

## **Contribution to the List of Issues to be adopted by Committee against Torture ahead of its upcoming review of Tunisia<sup>1</sup>**

### **I. Introduction**

In September 2011, the World Organisation Against Torture (OMCT) opened its Tunisia Office. The OMCT Tunisia has since reinforced partnerships with Tunisian civil society and engaged with state authorities to advance the country's democratic transition. The prevention of torture and ill-treatment and the fight against impunity are key elements in this process.

Over the past few years, the OMCT has closely monitored the situation in Tunisia and in particular, the legal and institutional reforms that relate to torture and ill-treatment. As part of this work, the OMCT has analysed and commented upon newly adopted laws and policies designed to prevent and punish such practices in Tunisia, and has involved itself directly in the documentation of cases of torture, providing legal and social assistance to victims. It has also embarked upon an awareness-raising programme with both Tunisian state authorities and the wider public, to highlight the harmful and far-reaching consequences of torture practices.

On the basis of recommendations made by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and in view of the work carried out by international observers and Tunisian civil society, the OMCT has set out its main areas of concern on Tunisia's compliance with the Convention against Torture, in order to inform the Committee's adoption of the List of Issues during its 56<sup>th</sup> session.

### **II. Post-Revolution Process**

The ousting of Ben Ali on 14 January 2011 fostered real hope that Tunisia would begin to take the necessary steps towards the implementation of democracy and respect for human rights. Given the oppressive legacy of the old regime however, the challenges of a democratic transition were unlikely to be easily overcome.

Although it would be premature to carry out a comprehensive assessment of Tunisia's progress since the 2011 Revolution, we can nevertheless identify a number of key areas that have affected Tunisia's on-going transition, particularly when it comes to the fight against torture and ill-treatment — which were previously common practice under Ben Ali's regime.

From a legislative and institutional point of view, Tunisia has strengthened its legal norms that address the prevention of torture and ill-treatment. Most notably, these include:

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<sup>1</sup> The original list of issues has been submitted in French.

The new Constitution adopted on 27 January 2014 which explicitly bans torture under Article 23 and renders the crime imprescriptible;

The creation of a National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture (OPCAT) (adopted in July 2011), in the form of the National Authority for the Prevention of Torture (Law No. 43 of 23 October 2013);

The reform of Article 101 bis of the Penal Code, which defines and criminalises torture;

The adoption of transitional justice legislation under Law No. 53 of 24 December 2013, which includes torture among the serious human rights violations to be examined by the Truth and Dignity Commission;

Several legislative decrees in support of victims of the old regime, including Decree No. 1 of 19 February 2011, establishing a general amnesty and granting certain rights for those convicted or prosecuted before 14 January 2011 for ‘political reasons’, and Decree No. 97 of 24 October 2011, establishing compensation for martyrs and those wounded in the revolution.

Despite the promise of these reforms, a number of legal ambiguities within their text maintain the potential to create obstacles in the fight against torture and ill-treatment, and in the establishment of victims' rights.

The extent of reforms and progress to date has been somewhat limited, as the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence attested in his 2013 report. There remains a real need for further substantial reforms, particularly within the justice, security, and prison sectors.

Moreover, the dysfunctional state of Tunisia's justice administration when faced with cases of torture and ill-treatment, the continued practice of torture, and the on-going cycle of impunity after the Revolution, severely hinder Tunisia's transition to democracy and the level of trust victims and the wider public are willing to invest in state institutions.

### **III. The List of issues raised by the OMCT**

#### **1. Definition and Criminalisation of torture**

Article 101 bis of the Penal Code has defined and criminalised torture since August 1999. This article was amended by Decree No. 106 of 22 October 2011, modifying and supplementing the Criminal Procedure Code and the Criminal Code. Despite this reform however, article 101 bis of the Criminal Code still fails to conform to the definition of torture proposed by article 1 of the Convention against Torture. Positively, the new version of the article does now consider ‘*as perpetrator, any public official or similar person who orders, encourages, endorses or keeps silent about torture*’. With regards to the constituent elements of the offence however, the article only criminalises those acts of torture inflicted on a person with the aim of extracting

confessions or information, or for any motive founded on reasons of racial discrimination. Consequently, the text does not allow for the criminalisation of torture inflicted for reasons other than those aforementioned, and is more limited in scope than the grounds of torture listed within article 1 of the Convention against Torture.

- What are the reasons for this reform?
- Despite this reform, article 101 bis of the Penal Code still fails to conform to Article 1 of the Convention against Torture. Will the government take the necessary steps to address this discrepancy?

## 2. Institutional and legal reforms

The legacy of the old regime creates the immediate need for further reforms, particularly within the judicial, security and prison sectors, to uphold the rule of law and a respect for human rights and dignity.

- Is there an overarching vision for reforms to ensure that the Tunisian legal corpus respects the new Tunisian Constitution and conforms to international legal standards?
- Article 5 of the Criminal Procedure Code states that: *“Prosecution that results from a crime of torture is prescribed after fifteen years.”* Will this article be amended to ensure it conforms to Article 23 of the Constitution?
- The law governing the Higher Committee of Human Rights does not guarantee its independence and functional autonomy. Will the legal framework of this authority be reformed to ensure it conforms to Article 128 of the Constitution and the Paris Principles?

## 3. National Mechanism for the Prevention of Torture

The National Mechanism for the Prevention of Torture is governed by Law No. 43 of 23 October 2013, on the National Authority for the Prevention of Torture. Aside from article 13 which can prevent the authority from conducting both scheduled and unannounced visits to detention centres *‘for urgent and compelling grounds of national defense, public safety, natural disaster or serious disorder’*, the law is for the most part satisfactory, and meets the key requirements of the OPCAT. Although the National Constituent Assembly has issued public calls for candidates to come forward, to date this authority is still yet to be properly established; there has been a lack of suitable applicants to fill certain positions required within the authority’s legal framework. Following the parliamentary elections in 2014, the new assembly is still yet to find a solution to this impasse.

- What are the reasons for the failure to establish the National Authority for the Prevention of Torture?
- How does the government interpret Article 13 of the law relating to this authority, which prevents it from conducting visits in certain circumstances?
- What support will the government provide to this authority?
- Will visits to detention centres be limited exclusively to this authority?

#### **4. Monitoring within detention centres**

Despite a number of agreements with both local and international organisations on their right to visit places of deprivation of liberty, these places remain largely closed off to the outside world. Without a legal framework or set of principles governing the right to visit places of deprivation of liberty, any requests remain at the discretion of state authorities.

- Why was the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment refused access to the Judicial Police Centre in El Gorjani during his visits to Tunisia in 2011 and 2014?
- Will the government permit members of civil society access to places of deprivation of liberty?

#### **5. Allegations of torture and ill-treatment**

Prior to the Revolution, torture and ill treatment were taboo subjects. Since 2011, there has been a certain acknowledgement of these practices, but the prevention of torture still has to receive broad recognition. State authorities have today a tendency to downplay the scale of torture practices, or seek immediately to deny allegations raised by civil society and human rights activists.

- Does there exist a code of conduct to which police and security forces must adhere?
- If yes, does this code explicitly prohibit agents from carrying out acts of torture and ill-treatment?
- How does the government respond to reports of on-going instances of torture and ill-treatment since the 2011 Revolution?
- Some official statements deny the existence of torture in prisons on the grounds that authorities have no need to extract confessions. What is the view of the government on this matter?
- Have there been awareness-raising workshops and training courses on torture and ill-treatment for law enforcement officers and judges? Are there any plans for such awareness-raising initiatives?

## **6. Fundamental legal guarantees**

Legal proceedings and a fair trial require judicial safeguards and an implementation of the law that is consistent with both the letter and spirit of the text by those, who are responsible for its enforcement. Some of Tunisia's judicial norms require application, whilst others require reform to guard against the risk of abuse and to ensure a fair trial throughout the legal process. By way of example, the number of persons in custody or in remand is generally quite high despite explicit statements within the Criminal Procedure Code that detention should only be used in exceptional cases. In addition, detainees, particularly those held in custody, face preliminary inquiries in the absence of certain guarantees, such as the right to a lawyer or the right to be consulted by a doctor.

- The Constitution guarantees a fair trial and the right to defence during the prosecution and trial process. What measures will be taken to ensure these guarantees are upheld?
- How do authorities intend to ensure access to a lawyer for persons in police custody? Are law enforcement officers predisposed and prepared for any new measures?
- Does the Tunisian government intend to reduce the pre-trial detention period so that it conforms to international standards?
- Why does the legal system only take into account the medical certificates and reports from doctors operating in public health facilities?
- Why do persons in custody and prison not have the right to be consulted by a doctor of their choice?
- Are there mechanisms to protect witnesses of torture and ill-treatment?
- Are there measures or mechanisms to protect persons who submit a complaint of torture and ill-treatment from reprisals?
- Do magistrates benefit from any protection measures or mechanisms?

## **7. Respect for the decisions of the Committee against Torture**

A failure to consider complaints against torture and ill-treatment by the Tunisian justice system, led the Committee Against Torture to take decisions in favour of a number of Tunisian victims prior to the Revolution. These decisions require the Tunisian authorities to take all necessary measures to ensure that the victims' cases are heard and their rights re-established. Unfortunately, despite reminders and calls from victims and from NGOs like the OMCT, to date, all decisions taken by the Committee Against Torture in favour of victims continue to be not respected.

- The CAT's decisions in favour of Tunisian victims of torture, such as those of Ali Ben Salem (CAT/C/39/D/269/2005, 27 novembre 2007), Faisal Baraket (CAT/C/23/D/60/1996, 24 janvier 2000) and Saadia Ali (CAT/C/41/D/291/2006, 26 novembre 2008), are still yet to be considered and implemented by the Tunisian authorities. Does the government have an explanation for its failings in this respect?

## **8. Reports submitted to the CAT and failure to respect deadlines**

Tunisia ratified the Convention against Torture in 1988, and today it presents its third periodic report – the last dating back to 1997. The submission of a periodic report every four years, as set out in article 19 of the Convention Against Torture, has thus not been respected.

- Can the government explain its failure to meet deadlines imposed by Article 19 of the Convention against Torture for the presentation of supplementary reports to the Committee against Torture? What are the reasons for such delays, especially since the 2011 Revolution?

## **9. Respect of international commitments**

Several treaties and international conventions have been ratified by Tunisia, which, according to article 20 of the constitution, hold a supra-legislative and infra-constitutional authority. Soon after the Revolution, the government further strengthened its legal apparatus by the ratification of other international standards. These include: the Optional Protocol to the Convention against Torture; the International Convention for the Protection of All Persons against Enforced Disappearance; the Optional Protocol for the International Covenant on Civil and Political Rights; and the Convention on the Rome Statute establishing the International Criminal Court.

- Does the government intend to accelerate the implementation of legislative provisions criminalising enforced disappearances according to the guidelines of the International Convention for the Protection of All Persons against Enforced Disappearance, ratified by Tunisia in 2011?
- Since its ratification of the Rome Statute, has the government taken steps to ensure this commitment is effective and enforceable?

## **10. Capital Punishment**

Despite a moratorium on capital punishment since 1991, the death penalty is still being pronounced and in place for certain crimes in the Criminal Code. Although these sentences are not carried out, those convicted remain incarcerated on death row.

- Does the government intend to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty?
- Will it review those provisions in the Criminal Code, which currently allow for capital punishment?
- How are those sentenced to death executed? Are there specific systems or measures in place?

## **11. Impunity, legal proceedings and administrative investigations**

The practice of torture and ill treatment was systematic before the revolution and has persisted in its aftermath. The way in which these violations are handled at both a judicial and administrative level is confusing and dysfunctional, ensuring a system that favours impunity and leaving complaints submitted by victims in a state of deadlock.

- Why have the majority of judicial complaints for torture and ill-treatment remained unaddressed to this day? Does the government have a response to the issue of non-compliance with reasonable delays for investigations and prosecutions?
- Is there an internal administrative audit, even if confidential, that could explain the reasons for the failures of justice for cases of torture and ill-treatment?
- In the event of death in any form of detention centre, what are the measures taken? How have authorities handled the cases of Walid Denguir, Mohamed Ali Snoussi and Abdelhamid Jedday who died in custody between 2013 and 2015?
- Could the government provide precise statistics on the judicial and administrative measures taken against public agents and other functionaries involved in acts of torture and ill-treatment since Tunisia's last periodic report?
- What value has been added by the designation of a substitute prosecutor in charge of the register of complaints of torture brought to the court of first instance in Tunisia? Is this register accessible to all those who have an interest in being informed? Is this measure unique to the central level? If yes, is there an intention to generalise it and make corrections to render it more effective?
- After the Revolution, did government authorities set up any form of administrative "Vetting System," specifically within security and penitentiary units, in order to guarantee the non-repetition of severe human rights violations? How did the careers of security and penitentiary agents evolve after the Revolution? Were there individual career evaluations?

## **12. Pre-trial detention, incarceration and prison conditions**

The living conditions in prisons are difficult, both for inmates and for prison staff. The main reasons for this arise as a result of outdated and inadequate prison infrastructure, and the level of prison overcrowding that generally exceeds 150% capacity. In addition, prisoners' health suffers due to a lack of available doctors; during his visit to Tunisia in June 2014, the UN Special Rapporteur on torture identified that there are only 24 full-time doctors serving the entirety of the country's estimated 24,000 inmates.

In addition, detainees currently lack a means by which to submit a complaint or grievance in a clear and well-defined manner. Those institutions and control mechanisms that do exist have proven ineffective in improving the conditions of prison life.

- How do penitentiary administrative services deal with allegations of torture and ill-treatment made by detainees?
- Is there an effective mechanism for general claims made by detainees in penitentiary centres?
- Is there any consideration to reform Law No. 54 of Mai 14 2001 relating to the organisation of prisons?
- The sentence enforcement judge seems to have limited prerogatives. Is the government considering reforms for this institution?
- Is there a governmental strategy to resolve the problem of prison overpopulation? How does the government explain the fact that just over half of all detainees are those in pre-trial detention awaiting trial?
- Could the government provide up-to-date data, classified by sex, age and type of infraction, on the number of detainees awaiting judgement and those who are serving their sentence?
- According to the High Commissioner for Human Rights' report in March 2014, approximately 45% of detainees are recidivists. Are there any plans for an individualisation of sentence enforcement and programmes of rehabilitation and reintegration?
- The prison healthcare system is defective. Does the government intend to react to this problem? Does the government intend to reinforce the professional healthcare workforce in detention centres and to submit them to a single administration, that of the Ministry of Health?
- Does the government anticipate the creation of prison hospital centres?
- The prison infrastructure is out-dated. Are there any plans to improve the architecture and infrastructure of prisons?

### **13. Reparation and rehabilitation for victims of torture and ill-treatment**

After the Revolution, there have been a number measures put in place in support of victims of serious human rights violations. As the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence attested in his 2013 report, these measures have, however, been sporadic, incomplete, and only reached a fraction of victims. As for the victims of torture and ill treatment, they remain, for the most part, deprived of any measures of support by state authorities. Will these cases be treated more favourably under a system of transitional justice? Without clear and precise statements from the government addressing the challenges and the scale and scope of this process, the answer to this question remains uncertain.

- Have there been efforts to provide reparation and rehabilitation to victims of torture and ill-treatment under Article 14 of the Convention against Torture?
- Has there been an overall review of the processing of the files of victims of torture and



ill-treatment?

- The Ministry of Human Rights and Transitional Justice no longer exists. It was in charge of certain files of victims of severe violations. How were these files dealt with? Is there an accessible database for any party interested in these files? Was the mandate of this ministry transferred to another ministry, department or public institution?
- What is the role of the State Secretariat who is in charge of the files of martyrs and of those wounded in the Revolution?
- What are the steps being taken to support the process of transitional justice?

## ANNEXES

### Articles of the Tunisian Constitution<sup>2</sup>:

**Art. 20** – International treaties signed and ratified by the Assembly of the Representatives of the People have a superior status than national laws and inferior status than the Constitution.

**Art. 23** - The State shall protect human dignity and physical integrity and shall prevent psychological and physical torture. Crimes of torture are not subject to any statute of limitations.

**Art. 27** - A defendant is presumed innocent until proven guilty in a fair trial where he or she is granted all guarantees of the right of defense throughout all phases of prosecution and trial.

**Art. 29** - No person may be arrested or detained unless in flagrant delicto or by virtue of a judicial order, and they shall be immediately informed of their rights and the charges against them, and has the right to appoint a lawyer to represent them. The period of arrest and detention shall be defined by law.

**Art. 30** - Every prisoner shall have the right to humane treatment that preserves their dignity. In

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<sup>2</sup> Unofficial English Translation by Jasmine Foundation. Original French version:

Art. 20 – Les traités internationaux approuvés par l'Assemblée des Représentants et ratifiés ont une autorité supérieure à celle des lois et inférieure à celle de la Constitution.

Art. 23 – L'État protège la dignité de l'être humain et son intégrité physique, et interdit toutes formes de torture morale et physique. Le crime de torture est imprescriptible.

Art. 27 – Tout prévenu est présumé innocent jusqu'à l'établissement de sa culpabilité établie dans le cadre d'un procès équitable où toutes les garanties nécessaires à sa défense durant les phases de la poursuite et du procès lui sont garanties.

Art. 29 – Nul ne peut être arrêté ou mis en détention sauf en cas de flagrant délit ou sur la base d'une décision judiciaire. Le détenu est immédiatement informé de ses droits et de la charge retenue contre lui. Il a droit de se faire représenter par un avocat. Art. 30 – Tout détenu a le droit d'être traité avec humanité préservant sa dignité. L'État, lors de l'exécution des peines privatives de liberté, tient en considération l'intérêt de la famille et veille à la réhabilitation du détenu et à sa réinsertion dans la société.

Art. 128 – L'Instance des droits de l'Homme veille au respect des libertés et des droits de l'Homme et œuvre à leur renforcement. Elle formule des propositions afin de développer le dispositif des droits de l'Homme. Elle est obligatoirement consultée au sujet des projets de lois en relation avec son domaine de compétence. L'Instance enquête sur les cas de violation des droits de l'Homme en vue de les régler ou de les soumettre aux autorités concernées. L'instance se compose de membres indépendants, impartiaux, compétents et honnêtes qui exercent leurs fonctions pour un mandat unique de six ans.

implementing a freedom-depriving punishment, the State shall take into account the interests of the family and shall work to rehabilitate and reintegrate the prisoner into society.

**Art. 128** - The Human Rights Commission shall oversee the extent to which human rights and freedoms are respected, and promote human rights and freedoms. The Commission shall propose reforms to develop the human rights framework and shall be consulted on draft laws that are related to its mandate. The Commission shall conduct investigations into violations of any human rights with a view to settlement or referral to the competent authorities. The Commission shall be composed of independent and impartial members who possess competence and integrity. They undertake their functions for one six-year period.

### **Criminal Code<sup>3</sup>**

**Art. 101 bis** (Updated under Decree No. 2011-106 of 22 October 2011 amending and supplementing the Criminal Code and the Code of Criminal Procedure) - The term torture means any act by which severe pain or acute physical or mental suffering is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession for an act he or a third person has committed, or is suspected of having committed.

It is considered torture to intimidate or put pressure on a person or intimidate or coerce a third person for the purpose of obtaining information or a confession.

The scope of torture, pain, suffering, intimidation or coercion can be inflicted for any reason based on racial discrimination.

Any public official or similar person who orders, encourages, endorses or is silent about torture in the course of, or in connection with the performance of his duties, will be considered to have inflicted torture.

Torture does not include suffering arising only from, inherent in or incidental to lawful sanctions.

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<sup>3</sup> Unofficial English Translation by Gethin Jenkins, OMCT. Original French version:

Art. 101 bis (nouveau depuis le décret-loi n° 2011-106 du 22 octobre 2011, modifiant et complétant le code pénal et le code de procédure pénale) – Le terme torture désigne tout acte par lequel une douleur ou une souffrance aiguë physique ou mentale, sont intentionnellement infligées à une personne aux fins d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis. Est considéré comme torture le fait d'intimider ou de faire pression sur une personne ou d'intimider ou de faire pression sur une tierce personne aux fins d'obtenir des renseignements ou des aveux. Entre dans le cadre de la torture, la douleur, la souffrance, l'intimidation ou la contrainte infligées pour tout autre motif fondé sur la discrimination raciale. Est considéré comme tortionnaire, le fonctionnaire public ou assimilé qui ordonne, incite, approuve ou garde le silence sur la torture, dans l'exercice ou à l'occasion de l'exercice de ses fonctions. N'est pas considéré comme torture, la souffrance résultant des peines légales, entraînée par ces peines ou inhérente à elles.

**Law No. 2013-43 of 23 October 2013, on the National Authority for the Prevention of Torture<sup>4</sup>**

**Art. 13** - The concerned authorities cannot make objection to a periodic or unexpected visit of a given place except for pressing and compelling reasons related to national defense, public security, natural disasters or serious disorders in the place to be visited, which temporarily prevent the visit from taking place, and this, via a justified written decision which shall be immediately transmitted to the chairman of the authority while mentioning obligatorily the duration of the temporary ban.

Any person who transgresses the provisions of the preceding sub-paragraph of the article herein is liable to disciplinary proceedings.

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<sup>4</sup> Official English Translation by Republic of Tunisia, Presidency of the Government