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

Mission to Egypt*

Summary

At the invitation of the Government, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism conducted a visit to Egypt from 17 to 21 April 2009.

In this report the Special Rapporteur examines the emergency law, criminal law provisions on terrorist crimes, and amended article 179 of the Constitution which provides the current legal framework to combat terrorism in this country. He analyses some of the key issues and challenges that are expected to be addressed in the new anti-terrorism legislation under preparation which the Government has committed to enacting in order to lift the state of emergency that has been in force, almost continuously, for more than 50 years. The Special Rapporteur discusses the importance of a strict definition of the concept of terrorism so that it is not overly expansive in scope. He expresses concern about the potential use of relying on exceptional powers in relation to arrest and detention of terrorist suspects that are then inserted into the ordinary penal framework of an anti-terrorism law. He addresses the reliance on the practice of administrative detention without trial and expresses concern that this practice will continue in violation of international norms. The Special Rapporteur examines the renewal of detention orders and lack of compliance with court rulings regarding release. He addresses concern regarding the use of unofficial detention facilities and the heightened risk of torture to terrorist suspects and the lack of investigation and accountability. The Special Rapporteur examines the use of special courts

* The summary of this mission report is being circulated in all official languages. The report itself is contained in the annex to the summary and is being circulated in the language of submission and in Arabic only.

to try terrorist suspects, including the use of emergency security courts and military courts, and calls for measures to ensure compliance with fair trial. Finally, the Special Rapporteur notes Egypt's leadership role, particularly in the region, in regard to the international fight against terrorism and expresses concern regarding the use of extraordinary renditions.

The Special Rapporteur views his visit as an important step towards helping to facilitate the Government's commitment to abolish the state of emergency but cautions the authorities against relying on amended article 179 of the Constitution as a legal basis due to its numerous deviations from other constitutional provisions and lack of adherence to international human rights law. The Special Rapporteur makes a number of key recommendations so that Egypt can develop a sustainable counter-terrorism programme that is both effective and in full compliance with human rights.

Annex

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

Mission to Egypt (17 to 21 April 2009)

Contents

I. Introduction

1. Pursuant to his mandate, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism visited Egypt from 17 to 21 April 2009 at the invitation of the Government. During his visit the Special Rapporteur met with the Minister of Legal and Parliamentary Affairs and the Ministries of Foreign Affairs, the Interior and Justice. He also met with the Chief of the Egyptian Supreme Constitutional Court, the Prosecutor General, the President of the People's Assembly, Chairpersons of the Legal and Constitutional Committee and the Foreign and National Security Committee of Parliament, and the Vice-President of the Egyptian National Council of Human Rights. In addition, the Special Rapporteur benefited from consultations with lawyers, academics, non-governmental organizations and the international community.

2. The Special Rapporteur thanks the Government of Egypt for its invitation and cooperation during his visit. The country is of great interest to his mandate, not only because of its long experience in combating terrorism, but particularly because of the emergency law framework that is primarily used to countering terrorism in the country. The resort to exceptional powers in the prevention and investigation of terrorist crimes reflects, in the view of the Special Rapporteur, a worrying trend in which this phenomenon is perceived as an emergency triggering exceptional powers, rather than a serious crime subject to normal penal procedures. The recent commitment of the Government of Egypt to lift the country's state of emergency and to confront the threat of terrorism through an anti-terrorism law, which at the time of the visit was still under preparation, gives the Special Rapporteur an opportunity to address the human rights risks emerging from the application of a state of emergency. The Special Rapporteur is convinced that an analysis of these measures together with an assessment of their compliance with international human rights standards can be a useful step in moving away from a culture of exceptionality.

3. The Special Rapporteur submits this mission report regretting that his first visit to Egypt in April 2009 and the constructive meetings held during that visit have not yet resulted in an invitation for a second visit, during which the Special Rapporteur could observe proceedings in terrorism-related court cases and visit places of detention, including private interviews of persons suspected of, or convicted for, terrorist crimes. The Special Rapporteur expresses his gratitude to the Government for the extensive written responses and comments he has received on the basis of a draft version of this report. These responses have been of great assistance in finalizing the current mission report. The Special Rapporteur expresses his wish that he may soon return to Egypt for a second visit, either prior to the consideration of this report by the Human Rights Council, or as a follow-up measure.

II. The emergency law and other laws currently regulating the fight against terrorism

4. In the past Egypt has faced situations which genuinely threatened the life of the nation, thereby reaching the threshold for proclaiming a state of emergency in which a State may derogate from some of its obligations under the International Covenant on Civil and Political Rights. On several occasions since the early 1970s Egypt has struggled with armed militants who have used a prolonged campaign of violence for the purpose of overthrowing the Government and replacing it with an Islamist State. The last time such a situation occurred was in the middle of the 1990s, when the terrorist organizations Jihad al-Islami

and Al-Gama`a Islamiyya resorted to violence in a prolonged campaign, which reached its peak on 17 November 1997 in Luxor when 62 people were killed in an attack.

5. While acknowledging the right of a State to proclaim a state of emergency as a temporary measure determined by the exigencies of the situation, the Special Rapporteur is concerned that Egypt has been almost continuously governed by emergency law, which includes far-reaching restrictions on fundamental rights and freedoms, for more than 50 years. Egyptian authorities have justified this long-standing state of emergency predominantly by referring to a range of permanent "destabilizing factors" which are perceived as posing a threat to the country's national security, including the position of the northern part of the Sinai desert which borders Gaza, the activities of the terrorist organization Hizbullah, the presence on the Egyptian territory of elements linked to the terrorist organization Al-Qaida, the increased accessibility of Al-Qaida's propaganda online, the existence of Islamist movements in the Middle East in general and the presence of the Muslim Brotherhood in Egypt in particular.

6. The Special Rapporteur learned that Jihad al-Islami and Al-Gama`a Islamiyya were effectively dismantled by the end of the 1990s. Since then, the country has been shaken by a number of isolated and sporadic terrorist attacks, among which were three larger attacks in 2004–2006 directed at tourist resorts in the Sinai peninsula, killing at least 145 people and injuring up to 300. Although it seems there is no permanent threat of terrorism, the latest extension of the state of emergency, as approved by the Peoples' Assembly on 28 May 2008, was officially explained on the basis of such a threat. Reiterating that terrorism as a phenomenon should in principle be combated through ordinary penal legislation, the Special Rapporteur acknowledges that a State under exceptional circumstances has a right to protect its society against the inexcusable methods of terrorism through the use of emergency measures. However, in the light of article 4 of the International Covenant and general comment No. 29 (2001) of the Human Rights Committee codifying its interpretation, such exceptional measures can be used only as a temporary tool, with the primary objective of restoring a state of normalcy where full compliance with international standards of human rights can be secured again. A state of emergency almost continuously in force for more than 50 years in Egypt is not a state of exceptionality; it has become the norm, which must never be the purpose of a state of emergency.

A. The Emergency Law

7. Emergency powers in Egypt are governed by Law No. 162 of 1958 (the Emergency Law). Provisions established in article 3 of that law authorize the conduct of counter-terrorism operations without restrictions by ordinary legislation which would guarantee, for example, that searches, seizures and surveillance as well as arrest and detention require judicial authorization, and that detention is limited in accordance with specific legal criteria that regulate its duration. In practice, counter-terrorism operations under the emergency law are carried out by officers of the State Security Investigations (SSI), which, under the supervision of the Ministry of the Interior, is the main body responsible for controlling the state of emergency in Egypt. The Special Rapporteur is troubled by the frequency and range of practices allowed for and facilitated by the wide powers established by the Emergency Law, only in part counterbalanced by the supervisory role of the Egyptian Court of Cassation. In line with United Nations human rights treaty monitoring bodies, he reiterates his concern that the state of emergency seriously hinders the full consolidation of the rule of

law in the country.[1] Again he wishes to draw attention to article 4 of the International Covenant, according to which all measures derogating from the Covenant are only permissible to the extent strictly required by the exigencies of the situation, and recalls that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party.[2]

8. The President may under provisions of the Emergency Law restrict a number of rights pertaining to freedom of assembly and expression and may, in addition to crimes concerning State security, refer offences involving public demonstrations and gatherings for prosecution in so-called Emergency Supreme State Security Courts,[3] the establishment of which is provided for by the same law. The Special Rapporteur recalls that articles 19 and 21 of the International Covenant on the right to peaceful assembly and freedom of expression, as well as article 22 on the closely connected right to association, in themselves allow a State to introduce certain permissible restrictions, when necessary and regulated by the law, in order to protect, inter alia, national security. Limitations in accordance with these criteria should, in his view, suffice for fighting terrorism effectively, and consequently no further derogations from these rights should, in principle, be needed even under a state of emergency. While the maintenance of a democratic society is to a large extent based on the diversity of peaceful activities exercised through the enjoyment of the aforementioned rights, full compliance with the requirements of necessity and proportionality becomes crucial whenever restrictions are imposed.

B. The definition of terrorist crimes in Egypt's Penal Code

9. The Special Rapporteur in his previous reports has advocated that domestic counter-terrorism provisions should, in the absence of a comprehensive international definition of the crime of terrorism, adhere to the three-step cumulative characterization according to which an act, in order to be classified as terrorist, must have been:

(a) Committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages;

(b) Committed for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act;

(c) Correspond to all elements of a serious crime as defined by the law.

This approach is reflected also in Security Council resolution 1566 (2004) which provides further guidance for what crimes can be defined as terrorist ones under item (c), by referring to existing international conventions and protocols against terrorism.

10. In addition to the three requirements above, the Special Rapporteur endorses the requirement that any provision criminalizing terrorism must comply with the principle of legality, as enshrined in article 15 of the International Covenant, and consequently be formulated with sufficient precision so as to allow the individual to regulate his conduct and anticipate the elements that make an activity a terrorist crime. Any terrorist act

[1] Conclusions and recommendations of the Committee against Torture: Egypt (CAT/C/CR/29/4), paras. 5 (a) and 6 (a). See also concluding observations of the Human Rights Committee: Egypt (CCPR/CO/76/EGY), para. 6.

[2] Human Rights Committee, general comment No. 29 (2001) (states of emergency, art. 4), para. 4.

[3] Articles 3 (1)–(2), Emergency Law, and Presidential Decree 1/1981 as amended by Presidential Decree 1/2004.

proscribed by the law must comprise or have sufficient relation to the intentional element of causing deadly or otherwise serious bodily harm.

11. In Egypt, legal provisions on counter-terrorism are, in addition to the Emergency Law, regulated through the Penal Code in Law No. 97[4] which establishes a number of terrorism-related offences and their corresponding penalties. The Special Rapporteur notes that the definition of terrorism, as provided for in article 86 of that law, in addition to violent acts extends to include "any threat or intimidation" with the aim of "disturbing the peace or jeopardizing the safety and security of the society" and, furthermore, contains a wide range of purposes, such as "to prevent or impede the public authorities in the performance of their work or thwart the application of the Constitution or of laws or regulations". The definition in article 86, including the substantial and intentional elements as well as its purposes, is notably much broader than the three-step cumulative characterization presented above and therefore, in the view of the Special Rapporteur, runs the risk of including acts that do not comprise a sufficient relation to violent terrorist crimes. Of particular concern is that a number of offences based on this definition are subject to the death penalty, and the Special Rapporteur recalls that in cases where States have not already abolished this punishment it can only be applied to the most serious crimes.[5]

C. Assessment of amended article 179 of the Egyptian Constitution

12. In May 2007, 34 articles of the Egyptian Constitution were amended by parliamentary vote. Consequently, the text of article 179 as amended stipulates the State's responsibility to counter the dangers of terrorism and, on that basis, establishes that legal provisions "related to the leading inquiry and investigation procedures required to encounter these dangers" shall not be precluded by constitutional provisions that guarantee the judicial oversight of detention, home searches and surveillance or seizure of communications.[6] The Special Rapporteur is troubled by the fact that theoretically article 179 predefines as constitutional any legally regulated proceedings deviating from the above-mentioned constitutional safeguards, including a blanket authorization for the unrestricted limitation of the rights protected therein. Even if technically constitutional, such proceedings would fall short of compliance with legally binding international standards protecting personal liberty and the right to privacy, as established in articles 9 and 17 of the International Covenant on Civil and Political Rights.

13. Article 179 of the Constitution is considered to be the basis for an anti-terrorism law currently under preparation. Egyptian authorities, however, firmly assured that any proceedings allowed for under the new law would come under strict judicial oversight. The Special Rapporteur endorses the requirement that any violation of the protection against arbitrary deprivation of liberty in article 9 of the International Covenant as well as against arbitrary or unlawful interference with privacy, family, home or correspondence in article 17 must be based on a judicial warrant issued in advance of any investigative measures taken within this context. In his view, article 179, even if the state of emergency is lifted, is not conducive to a genuine move away from practices that are facilitated by the emergency law framework and climate currently prevailing in Egypt. In short, article 179 of the Constitution carries features of a permanent state of emergency, although under a new name.

[4] Law No. 97 of 18 July 1992, arts. 86–102.

[5] See also concluding observations of the Human Rights Committee: Egypt (CCPR/C/79/Add.23), para. 8, and CCPR/CO/76/EGY, para. 16 (a).

[6] Articles 41 (1), 44 (1) and 45 (2) of the Egyptian Constitution.

III. Current challenges and prospects for change through proposed anti-terrorism legislation

A. Definitional matters

14. The promotion of an adequate and strict definition of the concept of terrorism is essential in the mandate of the Special Rapporteur. This issue constituted an important focus in his meetings with Egyptian authorities, particularly in regard to the drafting of the future anti-terrorism law. While regretting that the authorities were not willing to share with him a draft that would have allowed a more thorough assessment in this mission report, he is encouraged by having received, in principle, agreement from the side of the authorities on the three-step cumulative characterization supported in paragraph 9 above. However, on the basis of informal reports on the drafting of the proposed anti-terrorism law, he notes that the draft law appears to include in the definition of terrorism acts that do not entail physical violence against human beings, such as the occupation of the environment or buildings, or the prevention of activities or practices of religious centres or of those pertaining to legislative, executive and judicial authorities. The Special Rapporteur takes the view that the inclusion of such supplementary forms of conduct runs the risk of attaching the stigma of terrorism to separate acts which do not fall within the scope of terrorism and which should be provided for and penalized elsewhere in the law, if needed.

15. A closely connected issue relates to the matter of criminalization of a terrorist organization. The Special Rapporteur during his meetings with Egyptian authorities strongly advised against any wording in the future anti-terrorism law that would define a terrorist organization on the basis of its aim to commit any act legally characterized as terrorist, rather than on the commission of specific acts. He also spoke against penalizing leadership of such an organization with the death penalty. He stressed that legal provisions applicable to terrorist organizations, including the criminal responsibility of its members, should essentially be based on the use of or calls for deadly or otherwise serious violence against civilians. Any criminalization of a terrorist organization that is exclusively based on the goals of the organization risks inadequately expanding the concept of terrorism.

16. Any anti-terrorism law that is not properly confined to the countering of terrorism is problematic, not only because an overly expansive scope of such a law weakens its own legitimacy and ultimately may prove to be counter-productive, but particularly because it may unjustifiably restrict the enjoyment of human rights pertaining to the exercise of peaceful activities, including dissent and political opposition, through legitimate associations. The Special Rapporteur expresses concern that practices allowed for by the Emergency Law have been frequently applied in circumstances that have no clear link to terrorist violence. He refers to the prosecution of 49 persons before an Emergency Supreme State Security Court for their involvement in violent demonstrations in Mahalla al-Kobra on 6 April 2008, as well as to the arrest and detention of a number of Internet bloggers critical of the Government, human rights activists, members of the country's largest opposition group the Muslim Brotherhood, and journalists. Against this background, he calls upon the Government of Egypt to strictly limit all measures provided for in the proposed anti-terrorism legislation to countering terrorism alone, as well as to ensure explicit safeguards against any abuse of such measures.

B. Exceptional procedures

17. A decision to lift the state of emergency would, according to some Egyptian authorities, seriously challenge their capacity to conduct in particular preventive counter-

terrorism operations. As current provisions in the ordinary penal law framework would not adequately cover such operations, a model of so-called pre-charge detention has been elaborated for inclusion in the proposed anti-terrorism law. Such detention would, in exceptional cases, allow up to 29 days in custody without charge. Encouraged by assurances to the effect that a detainee subject to this procedure would enjoy certain safeguards, including the right to be informed of the reasons for detention, the right to contact legal counsel and family members and the right to challenge the legality of detention and present any arguments concerning the detention before a judicial authority, the Special Rapporteur urges that all cases of deprivation of liberty allow for prompt and substantive judicial review, and that each of the above-mentioned guarantees be explicitly provided for in the same law, in order to avoid any misunderstanding that the anti-terrorism law constitutes an exception to otherwise available guarantees. Access to judicial review within the first 24 hours of detention, as suggested to the Special Rapporteur by the Egyptian authorities, followed by regular and independent court review more often than once per week are, in the view of the Special Rapporteur, indispensible conditions for reaching compliance with article 9 of the International Covenant.

18. The future enactment of provisions regulating arrest and detention of terrorist suspects is closely dependent on the amended text of article 179 of the Egyptian Constitution. The Special Rapporteur is aware of a widely spread fear amongst his interlocutors that whereas article 179 exempts the affected persons from the constitutional protections against, inter alia, warrantless arrest and detention, the adoption of the proposed anti-terrorism law, even if the state of emergency is lifted, might make applicable the sweeping powers currently allowed for by the Emergency Law. In view of the human rights risks inherently attributed to the Egyptian emergency legislation, the Special Rapporteur strongly advises against inserting any provisions of an emergency nature into the ordinary penal framework. In sections C and D below he analyses in detail specific problematic aspects of the detention procedures allowed for by the current Emergency Law.

C. Administrative detention without trial

1. Powers of the State Security Investigations forces under the Emergency Law

19. Article 3 (1) of the Emergency Law provides for the arrest and detention of criminal suspects, but notably also of "persons who are dangerous to public security and order". Such detention, while in practice carried out by SSI officers on "an oral or written order" by the Ministry of the Interior, does not require that the commission or preparation of a crime be specifically identified, but is rather considered as a preventive measure in respect of a person who is considered as a criminal threat. Consequently, individuals considered a "national security threat" may during the state of emergency be subjected to a regime of "administrative detention", without necessarily ever being charged or brought to trial. The Government could not provide the Special Rapporteur with an exact number of persons being held under the Emergency Law but other sources indicate that as many as thousands of persons might have been detained at a certain point of time under article 3 (1) of the Emergency Law. The Special Rapporteur is also concerned at reports indicating that this legal regime has facilitated the practice of "proxy detentions", in which terrorist suspects are indefinitely being held in Egyptian prisons at the behest of another Government.

20. The lack of a clear indication in the law as to what exactly constitutes a threat to public security and order is at variance with the principle of legality. This deficiency, coupled with the fact that SSI officers in practice enjoy carte blanche in deciding on whom to arrest and that terrorist suspects are in many cases detained without receiving sufficiently detailed information, if any, on the reason for their detention, is incompatible with article 9 (2) of the International Covenant and seriously diminishes any real possibility for the

detainee to contest the legality of detention, as stipulated by article 9 (4). Provisions of the ordinary penal legislation provide that persons deprived of their liberty shall within 24 hours following the moment of detention be brought before a public prosecutor, who shall within another 24 hours either order their release or extend the detention.[7] Article 3 (1) of the Emergency Law, on the other hand, stipulates that only 30 days after the issuance of the detention order may the detainee challenge its legality before a court, which then has to decide within 15 days whether to release or detain the suspect. The Minister of the Interior can contest the release until 15 days after the decision, after which the court has another 15 days to decide on the case. The Special Rapporteur has misgivings in relation to the duration of the detention period preceding the detainee's appearance before a court and he endorses, in line with the Human Rights Committee's general comment No. 29 (2001) on article 4 of the International Covenant (para. 16), that the right to take proceedings before a court in order to enable the court to decide without delay on the lawfulness of detention is protected at all times, including during a state of emergency.

21. The Emergency Law does not define a maximum time limit for the administrative detention of an individual considered to be a national security threat, which implies that a person may be held indefinitely under this regime. Under such circumstances, the Special Rapporteur considers of little relevance the fact that administrative detainees are, in principle, granted the same rights as pretrial detainees, who are considered innocent until they receive a final conviction. With special reference to the proposed anti-terrorism law, the Special Rapporteur urges the Egyptian authorities to discontinue any use of administrative detention and to introduce a phase of transition during which each person currently held under this regime would be either tried or released, thereby securing Egypt's compliance with its international obligations.

2. Renewal of detention orders and non-compliance with court rulings on release

22. Complaints about detention under article 3 (1) of the Emergency Law are decided by a single judge acting in the capacity of an Emergency Supreme State Security Court. Decisions issued in favour of the detainee are subject to appeal by the Ministry of the Interior before another Emergency Supreme State Security Court. In cases where this second court rejects the appeal, the detainee must be released.[8] If the court, on the other hand, confirms the legality of the detention, the detainee is granted the right to renew his complaint after a further 30 days.

23. According to documented cases and testimonies given to the Special Rapporteur, the Ministry of the Interior often renews the detention order against a released person with the unsubstantiated justification that the person "immediately resumed suspicious activities" upon release. Of particular concern is the widespread practice that persons are not actually released after a release order is given, but are transferred by SSI officers to non-official premises or police stations where they are held illegally until a new detention order is given. As a consequence, an unspecified number of persons have been held for years, sometimes over a decade, using this mechanism. Especially worrying in this regard is the fact that prisoners who have protested against such measures and continued challenging the legality of their detention often face reprisals such as transfers to remote prisons, where the conditions are harsher, or stripping the detainee of his/her right to be visited by his/her relatives, lawyer or psychologist. The Special Rapporteur recalls that however serious a threat an individual may be perceived to pose, a state of emergency does not justify action that is in contravention of peremptory norms of international law, such as the prohibition

[7] Articles 36 and 131 of the Code of Criminal Procedure (CCP).

[8] Article 3, Emergency Law.

against arbitrary deprivation of liberty.[9] He urges the Government of Egypt to discontinue the renewal of administrative detention when a person has been granted release by a court.

3. Initiatives for dialogue and "declaration of repentance"

24. Egyptian authorities described extensive initiatives aiming at intellectually challenging terrorist ideologies, which base their message on an interpretation of Islam that favours violence as a means for the achievement of political goals. In July 1997, leading members of Al-Gama'a al-Islamiyya unilaterally announced the Nonviolence Initiative, in which convicted and imprisoned persons rejected in several publications earlier theological interpretations of Islam which had justified their violent acts. The Special Rapporteur was informed that the Government actively encouraged and supported this initiative, for instance by providing these prisoners with these publications and taking adherents of the Nonviolence Initiative on a tour throughout different prisons, thereby facilitating the exchange of views between prisoners.

25. The Special Rapporteur encourages governmental measures aiming to prevent and facilitate initiatives against violent radicalization, which in his view constitutes an important aspect of the global commitment to address conditions conducive to terrorism, including the promotion of a culture of peace and religious tolerance.[10] He takes the view that facilitating a constructive intrareligious dialogue and creating circumstances favourable to an independent and voluntary self-critical among persons affiliated with terrorism are welcome initiatives, not only because of the potentially diverting effect such renunciations of violence may have on other individuals in marginalized communities who may be particularly vulnerable to recruitment, but also because of the global contribution such efforts could bring in eliminating unacceptable prejudices against Islam as a religion. The Special Rapporteur stresses, however, that such developments must be based on the free and voluntary engagement of all persons affected.

26. However, the Special Rapporteur is troubled about claims that were made during his visit that personal commitments to religious review which have been made in the context of the Nonviolence Initiative are also used as a bargaining tool or a condition for releasing terrorist suspects who are subject to administrative detention. This implies the signature of so-called "declarations of repentance".

D. Irregular detention facilities and the use of torture during investigation of alleged terrorist crimes

1. Illegal detention in premises of the State Security Investigations

27. According to Egyptian law, all persons deprived of liberty in Egypt, whether under the ordinary penal framework or in accordance with the Emergency Law, must be detained in officially recognized places of detention. Public detention facilities are subject to inspection by the Public Prosecutor or any other judicial authority[11] and unannounced inspections are carried out on a regular basis with the purpose to prevent unlawful detention of any person.[12] Egyptian domestic law prohibits the detention of people in unofficial detention facilities, and unlawful arrest or detention constitutes a criminal offence.

[9] See also Human Rights Committee, general comment No. 29 (2001), para. 11.

[10] These are among the objectives listed under section I, paragraph 3, of the annex to General Assembly resolution 60/288, the United Nations Global Counter-terrorism Strategy.

[11] See article 42, CCP, and article 85 of the Law on Prison Regulations (Law No. 396 of 1956).

[12] Circular letter No. 11 of 1999.

28. Despite these safeguards there is an alarming lack of judicial oversight of facilities run by SSI, which as such are not subject to any inspections of the kind referred to above. With this in mind it becomes difficult to fully ignore many reports about terrorist suspects being arrested, transferred to, and held incommunicado in what are mainly referred to as SSI secret underground cells. This is said to occur long before the official registration of their detention. Such practices would result in a situation where the detainee is beyond any protection of the law, and in some cases amount to enforced disappearance.

29. The Special Rapporteur recalls that the Human Rights Committee has recommended that provisions be made against the use of incommunicado detention and that all detainees be given prompt and regular access to lawyers and doctors in order to ensure respect for the absolute prohibition against torture, as established in article 7 of the International Covenant.[13] However, as a prerequisite for the protection of this right, only officially recognized places of detention must be used for the detention of terrorist suspects. As consistent allegations exist of the use of other facilities for this purpose, independent, prompt and thorough investigations are needed.

2. Torture allegations

30. According to information received from the Government, in 2006–2009 five "officers" received prison sentences for torture-related allegations, while 49 persons were sentenced to deductions from their salary. While noting the existence of a small number of cases where police officers have been subject to investigations and trial following torture complaints, the Special Rapporteur is troubled that complaints against SSI officers in this regard have produced no results. The Special Rapporteur is gravely concerned about information that terrorist suspects subjected to detention by SSI officers are at particular risk of torture and that, according to the Human Rights Committee and the Committee against Torture, "recourse to such practices appears to display a systematic pattern".[14] This includes, inter alia, beatings, suspension in painful positions for long periods, electric shocks including on the genitals, rape and threats to kill the victim or members of the family, all of which aim at bringing the victim into a state of complete intimidation, including compelling him to confess to any charges brought against him/her. Condemning any connivance at the crime of torture, the Special Rapporteur reminds the Government of Egypt of the obligation of the State to ensure that all perpetrators of such offences are brought to justice on the basis of prompt and independent investigations that are carried out whenever there are reasonable grounds to believe that torture has been committed.

E. Investigation in terrorism cases and trials before special courts

1. Special investigative powers of the prosecution

31. The Public Prosecution, which according to law is entitled to exercise the powers of an examining magistrate and thereby generally conducts pretrial investigations, may in ordinary criminal cases not detain a suspect for more than four days from the moment of arrest.[15] Pretrial investigations relating to terrorist crimes, in contrast, are conducted by the Supreme State Security Prosecution which may detain a terrorist suspect for up to six months.[16]

[13] Human Rights Committee, general comment No. 20 (1992), para. 11.
[14] See CCPR/CO/76/EGY, para. 13 and CAT/C/CR/29/4, para. 5 (b)–(c).
[15] Article 201, CCP.
[16] Article 126 bis, CCP, as amended by Law No. 95 of 2003.

2. Jurisdiction over terrorism cases by military courts and Emergency Supreme State Security Courts

32. Under the state of emergency terrorism cases may be tried by so-called Emergency Supreme State Security Courts established by the Emergency Law. In addition, military courts, on the basis of Presidential Decree No. 375,[17] have tried civilians in terrorism cases and in cases, including against members of the Muslim Brotherhood, where charges have no clear connection to terrorist acts. The Special Rapporteur wishes to reiterate the view of the Human Rights Committee, which in 1993 stated that "military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties".[18]

33. Amendments to the Code of Military Justice in July 2007 (Law No. 16/2007) allow persons convicted of terrorist offences by a military court to appeal the judgement before the Supreme Court for Military Appeals. However, such review is restricted to questions of law and procedural issues only. While welcoming the reform as a step towards better compliance with international standards of a fair trial, the Special Rapporteur highlights that only a full review of the conviction and sentence, including of the factual basis of the verdict, is sufficient to reach compliance with article 14 (5) of the International Covenant. He is also deeply concerned that judgements pronounced in first instance by the Emergency Supreme State Security Courts are not subject to appeal and become final only after ratification by the President. He reiterates, in line with the Human Rights Committee,[19] that the right to a full review of the conviction and sentence by a higher court becomes particularly crucial when convictions may lead to the death penalty, which has indeed been the case in several terrorism trials in Egypt.

34. Article 12 of the Emergency Law entitles the President to order for retrial a case that has already been resolved by an Emergency Supreme State Security Court. This is at variance with the principle of *non bis in idem*, as enshrined in paragraph 7 of article 14 of the International Covenant, which prohibits the double trial or punishment of an offence for which a person has already been finally convicted or acquitted.[20]

3. Composition of military and Emergency Supreme State Security Courts

35. Whereas judges sitting in military courts are appointed by the Deputy Head of the Armed Forces, terrorism cases considered by the Supreme State Security Courts are decided by three ordinary judges, two of whom may be replaced by two military judges appointed by the President.[21] Considering in addition that the actual prosecution of a terrorism case in a military court occurs through referral by the President and that judgements issued by the Supreme Court for Military Appeals as well as Emergency Supreme State Security Courts become final only after ratification by the President,[22] these special judicial regimes as a whole seriously undermine the strict distinction between the judiciary and the executive, therefore unavoidably putting at least into question the appearance of impartiality and independence of these tribunals. The Special Rapporteur endorses, in this regard, the requirement of the independence and impartiality of a tribunal,

[17] Issued on the basis of article 6 of Law No. 25 of 1966.

[18] See CCPR/C/79/Add. 23, para. 9; see also Human Rights Committee, general comment No. 32 (2007), para. 22.

[19] Human Rights Committee, general comment No. 32 (2007), para. 51.

[20] Ibid., para. 54.

[21] Article 7, Emergency Law.

[22] Article 12, Emergency Law.

as established in article 14 (1) of the International Covenant, as an absolute right that is not subject to any exception.[23]

4. Equality of arms and the right to adequate time and facilities for the preparation of the defence

36. The right to legal counsel, including for those who lack financial means, is guaranteed by article 69 of the Egyptian Constitution whereas provisions in the Code of Criminal Procedure prohibit separating the lawyer from the suspect during interrogation.[24] However, the Special Rapporteur is concerned that terrorist suspects' access to, including private consultation with, a lawyer of their choice, seems to be severely restricted during both the pretrial phase and the actual hearings in court. For example, none of the 13 defendants accused of involvement in the Taba and Sharm el-Sheikh bombings in October 2004 and July 2005 were assisted in securing access to a lawyer throughout the duration of pretrial detention or were allowed to communicate in private with counsel even during trial. The Special Rapporteur recalls that the right to communicate with counsel of his/her own choosing, as established in article 14 (3) (b) of the International Covenant and embodied in the principle of equality of arms, requires that the defendant enjoy prompt access to counsel and be allowed private consultations in conditions that fully respect the confidentiality of communication. The complete denial of this right can in no circumstances be compatible with international standards of a fair trial (A/63/223, para. 35).

37. The principle of equality of arms embodies the prerequisite that all parties to a case shall enjoy the same procedural rights and that the defendant, in any case, shall not be subjected to any actual disadvantages in relation to the prosecution. The Special Rapporteur is aware of Egyptian legislation and instructions aiming at ensuring the defendant's access to the investigation file before trial, and recognizes that the criteria for what is to count as "adequate time" for the preparation of defence, as guaranteed by paragraph 3 (b) of article 14 of the International Covenant, must be assessed on a case-by-case basis. However, bearing in mind the seriousness of charges relating to terrorist offences as well as the often complex nature characterizing the investigation of crimes, the Special Rapporteur takes the view that giving access to case files or providing the exact content of the charges only during the first session in trial to lawyers defending terrorist suspects before military or emergency courts renders illusory the right of the accused to an adequate defence.

38. The Special Rapporteur wishes to highlight the role of the court in ensuring the lawfulness of all evidence presented and considered at trial, and the obligation not to consider any statements claimed to have been extracted under duress, if the contrary has not been proven. Considering in particular the difficulties posed by delayed forensic examinations and other impediments to the initiation or course of investigations into torture complaints (see paragraph 30 above), the Special Rapporteur is worried about the notable inconsistency of information, even provided by the authorities, on the procedures applied by military and emergency courts in cases where torture claims are raised at trial. He recalls the State's obligation to ensure, including during a state of emergency, that no statements or confessions or, in principle, other evidence obtained in violation of the absolute prohibition against torture may be invoked as evidence in any proceedings covered by article 14 of the Covenant.[25]

[23] Human Rights Committee, general comment No. 32 (2007), para. 19.
[24] Article 125, CCP.
[25] Human Rights Committee, general comment No. 32 (2007), para. 6.

5. Prospects for new anti-terrorism legislation

39. Amended article 179 of the Egyptian Constitution stipulates the right of the President to "refer a terrorist crime to any judiciary body stipulated in the Constitution or the law", thereby making the trial of civilians in special courts constitutional. While strongly advising against the trial of civilians in military courts, the Special Rapporteur acknowledges that trials of terrorist suspects in specialized courts are, in principle, not contrary to international standards of fair trial. However, article 14 of the International Covenant requires that all necessary measures be taken to ensure that such proceedings take place under conditions which genuinely afford the full guarantees stipulated by that article. Furthermore, the Special Rapporteur highlights that due to the non-derogable nature of the right to life, as established in article 6, any trial involving the death penalty, even under a state of emergency, must conform to all requirements of a fair trial.

F. International cooperation in the fight against terrorism

1. Egypt's international role in the fight against terrorism

40. International criminal law cooperation by Egypt is based on procedures provided for in bilateral treaties. The Special Rapporteur was informed that a domestic law on international judicial cooperation is being prepared, which will include, inter alia, procedures relating to the handing over of criminal suspects requested by other States, the transfer of convicted offenders between two jurisdictions and judicial assistance in criminal matters. Egyptian authorities explained that a section on this issue would be included in the proposed anti-terrorism law. The Special Rapporteur wishes to recall that explicit safeguards, such as access to a judicial body and a possibility of appeal, are indispensible in order to guarantee the principle of non-refoulement in cases where a person may forcibly be handed over to another State.

41. In order to facilitate extradition of criminal suspects from another State to Egypt, the Penal Code was amended to the effect that an earlier sentence pronounced in absentia must not be increased in cases where retrial of the requested person is conducted.[26] However, it is troubling that some States, in order to enable the extradition of terrorist suspects requested by Egypt, have felt a need to require so-called "diplomatic assurances" that serve to reduce what would otherwise be considered a well-founded risk of torture of the individuals requested,[27] and that on other occasions courts have refused the deportation of terrorist suspects to Egypt even when such assurances have been provided.[28] In light of the contribution that international cooperation bears to an effective and comprehensive fight against terrorism, it would be crucial for Egypt to investigate thoroughly all instances of torture, as any shortcomings in that respect unavoidably give rise to hesitation and refusal by other States to cooperate with Egypt in matters of terrorism.

[26] Article 395 of the Penal Code.

[27] Such events preceded the well-known cases *Agiza v. Sweden,* communication No. 233/2003, Views of the Committee against Torture on 20 May 2005 (CAT/C/34/D/233/2003) and *Alzery v. Sweden,* communication No. 1416/2005, Views of the Human Rights Committee on 25 October 2006 (CCPR/C/88/D/1416/2005).

[28] See Office of the Commissioner for Federal Judicial Affairs, Canada, Jaballah (Re), 2006 FC 1230, MacKay D.J., order dated 16 October 2006; United States Court of Appeals for the Third Circuit, *Khouzam v. Chertoff,* ruling of 5 December 2008*;* and ibid.

2. Disappearances and extraordinary renditions in the context of international counter-terrorism operations

42. According to Egyptian authorities any person convicted in absentia when staying outside the Egyptian territory will be retried upon return to the country and any implementation of the death penalty when pronounced in absentia would always be reconsidered. Despite these assurances, the Special Rapporteur has heard troubling allegations that some persons rendered to Egypt outside the framework of formal extradition have been executed without a new trial shortly after arrival. The disappearance in 1995 of Abu Talal al-Qasimi (Talaat Fouad Qassem), a leader of Al-Gama'a al-Islamiyya who was sentenced to death in his absence by an Egyptian military tribunal in 1992, is one example. Qassem was transferred to Egypt after being interrogated by United States of America security officials in September 1995 aboard an American ship cruising the Adriatic Sea, and there are very strong indications that he was executed upon arrival. In this context the Special Rapporteur also regrets that the Government of Egypt did not reply to his questions on the fate of Egyptian ex-Guantánamo Bay detainee Reda Fadel El-Weleli (alternative spelling: Fael Roda Al Waleeli), who was transferred from Guantánamo Bay to Egypt on 1 July 2003.

43. The Special Rapporteur has previously expressed concern about the use of so-called "extraordinary renditions" in the fight against terrorism. This practice, which refers to the secret transfer of a person to another State for the purpose of interrogation or detention, is for several reasons impermissible under international law. The removal of a person, including through "diplomatic channels", without providing him/her with access to any legally prescribed procedures, as well as the detention without charge, or for long periods even when charged, in themselves violate articles 9 and 14 of the International Covenant and may, in conjunction with incommunicado detention for long periods, amount to enforced disappearance. Such procedures, furthermore, put the person at a serious risk of torture or other ill-treatment, and are as a whole in contradiction with the principle of non-refoulement.

44. The Special Rapporteur is deeply concerned about Egypt's acknowledged involvement in the well-known CIA rendition programme,[29] which has affirmed earlier credible indications that Egypt has been one of the most prominent countries involved in this programme. Regular access to lawyers, doctors and judicial authorities upon arrival to and during detention in Egypt are necessary to prevent any resort by security officials to torture or other ill-treatment during interrogation of such persons, whether with the purpose of charging and bringing them to trial or to extract intelligence in relation to other persons.

45. The Special Rapporteur regrets that the Government of Egypt has not started any meaningful internal investigation into any rendition case, and he is deeply concerned about its passive obstruction of investigations by other countries by refusing to cooperate with any judicial or non-judicial inquiry into this phenomenon. In this context, the Special Rapporteur regrets that the Government of Egypt did not reply to his questions concerning the whereabouts of Abu Omar between 18 February 2003 and 20 April 2004, nor to his questions about the lack of investigation into the *Agiza* and *Alzery* cases. As there are many other reports of violations of article 7 of the International Covenant during past interrogations of rendered terrorist suspects, and even ongoing violations of articles 9 and 10, the Special Rapporteur is afraid that Egypt will only be able to be a respected and reliable partner in the international fight against terrorism when it conducts thorough,

[29] The Egyptian Prime Minister Ahmed Nazif during a visit to the United States in May 2005 stated on television that 60 or 70 people had been transferred to Egypt by intelligence services of the United States since September 2001. NBC News, *Meet The Press*, 15 May 2005.

independent and impartial investigations purporting to bring to justice the perpetrators of these abuses.

3. Egyptian initiative to counter online terrorism

46. The Government informed the Special Rapporteur that it is seeking to develop an international strategy on combating terrorists' use of the Internet. The main features of that strategy would include mandatory identity registration of website owners and clients of Internet service providers and the banning of websites that provide "terrorist training" through providing information on the development and use of explosives and weapons of mass destruction. The Egyptian Ministry of the Interior has in its annual report made an exhaustive list of such websites. The strategy would also aim at prohibiting individuals and entities listed by the 1267 Sanctions Committee of the Security Council from hosting websites on the Internet, including by punishing companies that deliberately violate this ban.

47. The Special Rapporteur recognizes that the dissemination of online material which incites to violence is a major problem that needs to be addressed at the international level. At the same time there exists a risk that any legislation which would block or filter Internet content may also be used to suppress unpalatable radical views which, while unpleasant, may not create a real danger of imminent violence. Furthermore, any law or treaty creating an offence which would interfere with freedom of expression must be sufficiently clear and precise for a person to be able to judge whether or not his/her expressions would amount to an infringement of the law.

IV. Conclusions and recommendations

A. Conclusions

48. **The Special Rapporteur regards his visit to Egypt together with the authorities' commitment to abolish the state of emergency as an important step towards improving domestic compliance with international human rights instruments. During his visit, he learned about the development of counter-radicalization initiatives that purport to intellectually challenge a violent interpretation of Islam and thereby contribute to the prevention of the spread of terrorism. These are measures that, in his view, may contribute to the creation of a best practice when elaborated on the exclusive basis of voluntary involvement by all actors concerned. Within the context of preventive counter-terrorism action in the field of law enforcement, on the other hand, article 179 of the Constitution is highly problematic. This is due to the following reasons. Firstly, the abolishment of the state of emergency would make possible, at least to the extent that the exceptional powers reflected in this report are exclusively provided for by the Emergency Law, a move away from the human rights risks inherent in the state of emergency. These include arrest and detention, as well as home searches and surveillance of terrorist suspects without judicial warrant; administrative detention for unspecified periods of individuals considered to be a security threat; and the prosecution of terrorist suspects in emergency courts, all measures that greatly facilitate the commission of abuse and reduce the suspects' prospects of having their cases resolved in accordance with internationally guaranteed and fair procedures. Secondly, in relation to future counter-terrorism legislation, article 179 explicitly provides for deviations from constitutional guarantees which are fundamental for the achievement of justice now put at risk by the Emergency Law. Convinced that only through full compliance with human rights can any counter-**

terrorism programme be effective and successful in the long term, the Special Rapporteur provides below a set of recommendations.

B. Recommendations

49. **The Special Rapporteur urges the Government of Egypt to lift the state of emergency and repeal the Emergency Law, including all decrees issued under it, with a view to restoring the rule of law and full compliance with human rights, including the International Covenant on Civil and Political Rights. As an essential step in this direction, he recommends that article 179 of the Egyptian Constitution be revised in order to secure compliance with international standards protecting personal liberty and privacy.**

50. **The Special Rapporteur recommends that all provisions establishing terrorist crimes, whether those established in Law No. 97 of 1992 or those being drafted for the purpose of the proposed anti-terrorism law, adhere strictly to the principle of legality. Any criminalization of terrorist activity must be formulated in explicit and precise terms that enable the individual to regulate his/her behaviour. In particular, the definitions of terrorist crimes should be confined exclusively to activities that entail or are directly related to the use of deadly or serious violence against civilians.**

51. **The proscription of terrorist organizations, including the application of criminal responsibility of its members, must be made on the basis of factual evidence of activities that are of a genuine terrorist nature as well as of the actual involvement of the individuals concerned. He strongly advises against criminalization based on goals or ends, which would risk targeting legitimate associations, including human rights organizations and opposition groups that should not fall within the ambit of any counter-terrorism law.**

52. **The Special Rapporteur recommends that any counter-terrorism measure that results in the restriction of human rights, in particular pertaining to freedom of expression and peaceful assembly and association, be brought into compliance with the requirements of necessity and proportionality and applied in accordance with clearly defined legal criteria. Furthermore, he recommends the enactment and consistent implementation of explicit legal safeguards against abuse in order to prevent any deliberate use of counter-terrorism measures aiming at negatively affecting open dialogue and criticism, including against the Government.**

53. **The Special Rapporteur urges the Government of Egypt to abolish any legal provisions allowing for administrative detention and to take effective measures to release or bring to trial all detainees currently subjected to that regime. He recommends that any detention without charge or trial be explicitly prohibited, including by provisions in the proposed anti-terrorism law, and that any exceptional detention procedures applied against terrorist suspects entail strict guarantees ensuring full compliance with articles 9 and 14 of the International Covenant, including access to a judicial authority within 24 hours from the moment of arrest, in order to explicitly protect against any behaviour contrary to article 7 of the Covenant.**

54. **The Special Rapporteur recommends that the Government of Egypt promptly and thoroughly investigate any claim regarding policies that through the imposition of a "declaration of repentance" would set as a condition for release the self-incrimination of administrative detainees.**

55. **The Special Rapporteur recommends the adoption of a mechanism that provides for the mandatory conduct of independent, unrestricted and unannounced inspections at all places of detention, including SSI premises and military institutions**

involved in counter-terrorism that have been consistently pointed out as irregular detention facilities. He urges the Government to explicitly prohibit and end the practice of incommunicado detention as well as to ensure that detainees are only held in officially recognized detention facilities in which the prompt and unhindered access to lawyers, doctors and family members is guaranteed.

56. **A stringent and independent complaints mechanism, including the conduct of adequate and thorough investigations whenever there are reasonable grounds to believe that serious human rights violations have occurred, is not only essential for the protection against torture but also a condition for preventing a climate of impunity. Expressing his deep concern about serious and frequent allegations of torture or other ill-treatment, illegal detention and non-compliance with judicial release orders for terrorist suspects, the Special Rapporteur urges the Government of Egypt to ensure that prompt and independent investigations of complaints are carried out on a consistent basis with the purpose of bringing to justice all persons implicated in such offences.**

57. **The trial of civilian terrorist suspects in military and Emergency Supreme State Security Courts raises concerns about the impartial and independent administration of justice and furthermore does not comply with the right to have a conviction and sentence fully reviewed by a higher court. The Special Rapporteur urges the Government of Egypt to ensure that all cases involving terrorism, whether they are prosecuted in an ordinary criminal court or in a specialized court, are tried in strict compliance with each of the guarantees as spelled out in article 14 of the Covenant, including full respect for the presumption of innocence at all stages.**

58. **Mindful of the hesitation or refusal by some countries to extradite alleged terrorist suspects to Egypt for reason of the principle of non-refoulement, the Special Rapporteur urges the Government to ensure that each person brought to Egypt is held in officially recognized places of detention from the moment of arrival, and has prompt and regular access to judicial authorities, a lawyer of his/her own choice and medical examinations by doctors. He recommends that the Government, in full cooperation with any country concerned, thoroughly investigate all cases where extradited terrorist suspects claim to have been tortured or otherwise ill-treated upon return to Egypt, with the purpose of bringing those responsible for these practices to trial.**

59. **The Special Rapporteur is deeply concerned about the widespread global involvement of other countries in CIA rendition programmes resulting in the illegal transfer of terrorist suspects to situations beyond any protection by the law. He urges the Government of Egypt to establish an independent investigatory body to promptly and thoroughly clarify all elements that indicate its collaboration and extended reception of persons subjected to "extraordinary renditions" carried out within this programme, and to commit itself to far-reaching and effective measures in order to guarantee that such policies are not repeated.**

60. **The Special Rapporteur recommends that Egypt ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which, in addition to strengthening independent control mechanisms over domestic detention facilities, would contribute to Egypt's unhindered counter-terrorism cooperation at the international level.**