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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin

Addendum

Mission to Tunisia*

Summary

The present report contains the findings and recommendations of the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his follow-up mission to Tunisia from 22 to 26 May 2011.

The Special Rapporteur expresses his gratitude to the interim Government of Tunisia for the invitation to conduct the follow-up mission in order to assess how Tunisia was making progress in implementing the recommendations contained in his report on his previous mission, conducted from 22 to 26 January 2010 (A/HRC/16/51/Add.2). The Special Rapporteur was pleased to learn that the interim Government regarded them as conducive to helping Tunisia to express its will to build a new culture of human rights in the context of countering terrorism. The invitation extended to the Special Rapporteur, and broad legislative reforms to bring the laws of Tunisia into line with international human rights standards that the interim Government planned to initiate, including a reform of the 2003 anti-terrorism law or the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other international human rights instruments, are promising signs of a break with the past of human rights abuses in the context of countering terrorism committed under the Ben Ali regime.

* The summary of the present report is being circulated in all official languages. The report itself, contained in the annex to the summary, is circulated in the language of submission and in French only.

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The first set of recommendations contained in the previous mission report of the Special Rapporteur centred on the provisions of the 2003 anti-terrorism law. The Special Rapporteur had recommended the revision of the definition of terrorism and provisions relating to membership in terrorist groups, and incitement to and the financing of terrorism. In his assessment, the law did not provide more security to the Tunisian people, but was in the past widely abused as a tool of repression against any form of political dissent.

The Special Rapporteur welcomes the decision of the interim Government to provide for a general amnesty for all political prisoners pursuant to the 19 February 2011 decree law relating to amnesty on the basis of which all prisoners detained as at 14 January 2011 under the 2003 anti-terrorism law, security related provisions of the Penal Code or article 123 of the Code of Military Justice had been released.

Although the amnesty law made the 2003 anti-terrorism law de facto obsolete, the Special Rapporteur was surprised to learn during his follow up visit to Al Mornaguia prison that at least two recently arrived detainees had been detained on the basis of the 2003 anti-terrorism law. The Special Rapporteur observes that the paradoxical status of the law is highly problematic from a rule of law perspective, given that a law cannot be enforced and not enforced at the same time, and requests the Government of Tunisia to resolve this ambiguous situation with immediacy.

One of the most disturbing findings of the Special Rapporteur during his previous mission in 2010 was the pattern of unacknowledged detention under the interrogation authority of the Ministry of the Interior, which was used secretly to detain terrorist suspects. During the period of secret detention on the premises of the Ministry of the Interior, practices of torture to obtain confessions were not the exception, but the rule.

The Special Rapporteur welcomes the confirmation received from all official interlocutors during the follow-up visit that such detentions no longer take place. He regards the decision by the interim Government to open the doors of the previously secret detention facility, and all other detention facilities in the country, to scrutiny by his mandate, international and regional organizations and non-governmental organizations, as a new sign of transparency. While the follow-up visit of the Special Rapporteur was held in a general atmosphere of cooperation and good will, he remains concerned, however, that some officials remaining from the Ben Ali regime were defensive, evasive or dismissive of the extent of human rights violations that had happened in the past. This was manifested in the refusal to allow the Special Rapporteur to inspect offices on the premises of the Ministry of the Interior where abusive interrogation had invariably taken place according to the findings in his report on the previous mission.

In the report on his previous mission, the Special Rapporteur expressed grave concerns about the activities of various entities of the Tunisian security apparatus and the secrecy and impunity in which they operated. The Special Rapporteur therefore welcomes the announcement made on 7 March 2011 by the Ministry of the Interior that it was dissolving the Directorate for State Security (DSS) and the "political police", which did not exist officially, but can be described as those elements in the security organs related to the Ministry that were responsible for cracking down on political opponents to the Ben Ali regime, irrespective of the entity by which the officer was officially employed.

While welcoming this announcement and other initial steps taken to remove from office, investigate and prosecute those responsible for serious human rights violations committed in the past, also in the context of countering terrorism, including the establishment of the National Commission to Establish the Facts of Abuses and Violations from 17 December 2010 until the Elimination of Their Cause, the Special Rapporteur considers that much more needs to be done to provide truth, justice, reparations and guarantees of non-recurrence. It is of utmost importance that a real investigation be initiated into the crimes committed by the DSS and that all those who were involved in these practices be removed, from office, subjected to a fair trial and, if found guilty,

punished. Legislation envisaged by the interim Government to provide for reparations to victims of human rights abuses should be adopted without delay.

In this context, and in a spirit of cooperation, the Special Rapporteur recommends that the Government of Tunisia proceed to, inter alia, resolve the ambiguous status of the 2003 anti-terrorism law; if it decides to prepare special legislation for countering terrorism, that it introduce a bill for its replacement that fully complies with international human rights norms and standards; introduce amendments to legislation to strengthen the safeguards against torture and other forms of ill-treatment; introduce legislative, institutional and budgetary reforms to strengthen the independence of the judiciary; and initiate ex officio investigations into allegations of torture and illegal detentions in the context of the fight against terrorism during the Ben Ali regime; and provide reparations to those who were harmed.

Annex

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his mission to Tunisia (22 – 26 May 2011)

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I. Introduction

1. The former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, conducted a follow-up visit to Tunisia from 22 to 26 May 2011 at the invitation of the interim Government. The purpose of the mission was to assess the progress made by the country in implementing the recommendations made by the Special Rapporteur after his previous country mission conducted from 22 to 26 January 2010 (A/HRC/16/51/Add.2).

2. During his five-day mission, the Special Rapporteur met with the Minister for Justice and Human Rights, the Prosecutor-General for the Administration of Justice, the Director-General for Prison Administration, the Director-General for International Cooperation and other officials at the Ministry of Justice; the Minister for the Interior, the Director-General for External Relations and International Cooperation, the Director-General for National Security, the Director-General of the National Guard, the Head of the Human Rights Unit, representatives of the Directorate for Criminal Investigations (*Police judiciaire*), the Directorate for Legal Studies and Disputes and other officials at the Ministry of the Interior; the Secretary of State for Foreign Affairs and other officials at the Ministry of Foreign Affairs; and other members of the interim Government. The Special Rapporteur also attended a class at the Security Forces Staff College and gave a brief lecture on counter-terrorism measures and compliance with international human rights law.

3. Another important part of the Special Rapporteur's mission were the meetings with the Chairperson of the National Commission to Establish the Facts of Abuses and Violations from 17 December 2010 until the Elimination of their Cause; the spokesperson of the High Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition; and representatives of civil society organizations, and lawyers. In addition, the Special Rapporteur held meetings with the United Nations country team, the International Committee of the Red Cross and the diplomatic community.

4. The Special Rapporteur visited the detention centres at Bouchoucha and Al Mornaguia Prison, where he was able to interview suspects of terrorist crimes in private.

5. The Special Rapporteur wishes to express his gratitude to the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Resident Coordinator, the United Nations country team, the members of his delegation, and others involved in organizing the visit for the excellent assistance prior to, throughout and after the mission. He would also like to thank the members of civil society for meeting with him.

6. The Special Rapporteur presented his preliminary findings to the interim Government on the closing day of his mission and held a press conference. On 30 December 2011, he shared a preliminary version in French of the present report with the Government, following the transmission of a version in English on 6 December.

II. Findings

A. Context of the follow-up mission

7. When the former Special Rapporteur presented his previous mission report (A/HRC/16/51/Add.2) to the Human Rights Council on 7 March 2011, the representative of the new interim Government of Tunisia reacted positively to many of the conclusions and recommendations made by the Special Rapporteur in the report. The Special Rapporteur was pleased to learn that the interim Government regarded them as conducive to helping

Tunisia to express its will to build a new culture of human rights in the context of countering terrorism. The interim Government was planning to initiate broad legislative reforms to bring its laws into line with international human rights norms and standards, including a reform of the 2003 anti-terrorism law[1] in order to prevent its abuse against innocent persons. It had adopted an amnesty law for persons convicted on the basis of the anti-terrorism law; according to the interim Government, thousands of political prisoners had already benefitted from the amnesty law. The interim Government also pledged to reinforce the independence of the judiciary. It acknowledged the existence of secret detention facilities, and announced that it had put an end to the practice of secret detention and had opened prisons and other facilities where people were deprived of their liberty to the scrutiny of international and regional organizations and non-governmental organizations since 14 January 2011. The interim Government promised to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to prevent such practices from taking place in the future. The overarching aim of the interim Government, as expressed to the Special Rapporteur by Government interlocutors of the highest level, was to make the achievements of the revolution irreversible and enter into an era where human rights and the rule of law are promoted and protected. The Special Rapporteur was assured that visits such as his and that of other human rights mechanisms and representatives of non-governmental organizations, as well as the presence of OHCHR, which had opened an office in the country following an assessment mission from 26 January to 2 February 2011[2] were highly welcome in the new Tunisia, as they helped the interim Government to correct past wrongs. In this atmosphere of increased transparency, the interim Government issued an invitation to the former mandate holder to conduct a follow-up mission in order to assess how Tunisia was making progress in implementing the recommendations made in the previous mission report.[3]

B. Definition of terrorism and the amnesty decree law

8. The first set of recommendations made in the previous mission report centred on the provisions of amended Law No. 2003-75 of 10 December 2003. The Special Rapporteur recommended the revision of the definition of terrorism and provisions relating to membership in terrorist groups, incitement to and financing of terrorism. Its article 4 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 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.

The definition of terrorism had to be changed and to be expressed in precise terms so that it fulfilled the requirement of legality enshrined in article 15 of the International Covenant on

[1] Law No. 2003-75 of 10 December 2003 on the support of international efforts in the fight against terrorism and the suppression of money laundering, *Journal officiel de la République tunisienne*, 12 December 2003, p. 3592, as amended.

[2] See the report of the assessment mission of OHCHR (available from www.ohchr.org/Documents/Countries/TN/OHCHR_Assessment_Mission_to_Tunisia.pdf).

[3] A/HRC/16/51/Add.2, para. 64.

Civil and Political Rights, which requires that all elements of a crime have to be encapsulated in legal definitions in explicit and precise terms.

9. Furthermore, as emphasized in several reports by the Special Rapporteur, deadly or otherwise serious physical violence against members of the general population or segments of it must be the central element of any definition of terrorism. If prosecutions relating to membership in terrorist groups, incitement to and financing of terrorism result in restrictions of human rights, such as the rights to freedom of opinion and expression, association or religion, such restrictions must comply with the requirements of necessity and proportionality.[4]

10. The concern about the definition of terrorism and its potential for abuse against political opponents, students, human rights activists, trade union officials, journalists or bloggers came to the fore when former President, Zine El Abidine Ben Ali, called the then ongoing nationwide protests "acts of terrorism" during a speech broadcast on national television on 11 January 2011.[5] Statements like these highlighted the potential for abuse of the 2003 anti-terrorism law, and its application indeed facilitated torture and secret detention. This law did not provide the Tunisian people with more security, but was widely abused as a tool of oppression against any form of political dissent. It was also counterproductive in the fight against actual terrorism as it had the effect of overstating the phenomenon. In the words of one civil society interlocutor with whom the Special Rapporteur met, "Tunisia had terrorists, but no terrorism". The negation of human rights by an oppressive regime, including under the pretext of countering terrorism, ultimately set one of the causes for bringing together a critical mass of people from very different walks of life to pursue their aspirations for a free and democratic society and a Government that respects human rights. Tunisia has become a symbol of this lesson.

11. At the first session of the first interim Government of Tunisia on 20 January 2011, an initial decision was made to provide for a general amnesty for all political prisoners. This decision became law in a decree signed by then Acting President, Foued Mebazaa, on 19 February 2011.[6] The decree applied to anybody who had been convicted or prosecuted for, inter alia, a violation of any provision of the 2003 anti-terrorism law, an attempt on the internal security of the State as foreseen in articles 63 to 83 of the Tunisian Penal Code, or a violation of the provisions of the second and third paragraphs of article 123 of the Code of Military Justice, which penalizes any Tunisian civilian who, in time of peace, provides services to or cooperates with any foreign army or any organization qualified as "terrorist" that operates abroad, or who incites to the above-mentioned crimes or facilitates them by any means. According to article 2 of the decree, all those who were affected by the amnesty law were entitled to be reinstated in their work and to apply for reparations.

12. During the mission, the Special Rapporteur learned that all prisoners detained as at 14 January 2011 on the basis of the 2003 anti-terrorism law, security related provisions of the Penal Code or article 123 of the Code of Military Justice had been released. This included prisoners who had been returned to Tunisia by certain European States, two former Guantánamo Bay detainees and all members of the political party Ennahda. A total of 8,700 people benefited from this amnesty law either by being released from prison or – in the broad majority of cases – by being restored their political rights.

13. The Special Rapporteur was informed by a credible source that some 3,000 people had been tried and sentenced under the 2003 anti-terrorism law only, many for such

[4] Ibid., paras. 64 (a) and (b).

[5] See www.amnesty.org/en/news-and-updates/arbitrary-arrests-warning-after-tunisian-president-brands-protests-acts-terrorism-2.

[6] Decree law No. 2011-1 of 19 February 2011 relating to amnesty. *Journal officiel de la République tunisienne*, 22 February 2011, p. 179.

"offences" as growing beards, wearing specific clothing or for consulting prohibited Internet sites. By the time of the visit of the Special Rapporteur, 217 people held on the basis of the 2003 anti-terrorism law had been released from prison. Suspects who were in pretrial detention were freed by a court order, while those convicted were released on the basis of a decision by the Minister for Justice and Human Rights. The Special Rapporteur was informed by the Prosecutor-General for the Administration of Justice that a number of those released under the amnesty law had subsequently been tried and convicted for reportedly recognizable offences under ordinary criminal law, and that cases were pending on appeal before the Supreme Court; exact statistics could not, however, be provided. In this respect, the Special Rapporteur notes with concern credible information received that some beneficiaries of the amnesty law were pushed back at the border on the basis of restraining orders or re-arrested on the basis of mere search warrants, both stemming from the time of the Ben Ali regime.

14. The adoption of the amnesty law made the 2003 anti-terrorism law de facto obsolete. This impression was confirmed by all Government representatives whom the Special Rapporteur met during the follow-up mission. They confirmed that the law was "dormant" but not yet officially scrapped from the books; however, without the formal repeal of the law, it is up to the judiciary to decide whether or not the law is still in force and, for instance, whether to use it as a basis to order the detention of terrorist suspects.

15. During his follow-up visit to Al Mornaguia prison, the Special Rapporteur was surprised to learn that at least two recently arrived detainees had been detained on the basis of the 2003 anti-terrorism law. This paradoxical status of the law is highly problematic from the perspective of the rule of law, as a law cannot be enforced and not enforced at the same time. It is important that this ambiguous situation be resolved as soon as possible. During the mission, the Special Rapporteur was informed by high-level Government officials that a reform of the 2003 anti-terrorism law was under way, but that it would be replaced only after a new Constitution comes into force. The Special Rapporteur offered his good services to provide technical assistance in the drafting in accordance with the mandate bestowed upon him by the Human Rights Council, and was encouraged by the assurances received from competent Government interlocutors that the assistance of his mandate would be sought for the drafting process.

16. The arrest and detention of the foreign terrorist suspects in question was related to the then ongoing violence in Libya and the movement of armed individuals through the territory of Tunisia, possibly in order to enter Libya. Such developments illustrate the reality of the threat of international terrorism for Tunisia, especially in the context of the porous border with Libya, and a further reason for swiftly establishing a proper legal framework to counter terrorism. Home-grown terrorism, assured Government interlocutors, had not been a major problem in Tunisia before or after the revolution, save for an attack, qualified as terrorist, that had led to the deaths of tourists visiting Tunisia in 2002. However, in the assessment of a representative from the interim Government, which was shared by a representative of civil society, poverty is considered to be a fertile ground for terrorism in Tunisia and that the consequences would include the real threat of terrorist hostage-taking.

17. Article 5 of decree law No 2011-14 dated 23 March 2011,[7] relating to the provisional organization of the public authorities, provides the interim Government with the explicit possibility of adopting a new decree law related to "the fight against terrorism and money laundering". The decision of whether or not to adopt a new, separate anti-terrorism law rather than relying on the existing offences of the Tunisian Penal Code is a sovereign decision that the Government of Tunisia and the legislature need to make. The Special

[7] *Journal officiel de la République tunisienne*, 25 March 2011, p. 365.

Rapporteur is fully cognizant of the fact that some of the civil society representatives and certain Government officials met during the mission cautioned against the adoption of a separate legal framework for countering terrorism, citing the abuses that occurred in Tunisia in the past under the pretext of the fight against terrorism and arguing that ordinary criminal and criminal procedure legislation in force would suffice. However, in the light of the State's international legal obligations to, inter alia, prevent the financing of terrorism, the adoption of a new anti-terrorism law is advisable.

18. In order to provide the Tunisian people with the security they deserve, the Special Rapporteur offered the assistance of his mandate to create a proper legislative framework to regulate the State's anti-terrorism efforts in line with international instruments on countering terrorism, while being in full conformity with international human rights norms and standards. Inspiration for such a legal framework can be drawn from his last thematic report as Special Rapporteur on 10 areas of best practice in countering terrorism[8] and from Security Council resolution 1566 (2004), paragraph 3.

19. In May 2011, the same month as the follow-up visit of the Special Rapporteur, Tunisian security forces uncovered in Tunisia several people from neighbouring countries who were allegedly related to "Al Qaeda in the Maghreb". In one particular event in Rouhia, two members of the National Guard and two terrorist suspects reportedly died during a violent confrontation. According to official sources, one Tunisian terrorist suspect had fled the scene and was still at large. Some of the interlocutors of the Special Rapporteur suggested that this particular event had led to various forms of harassment against people who had earlier been released under the amnesty law. They feared that such an event could easily be abused, falling back on the old habits of the former regime. The Special Rapporteur is not in a position to verify these claims, but notes again that such claims indicate the urgency of adopting a proper legal framework for counter-terrorism.

C. Addressing the former practice of secret police custody

20. One of the most disturbing findings of the previous mission in 2010 was the pattern of unacknowledged detention under the interrogation authority of the Ministry of the Interior, which was used to secretly detain terrorist suspects. Their official date of arrest was recorded at Bouchoucha police station – where the terrorist suspects pass through before being taken into pretrial detention upon a decision of the judge – only much later, after the authorities have obtained a confession. During the period of secret detention on the premises of the Ministry of the Interior, practices of torture were not the exception, but the rule, in total disregard not only for the international human rights obligations that Tunisia had undertaken, but also for the articles of the Constitution of Tunisia and the provisions of ordinary laws safeguarding against such practices.[9]

21. All the official interlocutors of the Special Rapporteur stressed during his follow-up visit that such detentions no longer took place. As a sign of new transparency, the interim Government opened the doors of its previously secret detention facility at the Ministry of the Interior to the Special Rapporteur. This facility consisted of around a dozen cells of various sizes, ranging from 8 to 14 m^2, which were positioned around a large room with direct access from the closed courtyard of the Ministry. In one room, 70 mattresses were piled up. One staircase in the facility led to the upper floors of the Ministry. Unfortunately, the premises had not been preserved in their original state; for example, the walls had received a fresh coat of white paint.

[8] A/HRC/16/51.

[9] A/HRC/16/51/Add.2, paras. 22-32.

22. While the mission of the Special Rapporteur was conducted in a general atmosphere of cooperation and good faith, some officials remaining from the Ben Ali regime were defensive, evasive or dismissive when questioned about the extent of illegal practices of the past; for example, the Special Rapporteur's delegation was shown what were supposed to be the only two interrogation rooms at the entrance of the formerly secret detention facility at the Ministry of the Interior. In his previous mission report, however, the Special Rapporteur had found that interrogations invariably did not take place in these two small white cabins at the entrance, but on the upper floors of the offices of the Ministry of the Interior.[10] This fact was still denied by some officials, who insisted that the two small white cabins were the only interrogation facilities in the building. The Special Rapporteur was also disturbed to learn during his follow-up visit to Bouchoucha police station that no disciplinary or criminal proceedings had been initiated against those who collaborated in the practice of back-dating dates of arrests of terrorism suspects in the past that resulted in secret detention.

23. The Special Rapporteur notes that two related recurring problems in the country's criminal justice system have still not been resolved. Firstly, suspects still do not have effective access to a lawyer immediately after apprehension.[11] This is a crucial issue that should be introduced in the legal framework as soon as possible, since lack of access has greatly contributed to the impunity under which torture has been carried out in the past, also in the context of countering terrorism.[12] Secondly, a more elaborate system of bail is urgently needed in order to prevent overcrowding and to lower the number of people currently under *garde à vue* or in pretrial detention. At Al Mornaguia prison, for instance, the Special Rapporteur found that, even after the implementation of the amnesty law, more than 60 per cent of the 5,462 prisoners were pretrial detainees, which is an unacceptably high ratio and cannot be explained simply on the basis of the limited number of functioning prisons (17 of which were set alight during the revolution, were thus not fully in use and required the transfer of inmates to other usable detention facilities).

24. In order to abolish the practice of secret detention and to strengthen independent domestic and international monitoring mechanisms over domestic detention facilities, one of the recommendations made in the mission report and addressed to the former Government was the ratification of Optional Protocol to the Convention against Torture.[13] During the follow-up mission, the Special Rapporteur commended the interim Government for its decision to ratify or to accede to several international instruments, including the International Convention for the Protection of All Persons from Enforced Disappearance,[14] the Optional Protocol to the International Covenant on Civil and Political Rights,[15] the Optional Protocol to the Convention against Torture[16] and the Rome Statute of the

[10] A/HRC/16/51/Add.2, para. 24.

[11] See A/HRC/16/51/Add.2, paras. 37 and 64 (d).

[12] See also A/HRC/19/61/Add.1, para. 102 (c).

[13] A/HRC/16/51/Add.2, para. 64 (e).

[14] Decree law No. 2011-2 of 19 February 2011, relating to the approval of the International Convention for the Protection of All Persons from Enforced Disappearance. *Journal officiel de la République tunisienne*, 22 February 2011, p. 180.

[15] Decree law No. 2011 of 19 February 2011, approving the accession of the Republic of Tunisia to the Optional Protocol to the International Covenant on Civil and Political Rights. *Journal officiel de la République tunisienne*, 22 February 2011, p. 181.

[16] Decree law No. 2011-5 of 19 February 2011, approving the accession of the Republic of Tunisia to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. *Journal officiel de la République tunisienne*, 22 February 2011, p. 181.

International Criminal Court,[17] but emphasized that such promises turn into real rights only when implemented by depositing the international instrument of accession. On 29 June 2011, one month after the follow-up visit, Tunisia acceded to the Optional Protocol to the Convention against Torture. In June 2011, Tunisia also acceded to the Optional Protocol to the International Covenant on Civil and Political Rights and to the Rome Statute of the International Criminal Court, and ratified the International Convention for the Protection of All Persons from Enforced Disappearance. While the Special Rapporteur welcome these important measures, he feels that a concern from his previous report should, however, be reiterated. In general, the country's pre-revolutionary legal framework provided procedural and substantive guarantees that should have prevented many abuses and human rights violations from taking place. These guarantees, however, were circumvented in a number of ways, described by the Special Rapporteur in his previous report.[18] There must be no new gap between the law and the reality in Tunisia. Changes in laws and policies is an important first step, but these changes must be accompanied by institutional changes and the replacement of all Government officials involved in atrocious human rights violations, following a proper vetting process. The Special Rapporteur was encouraged at information received from the interim Government that 10,000 new recruitments to the security services had been carried out, but was surprised to see that some of the officials that he encountered at the Ministry of the Interior during the follow-up visit were the same that he had met in January 2010 during his first mission.

D. Reform of State security entities and accountability

25. In his previous report, the Special Rapporteur expressed grave concerns about the activities of various entities of the security apparatus, and the secrecy and impunity in which they operated. He singled out the Directorate for State Security (DSS) as a crucial entity that was responsible for activities of torture, and arbitrary and even secret detention. The Special Rapporteur therefore welcomes the announcement of the Ministry of the Interior, made on 7 March 2011, that it was dissolving both the DSS and the "political police". The latter did not exist officially and can generally be described as those members of the security organs related to the Ministry of the Interior, notably within the DSS/*Police judiciaire*, that were responsible for cracking down on political activities by political opponents, students, human rights activists, trade union officials, journalists, bloggers and others, irrespective of the entity by which the officer was officially employed. It is unclear, however, how many officials have been affected by this abolition, and what the implications were for their future status. The Special Rapporteur also received inconclusive accounts about whether those who served in the DSS had been dismissed, forced to retire or simply moved to new positions inside the Ministry of the Interior or other parts of the State security apparatus. While the abolition of these two bodies is a welcome step, it does not amount to holding individual members of these entities to account for the crimes they have committed.

26. Changes to the way the State's security organs operate should not be limited to slogans but should result in concrete measures. The first steps for establishing accountability have been taken in relation to officials who cracked down on demonstrators after 17 December 2010. The Special Rapporteur welcomes this positive development, but stresses that, for Tunisia to be able to truly look forward to a new era, it has to come to terms with the dark remnants of its past. Therefore, it is of utmost importance that a real

[17] Decree law No. 2011-4 of 19 February 2011, approving the accession of the Republic of Tunisia to the Rome Statute of the International Criminal Court and to the Agreement on the Privileges and Immunities of the Court. *Journal officiel de la République tunisienne*, 22 February 2011, p. 181.

[18] A/HRC/16/51/Add.2, paras. 22-43.

investigation be initiated into the crimes committed by the DSS, and that those who were involved in these practices be removed from office, subjected to a fair trial and, if found guilty, punished. The Special Rapporteur learned that, at the time of his follow-up mission, 66 security officials had been arrested and taken into pretrial detention, including a former Minister for the Interior, seven high-ranking officials had been prosecuted, and 42 others had been forced to retire or went into voluntary retirement, including some 10 members of the leadership of the National Guard. Tunisia should continue along the same path and investigate *ex officio* allegations of torture and illegal detention committed in the context of the fight against terrorism. Requiring victims of serious human rights violations committed in the past, including in the context of counter-terrorism, to submit complaints before an investigation is opened would subject them to an uphill battle. The need to reinforce this *ex officio* mechanism is also linked to the general lack of trust of the Tunisian people in the independence and effectiveness of the judicial system and the presence of some representatives of the Ben Ali regime remaining in office, which might deter them from filing complaints. The Special Rapporteur is concerned about reports he received during his follow-up visit that complaints may have to be filed with the same State entity whose agents are alleged to have committed these human rights abuses.

27. The Special Rapporteur commends the interim Government for having established a mechanism, in the form of a fact-finding commission, as a first step for ultimately providing truth, justice, reparations and guarantees of non-recurrence of serious human rights violations. He feels, however, duty-bound to stress that such an investigative mechanism cannot – and indeed is not meant to – substitute justice, including criminal justice, which should be allowed to take its course. The fact-finding commission does not have any prosecutorial, let alone judicial, powers to bring to justice the perpetrators of excesses committed in the context of countering terrorism and hold them to account, nor can it award compensation or other forms of reparation to the victims of abuses. In addition, its mandate is limited in time to investigate and document human rights violations that occurred after 17 December 2010; it is imperative, therefore, that accountability be established prior to this date.[19] In the view of the Special Rapporteur, however, it is nonetheless a very important mechanism, since it is mandated to make its final report available to the President of the country and to the public at large, and to submit its findings and relevant evidence to the Office of the Public Prosecutor so that criminal investigations leading to prosecution may be initiated.

28. In his previous report, the Special Rapporteur also highlighted the lack of publicly available information in which several security organs of the State performed, including the secrecy surrounding decree No. 246 of 15 August 2007, which purportedly clarified the structure of the internal security forces under the Ministry of the Interior,[20] but was not a publicly available document. The previous Government of Tunisia itself, in its comments of 2 December 2010 on the draft report on the first mission to Tunisia by the Special Rapporteur, stated that:

> The structures under the Internal Security Forces within the Ministry of the Interior and Local Development, to prevent and combat terrorism, operate in the context of specialization and complementarity; a decree organizing such structures attached to the Directorate General of National Security, on the one hand, and the Directorate General of the National Guard, on the other (Decree n° 246-2007 of August 15, 2007).

29. During his follow-up mission, the Special Rapporteur requested a copy of the above-mentioned decree from Government interlocutors operating under the auspices of the

[19] See also A/HRC/19/61/Add.1, paras. 71-77.

[20] A/HRC/16/51/Add.2, para. 20.

relevant ministries, who all referred him to the Ministry of the Interior as the appropriate entity. The Special Rapporteur regrets the fact that he was not provided with a copy of the decree during his visit despite the assurances of the Minster of the Interior to the contrary. In a note verbale dated 28 June 2011, the interim Government of Tunisia transmitted, however, a document entitled "Circular No. 246 of 15 August 2007", which outlined the structure of the Ministry of the Interior but had the appearance of an organization chart lacking all formal elements of a law.

30. According to "Circular No. 246", the Ministry of the Interior is divided into three subdirectorates: the General Directorate for National Security, the General Directorate of the National Guard, and the National Bureau for Civil Protection. The General Directorate for National Security has eight subdivisions, including the Directorate of Special Services and the General Directorate for Public Security. The General Directorate for Public Security is in turn divided into six subdivisions, including the *Police judiciaire,* which comprises four entities, one of which is the Subdirectorate for Criminal Affairs.

31. The Special Rapporteur regrets that he has been unable to establish the existence, nature and contents of a "Decree No. 246 of 15 August 2007" during his two missions, which only confirmed his previous findings: namely, that it was this secrecy that was an important element that contributed to the shield of impunity behind which the actors of the Tunisian security apparatus under the Ben Ali regime could operate. In transparent States, all functions and powers of the security organs are regulated by publicly available laws. Such transparency prevents not only the creation of myths about what these agencies do but also ensures their accountability when these agencies commit illegal acts.

E. Reparations

32. During his follow-up visit, the Special Rapporteur sensed a general dissatisfaction within civil society with the way in which the interim Government was progressing with the issue of reparations for past human rights abuses. He was informed that separate legislation providing for reparations was envisaged by the interim Government, but had not yet been adopted. Article 2 of the amnesty law[21] also envisages the adoption of a specific legal framework for reparations to be awarded to the beneficiaries of the law, stating that "all those who will be concerned by the amnesty in accordance with the decree-law herein will be entitled to the right to return to their employment and to a damages request. The requests for damages submitted by the persons benefiting from the amnesty will be examined in accordance with the procedures and methods fixed by a specific legal framework."

33. The Special Rapporteur has always emphasized in his country missions and thematic reports the importance of providing redress and assistance to victims of human rights violations committed in the context of countering actual or perceived terrorism, and also to victims of terrorist acts, from the State budget.[22] He therefore encourages Tunisia to swiftly adopt and implement a legal framework and set aside the necessary funding for reparative measures for past human rights violations, including for the compensation and rehabilitation of victims of counter-terrorism measures.

[21] Decree law No. 2011-1 of 19 February 2011 relating to amnesty. *Journal officiel de la République tunisienne,* 22 February 2011, p. 179.

[22] A/HRC/16/51, paras. 22-25.

III. Conclusions and recommendations

A. Conclusions

34. **The Special Rapporteur was able to conduct his follow-up mission in a spirit of cooperation with general transparency and openness extended to him by all the interlocutors from the interim Government whom he met. He remains concerned, however, that some officials were still in a state of denial about the existence of interrogation rooms on the upper office floors of the Ministry of the Interior that were used during the Ben Ali era for the secret detention of terrorism suspects in order to obtain confessions under torture and other forms of cruel, inhuman or degrading treatment.**

35. **The Special Rapporteur welcomes the fact that the interim Government has embarked upon legal reforms to bring its legislation into conformity with international human rights law and standards, and has ratified or acceded to several international human rights instruments, including the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as an important instrument for the prevention of torture and other forms of ill-treatment, also in the context of counter-terrorism.**

36. **The Special Rapporteur also welcomes the adoption by the interim Government of an amnesty law, pursuant to which all detainees detained as at 14 January 2011 under the 2003 anti-terrorism law, security-related criminal offences in terms of the Penal Code, and article 123 of the Code of Military Justice were released.**

37. **With regard to the requirements of the principle of the rule of law, it is imperative that the ambiguous status of the 2003 anti-terrorism law, which was rendered de facto obsolete by the amnesty law but has not been formally repealed, be addressed.**

38. **If the Government of Tunisia proceeds with its plan to replace the 2003 anti-terrorism law with a special legal framework for countering terrorism, the Special Rapporteur renews his commitment, expressed during his follow-up mission, that his mandate stands ready to assist in the drafting process.**

39. **The Special Rapporteur welcomes the fact that Tunisia has seized a historic opportunity to break with the past practice of secret detention and torture of terrorism suspects in order to obtain a confession before the arrest of the suspect was formally recorded. While commending the interim Government for establishing the fact-finding commission with a mandate to investigate excesses and violations that took place after 17 December 2010, such a mechanism can only be the first step for fighting impunity, holding perpetrators of human rights violations of the bygone era, including in the highest ranks, to account, and providing the victims with redress, including compensation, rehabilitation and other forms of reparations.**

40. **While welcoming the dissolution of the infamous DSS and the "political police", the Special Rapporteur insists that it is imperative that the reform of the security apparatus of Tunisia continue as speedily as possible and that further steps be taken to ensure that officials who were implicated in human rights violations no longer hold public office.**

B. Recommendations

41. **In a spirit of cooperation, the Special Rapporteur recommends that the Government of Tunisia:**

(a) Proceed to resolve the ambiguous status of the 2003 anti-terrorism law (Law No. 2003-75 of 10 December 2003 relating to the support of international efforts in the fight against terrorism and the suppression of money laundering, as amended), which had not been formally repealed at the time of the visit of the Special Rapporteur, but was qualified as "dormant", yet still applied by courts in isolated cases;

(b) If it decides to prepare special legislation for countering terrorism to meet its international obligations under pertinent Security Council resolutions, as a second step, introduce a bill to replace the 2003 anti-terrorism law with a proper legal framework that complies fully with international human rights norms and standards, including the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights. Inspiration for a proper legal framework in countering terrorism may be drawn from the report of the Special Rapporteur on 10 areas of best practices in countering terrorism (A/HRC/16/51) and from Security Council resolution 1566 (2004). If a special counter-terrorism law were to include not only special substantive provisions but also special powers for law enforcement agencies, it would imperative to provide for clear limitations to the application of such powers to terrorism crimes as properly defined in order to prevent the risk of a spillover effect to other forms of crimes;

(c) Initiate amendments to legislation to the effect that persons deprived of their liberty have access to a lawyer immediately after apprehension and enjoy a right to have a lawyer present from the moment of the first interrogation, to ensure prompt access to medical examination, and to implement video and audio recording of interrogations, in order to strengthen the safeguards against torture and other forms of ill-treatment with a view to their prevention in the future in the context of measures taken in countering terrorism;

(d) Create an effective system of bail;

(e) Show full respect for the independence of the judiciary and introduce legislative, institutional and budgetary reforms to that effect;

(f) Clarify the exact structures, responsibilities and powers of all internal security forces in publicly available laws;

(g) Initiate *ex officio* investigations into allegations of torture and illegal detentions committed in the context of the fight against terrorism under the Ben Ali regime, and provides reparations to those who were harmed;

(h) Establish promptly an effective national preventive mechanism in full compliance with the Paris Principles, and following broad-based consultations, following the State's accession to the Optional Protocol to the Convention against Torture, which can also provide for a powerful deterrent against unlawful detention and prevent torture and other forms of ill-treatment in the context of countering terrorism;

(i) Strengthen human rights education further at the Security Forces Staff College as an important element of ensuring human rights-compliant counter-terrorism measures by the security forces and for rebuilding trust of the Tunisian people in the security apparatus. A particularly effective approach is the training of trainers, which combines a high level of peer acceptance and professional expertise. It

is also essential to involve the leadership of the respective security agencies in such training activities.