually being used, for example, against journalists and political opponents in a manner incompatible with their rights to freedom of expression.

Article 30 of the Counter-Terrorism Law criminalizes as a terrorist offence the conduct of whoever "inside or outside the Republic, by any means, praises and glorifies, in a

¹³ UN Security Council Resolution 1624 (2005), 14 September 2005, UN Doc. S/RES/1624 (2005), paragraph 1(a). See also, Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, Warsaw, article 5 and European Union Framework Decision on Combating Terrorism, 2002/475/JHA, 13 June 2002, Article 4.1.

¹⁴ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, principle 6, endorsed by the UN Special Rapporteur on the right to freedom of opinion and expression (UN document E/CN.4/1996/39, Appendix). See also former UN Commission on Human Rights resolution 2000/38 of 20 April 2000. See also, Legal Commentary to the ICJ Berlin Declaration: Counter-terrorism, Human Rights and the Rule of Law, Geneva, 2008, p.78. Based on these sources, on the issue of the threshold degree and imminence of risk, the ICJ may respectfully differ with the former Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, whose best practice recommendation relied instead on article 5 of the Council of Europe Convention on the Prevention of Terrorism (A/HRC/16/51, 22 December 2010, paras. 29-32).

public, clear and manifest manner, a terrorist offence or its perpetrator or an organization or a conspiracy related to terrorist offences or its members or its activities.” Both article 31 of the Constitution and article 19 of ICCPR guarantee the right to freedom of expression. In its General Comment 34, the UN Human Rights Committee affirmed that States must ensure that offences such as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, “should be clearly defined to ensure that they do not lead to an unnecessary or disproportionate interference with freedom of expression”.¹⁵ The UN Special Rapporteurs on counter-terrorism and on freedom of expression, and other expert bodies, are of the view that “glorification” offences should be avoided altogether given the potential for vagueness and overbreadth, and that any such conduct should be addressed only by properly-framed “incitement” offences.¹⁶

Article 30 of the Counter-Terrorism Law appears to be unjustifiably broad and imprecise and therefore inconsistent with articles 15 and 19 of the ICCPR. For instance, in some countries, organizations designated as “terrorist” by the governments are opposition groups that also deliver, or have members who privately deliver, basic services to certain populations. Article 30 is drafted so broadly that it would appear to criminalize, for instance, a person who praises individuals delivering such services, regardless of whether the person concerned knew about the membership of these individuals to the organization, or of whether these individuals themselves knew about, participated in or contributed towards the commission of any terrorist act.

Other provisions of the Counter-Terrorism Law also have the potential of undermining the exercise of the right to the freedom of expression and information and could endanger the legitimate work of journalists and whistle-blowers.

For example, under article 35 someone may be charged for not disclosing facts or information related to the commission, or potential commission, of terrorist acts listed under the Counter-Terrorism Law. The ICJ notes that the Law includes journalists in the list of persons exempted from this obligation of disclosure, in accordance with “the 2011 Decree-Law on the freedom of press, printing and publishing.” The ICJ is concerned, however, that article 35 provides for an exception to this exemption when the information journalists have access to, if it was disclosed to the authorities, would contribute to avoiding a terrorist offence in the future. The ICJ considers that this provision is not precise or predictable enough in its application to satisfy the requirement of legality for a criminal offence. This is both because the definition of a “terrorist act” in articles 13 and 13 bis, on which article 35 depends, is itself imprecise and overbroad, but also more fundamentally because a person will generally not be in a position to predict what specific pieces of information “would avoid the commission of terrorist crimes in the future”; the vagueness and uncertainty is of even greater

¹⁵ Human Rights Committee, General Comment No. 34, Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34, para. 46.

¹⁶ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/HRC/16/51, 22 December 2010, para. 31 (the offence “must be prescribed by law in precise language, including by avoiding reference to vague terms such as ‘glorifying’ or ‘promoting’ terrorism”). See also Joint declaration on anti-terrorism measures by the UN Special Rapporteur on freedom of opinion and expression, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on freedom of expression, 21 December 2005 and Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 323 and recommendation 11(c).

concern given the importance, discussed below, of maintaining the confidentiality of journalists' sources as a component of freedom of expression.

Furthermore, article 46 criminalizes the failure to meet the requirements of providing a testimony as a witness in terrorism related cases. Article 60 of the Counter-Terrorism Law also makes it an offence for anyone to knowingly disclose information related to the interception of communications, infiltration, or audio-visual surveillance or data collection.

The ICJ is concerned that these articles, individually or more significantly when taken together, could potentially be used to prosecute whistle-blowers and journalists reporting on the State use of surveillance powers or refusing to testify or disclose the name of their sources to the authorities, in a manner that disproportionately or otherwise unjustifiably limits freedom of expression and information in violation of international law.

The right of journalists to protect the confidentiality of their sources is a component of the freedom of expression and is recognized and protected under international law.¹⁷ Journalists' right to non-disclosure should only be limited in exceptional circumstances. Restrictions must be strictly necessary to achieve the public interest in disclosure and must only take place in cases where reasonable alternatives have failed. This must be established on the facts of each particular case. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stressed the need for disclosure to be strictly limited "to exceptional circumstances where a vital public or individual interest is at stake."¹⁸ In relation to whistle-blowers, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism insisted that "robust whistle-blower protection mechanisms for intelligence agents and other informers are crucial in order to break illegitimate rings of secrecy", stressing that "the public interest in disclosure outweighs the public interest in non-disclosure".¹⁹

The ICJ is also concerned that article 13 bis to article 28 all provide for the death penalty. The acts punishable by death are restricted to those that have directly caused death, such as the act of killing under article 13 bis. However, some provisions provide for the death penalty despite vague definitions or without clearly requiring intent to cause death, and would be linked to the potential violation of fair trial rights

¹⁷ African Commission on Human and People's Rights' 2002 Declaration of Principles on Freedom of Expression in Africa, Article XV on Protection of Sources and other journalistic material. See also, Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 279 and ECtHR, *Goodwin v. United Kingdom*, Application no. 17488/90, Judgment of 27 March 1996, para. 39.

¹⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mission to the Republic of Poland, E/CN.4/1998/40/Add.2, 13 January 1998, para. 70. See also The Global Principles on National Security and the Right to Information ("The Tshwane Principles"), 12 June 2013, finalized in Tshwane, South Africa, Part VII: Limits on Measures to Sanction or Restrain the Disclosure of Information to the Public, available at <https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>

¹⁹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3, 4 February 2009, para. 61. See also The Global Principles on National Security and the Right to Information ("The Tshwane Principles"), 12 June 2013, finalized in Tshwane, South Africa Part VI: Public Interest Disclosures by Public Personnel, available at <https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles> ; and African Commission on Human and People's Rights' 2002 Declaration of Principles on Freedom of Expression in Africa, Part V: Freedom of Information.

occasioned by other provisions of the law, all of which would be inconsistent with international standards on the death penalty. For example, article 20 of the Counter-Terrorism Law criminalizes those who spread false information in bad faith, thereby compromising the safety of an aircraft or civilian ship and provides for death penalty if those acts resulted in the death of a person. These provisions contradict Tunisia's moratorium on executions maintained since 1991 and its practice of commuting the death sentences that are infrequently handed down into prison sentences.

The ICJ opposes the death penalty in all circumstances as a violation of the right to life and the prohibition of torture and other cruel, inhuman or degrading punishment.

2. Immunity and impunity of members of security forces

The ICJ is concerned that the Counter-Terrorism Law would appear to shield members of the security forces, military personnel and custom officers from criminal liability when using lethal force in the context of combatting terrorism, even in some circumstances when the use of force may be in violation of the internationally-protected right to life. Article 68 provides that: "In addition to self-defence cases, internal security forces, military personnel and customs officers are not criminally liable when they use force or give orders to use force if that was necessary to perform tasks within the limits of the law, internal regulations and instructions given on a legal basis in the framework of fighting terrorist crimes provided by this law."

The language of this article is insufficient to ensure that immunity will not be applied to the use of force in violation of international standards, particularly in relation to the right to life under article 6 of the ICCPR, and as further elaborated in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and UN Code of Conduct for Law Enforcement Officials.²⁰ This would include among other things an explicit requirement of proportionality, explicit restrictions on the circumstances in which firearms can be used at all, and an explicit restriction stating that intentional use of lethal force by law enforcement officers is only permitted when strictly unavoidable in order to protect life. The requirements should in principle be implicit in the 2014 Constitution provisions relating to the right to life and physical integrity (articles 22 and 23), but given the lack of jurisprudence under this recent Constitution, concerns about consistency with international standards remain.

Human rights violations committed in the course of carrying out official duties, including cases of killings that do not comply with article 6 of the ICCPR, must under article 2 of the ICCPR be fully investigated and prosecuted and all those responsible must be held to account. The ICJ is concerned that article 68 would not fully comply with this requirement. The Basic Principles on Use of Force and Firearms, for instance, provide among other things as follows:

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

²⁰ The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Havana, from 27 August to 7 September 1990, articles 5(a) and 8-11; UN Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169 of 17 December 1979, article 3 and commentary.

...

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

The Human Rights Committee, commenting on states' obligations under article 2 of the ICCPR, has said:

15. Article 2, paragraph 3 [of the ICCPR], requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. ...

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). ...

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties ... and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.
...²¹

Article 68 must therefore be amended to ensure its full compliance with international standards, notably the right to life under article 6 of the ICCPR and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and UN Code of Conduct for Law Enforcement Officials.

3. Fair trial, liberty and privacy rights

The ICJ wishes to stress that the Counter-Terrorism Law raises serious concerns as to its conformity with the right to liberty, the right to a fair trial and related guarantees, as well as the right to privacy.

The Counter-Terrorism Law creates an exceptional regime for police custody compared to the relevant provisions of the Code of Criminal Procedure (the Counter-Terrorism Law specifies that the Code of Criminal Procedure only applies to the extent that it does not contradict the Counter-Terrorism Law, article 4)). In that respect, the ICJ is concerned that while article 29 of the 2014 Constitution provides for a general protection against arbitrary arrest and detention, the Tunisian Criminal Code of

²¹ Human Rights Committee, General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 26 May 2004, CCPR/C/21/Rev.1/Add.13, paras 15 and 18.

Procedure (CCP) itself does not contain specific guarantees against arbitrary detention sufficient to fully comply with international standards. In particular, under the CCP police custody can last up to six days without the accused being brought before a judge or judicial officer and without access to a lawyer (if the prosecutor decides to renew the initial maximum detention of 3 days for a further 3 days).²² Although officers are required by law to inform the suspect of the measures taken against him or her, the reasons for and duration of these measures and the guarantees provided by the law, including the right to request a medical examination, the law does not specify when such information must be provided to suspects.²³ Furthermore, although police officers must under the CCP inform the family of the suspect of the measures taken against their relative, there is no right of access to a lawyer or to family visits during police custody. The right of the accused to communicate with his or her lawyer is only expressly permitted after the accused has had his/her first appearance before the investigative judge (article 70 of the CCP).²⁴

Under article 37 of the Counter-Terrorism Law "judicial police officers are required to immediately notify the State Prosecutor to whom they report, of terrorist offences they have knowledge of" and they are allowed to detain the accused for up to five days. Article 39, however, provides that the prosecutor has the power decide to renew it twice, resulting in a maximum period of 15 days of police custody without the accused having the right to have access to a lawyer or to be brought before a judicial officer.

International law recognizes the right to liberty and the right not to be arbitrarily deprived of liberty.²⁵ Pursuant to these rights, anyone arrested or detained on suspicion of involvement in criminal activity must be brought before a judge or judicial officer promptly.²⁶ According to the Human Rights Committee, any delay longer than 48 hours must be absolutely exceptional and must be justified under the circumstances.²⁷

A public prosecutor cannot be considered as a judicial officer for the purposes of guaranteeing the right to liberty and the prevention of arbitrary detention.²⁸ Following her latest visit to Tunisia the Special Rapporteur on the independence of judges and lawyers noted that the range of powers the Minister of Justice has vis-à-vis the State Prosecutor was "in contradiction to the principle of independence of the public prosecution service of the executive branch of Government."²⁹

²² Code of Criminal Procedure, article 13bis.

²³ Code of Criminal Procedure, article 13bis.

²⁴ In addition, Law No.2001-52 on the organization of prisons, which grants detainees access to lawyers and family visits does not apply to police custody.

²⁵ ICCPR, article 9; International Convention for the Protection of All Persons from Enforced Disappearance, article 17; ACHPR, article 6; ACHPR, Principles and Guidelines on the right to a fair trial and legal assistance in Africa, principle M; American Declaration of the Rights and Duties of Man, articles I and XXV; Arab Charter on Human Rights, article 14.

²⁶ ICCPR, article 9(3); ACHPR, article 6; ACHPR, Principles and Guidelines on the right to a fair trial and legal assistance in Africa, principle M.3; and ACHR, article 14. Human Rights Committee, General Comment No.35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 32.

²⁷ Human Rights Committee, General Comment No.35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 33. See, for example, Human Rights Committee, *Freemantle v. Jamaica*, Communication No. 625/1995, CCPR/C/68/D/625/1995, 28 April 2000, para. 7.4, where four days were considered not prompt.

²⁸ Human Rights Committee, General Comment No.35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 32.

²⁹ Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Tunisia, A/HRC/29/26/Add.3, 26 May 2015, para. 71.

The requirement that anyone arrested or detained in criminal matters be promptly brought before a judge or judicial officer also aims at avoiding torture and other ill-treatment in police custody, and preventing arbitrary or otherwise unlawful deprivation of liberty.

The ICJ considers that the Counter-Terrorism Law violates the right to liberty by allowing for a period of police custody from 5 to 15 days and by merely providing that the prosecutor must take his or her decision on the basis of a motivated decision without setting out any exceptional circumstances justifying such prolonged detention. In addition to the above-mentioned guidance from the UN Human Rights Committee acting under the ICCPR, by way of illustration, the European Court of Human Rights has held that four days and six hours in detention without appearing before a judge, even in the context of terrorist acts, violated the right to liberty and security of person.³⁰

Furthermore, the ICJ is deeply concerned that the potential for an accused to be deprived of access to a lawyer for up to 15 days, and presumably subjected to interrogation during this time, would clearly violate his or her right to a fair trial. The UN Basic Principles on the Role of Lawyers provides:

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.³¹

As the Grand Chamber of the European Court of Human Rights has held in relation to the right to fair trial under article 6 of the European Convention on Human Rights:

as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 (see, *mutatis mutandis*, Magee, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.³²

The ICJ is further concerned that the police custody period provided by the Counter-Terrorism Law and the lack of judicial oversight by an independent judge increase the risk of the accused being subjected to torture and other ill treatment.³³ The Counter-Terrorism Law, in conjunction with the Code of Criminal Procedure, also violates international standards on the right to be granted prompt access to legal counsel, including during interrogation, and to notify family members, or have them notified, of their arrest and to have access to them.³⁴

³⁰ See ECtHR, *Brogan and Others v. United Kingdom*, Application No. 11209/84; 11234/84; 11266/84; 11386/85, Judgment of 22 November 1988, para 62.

³¹ Basic Principles on the Role of Lawyers, welcomed by General Assembly resolution 45/166 (1990), article 7, para. 4.

³² ECtHR, *Salduz v Turkey*, Application No. 36391/02, Judgment of 27 November 2008, para 55.

³³ Committee against Torture, General Comment No. 2, 24 January 2008, CAT/C/GC/2, para 13.

³⁴ The International Convention for the Protection of All Persons from Enforced Disappearance, article 17; The Standard Minimum Rules for the Treatment of Prisoners, rules 37, 92 and 93; The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 15 to 19; the UN Basic Principles on the Role of Lawyers, principles 1, 5, 6, 7 and 8; the Principles on the Effective Prevention and Investigation of Extra-legal,

The Counter-Terrorism Law also includes provisions on special protective measures for witnesses. Under Article 69 of the Counter-Terrorism Law, witnesses can be examined using visual or audio means without them having to be physically present during the hearing and "adequate measures are taken not to reveal the identity of the persons subject to protection measures". Article 72 allows the judge seized of the matter to disclose the identity of the witness upon request if he or she considers the request founded and if there is no reason to fear for the life or property of that person or of his/her relatives. This decision can be appealed.

The ICJ is concerned that certain aspects of these provisions fall short of the requirements of the right to a fair trial as recognized and protected by universal human rights standards, including in treaties to which Tunisia is party, and which is also reflected in article 108 of the Constitution.

The right to a fair trial includes the right to be tried by an independent and impartial tribunal.³⁵ The Human Rights Committee has stated that the right to an independent and impartial tribunal is "an absolute right that may suffer no exception".³⁶ Furthermore, the UN Basic Principles on the Independence of the Judiciary provide that "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".³⁷

While certain components of the right to a fair trial may be restricted in exceptional circumstances, such as the right to a public trial³⁸, such restrictions must always comply with the principles of proportionality, necessity, non-discrimination and equality of arms and they should be subject to judicial review.

The ICJ is concerned that the restrictions on certain elements of the right to a fair trial under the Counter-Terrorism Law are inconsistent with international standards.

For instance, the use of evidence from an anonymous witness (where the defence is unaware of the witnesses' identity) is inconsistent with the right of the accused to examine the witness presented against him.³⁹ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that in all judicial proceedings, "Judicial bodies may take steps or order measures to be taken to protect ... the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings". At the same time, the Principles and Guidelines affirm that, "Nothing in these Guidelines shall permit the use of anonymous witnesses where the judge and the defence is unaware of the witnesses' identity at trial". The Principles and Guidelines further state, "The testimony of anonymous witnesses during a trial will be allowed only in exceptional circumstances, taking into consideration the nature and the circumstances of the offence and the

Arbitrary and Summary Execution, principle 6; and the Principles and Guidelines on the right to a fair trial and legal assistance in Africa, principle M.

³⁵ ICCPR, article 14; and the African Charter on Human and Peoples' Rights, articles 7 and 26.

³⁶ Human Rights Committee, *Miguel González del Río v. Peru*, Communication N° 263/1987, CCPR/C/46/263/1987, 20 November 1992, para 5.2. See also the Arab Charter on Human Rights, articles 4 and 13.

³⁷ UN Basic Principles on the Independence of the Judiciary, principle 5. See also, the former Commission on Human Rights, Operative paragraph N° 2 of Resolutions N° 2002/37 of 22 April 2002 and N° 2003/39 of 23 April 2003.

³⁸ ICCPR, article 14(1).

³⁹ ICCPR, article 14(3)(e).

protection of the security of the witness and if it is determined to be in the interests of justice.”⁴⁰ The Council of Europe Guidelines on Human Rights and counter-terrorism state, “The imperatives of the fight against terrorism may ... justify certain restrictions to the right of defence, in particular with regard to ...the use of anonymous testimony”, but specify that, “Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.”⁴¹

Among other things, the need for anonymity cannot be implied merely by the seriousness of the offence but needs to be warranted by the circumstances of each individual case. Anonymity must be strictly necessary to ensure the legitimate aim of witness protection; there must not have been less restrictive means to achieve the same ends. In addition, no conviction can ever be solely or substantially based on anonymous testimony.⁴²

The Counter-Terrorism Law does not specify that anonymous witnesses should be used in exceptional circumstances and only when it is strictly necessary to achieve the legitimate aim of witness protection. It does not specifically require the court to adopt compensatory measures to protect the interests of the accused. Nor does it provide that anonymous testimony cannot be the sole or substantial basis for a conviction. The ICJ is therefore concerned that articles 69 and 72 do not restrict the use of anonymous witnesses to the very limited circumstances permitted by international fair trial standards.

The Counter-Terrorism Law also provides that “in exceptional cases and when there is genuine danger that could result from a public trial, the judicial body in charge may decide on its own initiative or at the request of a prosecutor or at the request of any person having interest, to hold closed hearings” (article 69). The provision does not make clear what types of “danger” would provide grounds for such a decision. Article 14 of the ICCPR requires public hearings except in narrowly defined circumstances where closed hearings are necessary “for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest 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.” To ensure consistency with article 14 by specifying the character of the “danger” in question, in light of the kinds of concerns that can be associated with such cases, the ICJ recommends that article 69 be amended to replace “in exceptional cases and when there is a genuine danger that could result from a public trial” by “in exceptional cases where the Court concludes that closed hearings are necessary to protect against a specific threat to the life or bodily integrity of a person”.

The ICJ is further concerned with the provision of the Counter-Terrorism Law establishing administrative surveillance for a period of up to ten years. Under article 6 of the Counter-Terrorism Law “[t]he perpetrators of terrorist offences under the present law must be placed under administrative supervision for a minimum period of three years, without, however, exceeding a period of ten years, unless the court

⁴⁰ The African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Articles A.3 (g) and (i), N.6(f)(vi).

⁴¹ Council of Europe Guidelines on human rights and counter-terrorism, Guideline IX(3)(iii) and IX(4).

⁴² ECtHR, *Van Mechelen and Others v the Netherlands*, Application No. 21363/93, 21364/93, 21427/93 and 22056/93., Judgment of 23 April 1997, paras 55, 60-61. Inter-American Commission on Human Rights Report on Terrorism, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para 251.

decides to reduce this sentence below the legal minimum, and without prejudice to the application of one or all the other additional sentences provided by law.”

Such measures raise particular concerns with regards to the right to privacy. This right is recognised in article 24 of the Constitution and by article 17 of the ICCPR. It requires that everyone be protected against arbitrary or unlawful interference with a persons’ privacy, family, home or correspondence.⁴³ The UN Human Rights Committee has said that any such interference or restriction should be essential in the interests of society, and national legislation must specify in detail the precise circumstances in which such interference is possible.⁴⁴

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, during his visit to Tunisia, warned against resorting to administrative surveillance as a supplementary penalty and underlined 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”.⁴⁵ In particular the former prisoner is submitted to onerous reporting requirements, which might prevent his ability to find paid employment, to study and to be eventually reintegrated into society. The Special Rapporteur also noted that while legal challenges to these measures could in theory be brought, he had no knowledge of such contestations taking place.

While it notes that administrative surveillance under article 6 requires a court’s decision, the ICJ is deeply concerned at the lack of safeguards, including the right to challenge the lawfulness of a measure, to ensure administrative surveillance does not infringe on human rights more than is strictly necessary to achieve the aim sought. Further, the apparent automatic nature of the resort to administrative surveillance measures is particularly worrying and violates the requirement that limitations on human rights be warranted by the specific circumstances of each case.

In light of this, the ICJ is concerned that the Counter-Terrorism Law imposes blanket arbitrary infringements on the right to privacy through the automatic imposition of administrative surveillance in all cases.

A similar concern exists for special investigative measures envisaged in the Counter-Terrorism Law. Indeed, chapter V of the Counter-Terrorism Law provides for a wide range of surveillance measures such as communications interceptions (articles 52 to 54), infiltration (articles 55 to 58), and audio-visual surveillance (article 59) with interception and audio-visual surveillance lasting up to 4 months with the possibility of being renewed once.

The right of everyone to the protection of the law against unlawful or arbitrary interference with their privacy is recognised by article 24 of the Constitution and article 17 of the ICCPR. Interference with the right must meet the core requirements

⁴³ The Universal Declaration of Human Rights, article 12; ICCPR, article 17; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 14, American Convention on Human Rights, article 11; and European Convention on Human Rights, article 8.

⁴⁴ Human Rights Committee, General Comment No. 16, Article 17 (Right to Privacy), 28 September 1988, HRI/GEN/1/Rev.9, para.1.

⁴⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Tunisia, A/HRC/16/51/Add.2, 28 December 2010, paras. 42 and 43.

of foreseeability, specificity and accessibility. Any interference must be strictly necessary to achieve a legitimate aim.

The ICJ is concerned that decisions on communications, interceptions and infiltration are taken by the prosecutor or the investigative judge and that surveillance measures are under their sole control. The Counter-Terrorism Law also allows for surveillance measures to be adopted whenever "the needs of the investigation so require". Not only is this not a sufficiently clear threshold but it does not comply with the requirements for permissible human rights limitations.

Another cause for concern is the apparent lack of a mechanism allowing for an *ex post facto* review of those intrusive surveillance measures or for judicial remedy.

According to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

One of the core protections afforded by article 17 is that covert surveillance systems must be attended by adequate procedural safeguards to protect against abuse. These safeguards may take a variety of forms, but generally include independent prior authorization and/or subsequent independent review. Best practice requires the involvement of the executive, the legislature and the judiciary, as well as independent civilian oversight. The absence of adequate safeguards can lead to a lack of accountability for arbitrary or unlawful intrusions on the right to Internet privacy.⁴⁶

Similarly the Human Rights Committee has said in relation to counter-terrorism surveillance:⁴⁷

- Measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance;
- Any interference with the right to privacy, family, home or correspondence must be authorized by laws that: (i) are publicly accessible; (ii) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (iii) are sufficiently precise and specify in detail the precise circumstances in which any such interference may be permitted, the procedures for authorization, the categories of persons who may be placed under surveillance, the limit on the duration of surveillance; procedures for the use and storage of data collected; and (iv) provide for effective safeguards against abuse;
- Surveillance activities must be subject to effective oversight, including through judicial involvement in the authorization or monitoring of surveillance measures, and should involve the establishment of strong and independent oversight mandates with a view to preventing abuses;
- Affected persons must have access to effective remedies in cases of abuse.

⁴⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/69/397, 23 September 2014, para 45.

⁴⁷ Human Rights Committee, Concluding Observations on the United States of America, CCPR/C/USA/CO/4, 23 April 2014, para 22.

Numerous provisions of Chapter V of the Counter-Terrorism Law fall short of these requirements and are, therefore, not compatible with Tunisia's obligations under the ICCPR.

4. The protection of confidentiality of lawyer-client communications

Article 35 of the Counter-Terrorism Law provides that individuals, even though they are bound by a duty of professional secrecy, may face terrorism charges if they do not disclose facts or information related to the commission, or potential commission, of terrorist acts listed under the Counter-Terrorism Law. Lawyers, as well as doctors and journalists, are exempted when they obtain said information in the context of their profession, except if providing such information to the authorities "would result in avoiding the commission of terrorist crimes in the future".

As mentioned earlier in relation to journalists, the ICJ is concerned at the imprecise and unpredictable character of this provision in order to be applied in accordance with the principle of legality. This results from both the imprecise and overbroad definition of a "terrorist act" in articles 13 and 13 bis, on which article 35 depends, and more fundamentally from the fact that a lawyer will generally not be in a position to predict what specific pieces of information "would avoid the commission of terrorist crimes in the future". The vagueness and uncertainty is of even greater concern given that lawyers are bound by professional rules of ethics and conduct not to disclose information generally, an obligation that is inherent to the fair trial rights of the lawyer's clients.

Further in this regard, the provision also appears to be inconsistent with the right to confidentiality of client-lawyer communications as an aspect of the right to fair trial. It also appears inconsistent with international instruments and other standards concerning the role of lawyers.

The right to confidentiality of client-lawyer communications is an aspect of the right to a fair trial as protected by the ICCPR.⁴⁸ The United Nations Basic Principles on the Role of Lawyers also provide that "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential" (Principle 22).

The International Bar Association has noted:

Some jurisdictions also allow or require a lawyer to reveal information relating to the representation of the client to the extent the lawyer reasonably believes it necessary to prevent reasonably certain crimes resulting, for example in death or substantial bodily harm, or to prevent the client from committing such a crime in furtherance of which the client has used or is using the lawyer's services. Recent legislation imposing special duties upon lawyers to assist in the prevention of criminal phenomena such as terrorism, money laundering or organised crime has led to further erosion of the protection of the lawyer's duty of confidentiality. Many bars [bar associations] are opposed in principle to the scope of this legislation. Any encroachment on the lawyer's duty should be limited to information that is absolutely indispensable to enable lawyers to comply with their legal obligations or to prevent lawyers from being unknowingly abused by criminals to assist their improper goals. If neither of the above is the case and a suspect of a past crime seeks advice from a

⁴⁸ Human Rights Committee, General Comment No. 32, Article 14 (Right to equality before courts and tribunals and to fair trial), 23 August 2007, CCPR/C/GC/32, para 34.

lawyer, the duty of confidentiality should be fully protected. However, a lawyer cannot invoke confidentiality/professional secrecy in circumstances where the lawyer acts as an accomplice to a crime.⁴⁹

The ICJ considers that article 35 does not meet the strict tests for exceptions to the confidentiality of communications with lawyers.

The article does not comply with the requirements of legal precision for criminal offences, and is incompatible with the right to a fair trial and international standards on the role of lawyers.

Recommendations

Based on the above, the ICJ calls on the Tunisian President to refrain from promulgating the Counter-Terrorism Law. It urges the Tunisian authorities to amend the Counter-Terrorism Law through a transparent and inclusive process with a view to ensuring its full compliance with Tunisia's obligations under international law, as well as the 2014 Constitution, including by:

- i) Amending the Counter-Terrorism Law to ensure that crimes are defined using precise and clear language that enables persons to be sufficiently certain from the wording of the provision what acts and/or omissions would make him or her criminally liable, in compliance with the principle of legality as applied under international law;**
- ii) Ensuring that crimes of terrorism, notably the principal definition of a terrorist offence under articles 13 and 13 bis, are limited to acts that involve hostage-taking, death or serious physical injury to human beings;**
- iii) Amending the definitions of terrorism and/or terrorism-related crimes under the Counter-Terrorism Law, including articles 5, 13, 13 bis, 20, 21, 30, 35 and 46, so as to ensure that the exercise of the right to freedom of expression is not restricted in a disproportionate, unnecessary or otherwise unjustified fashion;**
- iv) Amending articles 5 and 13(8) so as to ensure that any criminalization of incitement requires a subjective intent to incite acts of violence, and a causal link between the incitement and the commission of an act of violence or an imminent risk of such an act;**
- v) Removing article 30 concerning the offence of "glorification";**
- vi) Removing the death penalty as an applicable penalty under the Counter-Terrorism Law;**
- vii) Incorporating a provision to ensure that any person arrested or detained has the right to prompt access to legal counsel, including during interrogation, and to notify family members, or have them notified, of their arrest and to have access to them;**
- viii) Incorporating the requirement that anyone arrested or detained in police custody be brought before a judge or other judicial officer within 48 hours and that any delay longer than 48 hours is exceptional and must be justified in the individual circumstances of the case and that the person, his lawyer, or his family has the full**

⁴⁹ IBA International Principles on Conduct for the Legal Profession Adopted on 28 May 2011 by the International Bar Association, commentary, pp. 21-22.

- right to challenge the lawfulness of deprivation of liberty before a court, at all times;
- ix) **Guaranteeing that anyone deprived of liberty must have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention with any delay within the forty-eight hours being exceptional and based only on legitimate grounds, and that any incriminating statements made by a person questioned during a period in which he or she has not been given access to a lawyer may not be used to convict him for a criminal offence.**
 - x) **Ensuring that any decision on the renewal of police custody is taken by a judge and not left to the sole discretion of a prosecutor, and is an exceptional measure based on an individualized determination that it is reasonable and necessary taking into account all the circumstances;**
 - xi) **Deleting or amending articles 6 on administrative surveillance and articles 52-59 on other forms of surveillance, to ensure that any restrictions on the right to privacy are not arbitrary, including by ensuring that any interference in or restriction on privacy:
 - a. is essential in the interests of a democratic society;
 - b. specifies in detail the precise circumstances in which such interference is possible; and
 - c. is subject to appropriate judicial authorization and judicial remedy;**
 - xii) **Removing article 35, or amending it to provide the precision required by the principle of legality, and eliminating or narrowing the circumstances in which a lawyer or a journalist or a doctor may be punished for failing to disclose professionally-confidential information to the authorities, to at most those circumstances where they specifically intends to act as a co-conspirator or accomplice to the crime by concealing the information;**
 - xiii) **Amending article 68 to ensure it is in line with Tunisia's obligation to protect the right to life by ensuring it only relates to the use of force that is consistent with the criteria set out in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, including that intentional use of lethal force is permitted only when necessary, proportionate, and strictly unavoidable in order to protect life;**
 - xiv) **Amending article 69 to clearly state that anonymous witnesses may only be used in exceptional circumstances when strictly necessary to achieve the legitimate aim of witness protection; that the giving of evidence by such a witness can only be permitted if the court orders compensatory measures sufficient to protect the interests of the accused; and that anonymous testimony cannot be the sole or substantial basis for a conviction;**
 - xv) **Amending article 69 with a view to ensuring, consistent with article 14 of the ICCPR, that hearings are public except when the Court concludes that closed hearings are necessary to protect against a specific threat to the life or bodily integrity of a person.**