HUMAN RIGHTS WATCH

An Analysis of Tunisia's Draft Counterterrorism Law

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Summary

This report analyzes Tunisia's draft counterterrorism law and assesses to what extent the proposed law conforms to international human rights standards.

An initial version of the draft law was submitted to the National Constituent Assembly (NCA), Tunisia's parliament, by the Council of Ministers in January 2014. The NCA suspended voting on the draft amid disagreements over its provisions and in advance of legislative elections in October 2014. The new government submitted a new draft on March 26 to the parliament that was elected on October 26, 2014.

The new draft comes amid a spate of violent attacks by extremist groups targeting both Tunisians and foreign visitors, including the March 18 attack against tourists at the Bardo Museum in Tunis that killed 21 foreigners and one Tunisian.

The bill is intended to replace the counterterrorism law currently in force that was adopted in 2003 (the law on supporting international efforts to fight terrorism and to eradicate money-laundering). That law was criticized both for its broad definition of terrorism and provisions undermining the right to a fair trial, and for the way that the government of ousted president Zine el-Abidine Ben Ali was able to use it to prosecute dissenters for peaceful activities.

From a human rights perspective, the new draft is worse than the 2014 draft in two aspects. First, it would allow police to hold suspects in pre-trial incommunicado (garde-à-vue) detention for up to 15 days with a prosecutor's consent. During that time the police would not have to present the suspect to a judge or allow him or her contact with a lawyer or family member. This makes the suspect more vulnerable to torture and ill-treatment because the isolation reduces the chance that a third party will detect such abuses. Currently, Tunisian law allows authorities to hold suspects—including those accused of terrorism-related crimes--in garde-à-vue for a maximum of six days.

Second, it introduces capital punishment for terrorist acts that lead to death. Neither the 2003 law, nor the previous draft provided for the death penalty.

The new draft of the law also retains some of the flaws contained in the January 2014 draft:

- It contains a broad and ambiguous definition of terrorist activity that could permit the government to repress a wide range of internationally protected freedoms.

- It includes as “terrorism crimes” acts such as “harming private or public property” and harming “resources and infrastructures, transportation means, communication networks, information and computer systems or public facilities” that could lead to criminalizing political dissent or minor acts of violence during social protests.
- The draft’s vague terminology on apology of terrorism means that people could be prosecuted for using a term or symbol that is deemed supportive of terrorism, regardless of whether it was likely to result in any concrete action.

However the latest version of the draft law also retains some of the improvements introduced in the 2104 draft. These include:

- Reparation provisions that would provide support for terrorism victims, including free health care in public hospitals and judicial assistance.
- A ban on deporting or extraditing suspects to countries where they would face torture or other inhumane treatment.
- The creation of a commission headed by a magistrate to devise a comprehensive strategy to address terrorism. Requirements that the judiciary exercise greater oversight of surveillance and other activities conducted by Tunisia’s security and intelligence services, including interception of communications and infiltration of groups the government considers terrorists.

However, with regard to judicial oversight of the security and intelligence services, there remain serious flaws in the draft counter terrorism law. Rather than placing surveillance decisions under the exclusive oversight of independent judges, it extends the power to order such measures to prosecutors, who under Tunisian law are linked to the executive branch. Furthermore, the draft law would give judges overly broad discretion to close hearings and to hear anonymous witnesses. It would also undermine the right to an effective defense by obliging lawyers of suspected terrorists to reveal information about their clients. In addition, the draft does not offer sufficient judicial oversight over exceptional police powers to interfere with privacy in anti-terrorism operations.

Recommendations

The National Constituent Assembly should:

- Amend article 13 to ensure that all acts mentioned in the law constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism ratified by Tunisia. As a matter of best practice suggested by the special rapporteur, reformulate the definition of terrorism to meet these criteria cumulatively rather than in the alternative: Employing deadly means or otherwise serious violence against members of the general population or segments of it, or taking hostages; having the intent to cause fear among the population or the destruction of public order or to compel the government or an international organization to take or refrain from an action; and having the aim to further an underlying political or ideological goal.

- Amend article 30 to avoid infringements to freedom of expression, possibly using the definition suggested by the special rapporteur and stating that incitement to terrorism requires intentionally and unlawfully distributing or otherwise making available a message to the public with the intent to incite the commission of a terrorist offense, where such conduct, whether or not expressly advocating terrorist offenses, causes a danger that one or more such offenses may be committed.

- Repeal the death penalty for all crimes including those for terrorism related crimes and reestablish life imprisonment as a maximum penalty.

- Ensure access to a lawyer from the outset of detention in all cases and ensure that all suspects are brought promptly before a judge, normally within 48 hours. Any delay must be exceptional and justified with reasons. The maximum period between detention and being brought before a judge must not exceed a few days. Any extension of the current garde-a-vue time limit in terrorism cases would be contrary to Tunisia's international obligations.

- Amend article 35 to specify that the lawyers of presumed terrorists need to reveal only information "necessary" for preventing specific acts of terrorism.

- Amend article 68 to specify that hearings for terrorism suspects shall be public and that the judge may order closed or restricted sessions only in exceptional circumstances justified by the protection of court proceedings, victims and witnesses when there is real danger arising from making proceedings public. Restricted sessions should be for the minimum period necessary, and should not diminish the right of defendants to hear and challenge witnesses and other evidence against them.

- Specify in articles 68 and 70 that the information provided by anonymous witnesses could be used in court as evidence only when in exceptional circumstances, and should not be the sole or decisive basis of the conviction.

- Amend articles 52 and 59 by specifying that the most intrusive special investigative measures such as “taping” and “surveillance” will be ordered in exceptional circumstances in which there is evidence showing a credible risk that a terrorist offence will be committed. Judges alone should have the authority to authorize such measures.

Areas of concern

Overly broad definition of terrorism and terrorists

The draft law defines a terrorist act as any act that: "First: kills a person or several people, or inflicts considerable physical damage; Second: causes damages at facilities of diplomatic and consular missions, and international organizations; Third: does substantial damage to the environment, putting residents' lives and health at risk; Fourth: Harms public or private property, vital resources and infrastructures, transportation means, communication networks, information and computer systems or public facilities; or aims by its nature and context to terrorize the population or to force a state or an international organization to carry out or refrain from carrying out an action."

This definition is better than the one included in the 2003 law, which included other broad concepts such as "disturbing the public order, peace or international security." However, it still includes acts that do not involve or intend to cause violence or injury to people, such as property crimes and disruption of public services.

The broad and ambiguous definition of terrorist acts under the draft law could readily be used to criminalize acts of peaceful political dissent that result in harming public transportation or public facilities, as sometimes happens during protests. A non-violent march that blocked traffic could qualify as a terrorist act, subjecting protesters to several years in prison.

The law might also permit prosecutions on terrorism charges for minor acts of violence committed in the context of political activism. A political protestor who damages a police car or breaks the window of a government building could conceivably be prosecuted as a terrorist. Furthermore, an individual need only "threaten to commit" any of the relevant acts, including property crimes and harming public transportation or other facilities to be prosecuted as a terrorist and punished with a minimum of six years in prison.

In resolution 1566, the Security Council considered that these elements are needed for a definition of acts of terrorism

> Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The former UN special rapporteur on human rights and counterterrorism addressed the issue of defining conduct that is "genuinely of a terrorist nature:"

> The specificity of terrorist crimes is defined by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refraining from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise it loses its distinctive force in relation to ordinary crime.

The special rapporteur thus attempted to give a model definition of terrorism. He considers that:

Terrorism means an action or attempted action where:
1. The action:
(a) Constituted the intentional taking of hostages; or
(b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
(c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. The action is carried out or attempted with the intention of:
(a) Provoking a state of terror in the general public or a segment of it; or
(b) Compelling a Government or international organization to do or abstain from doing something; and
(3) The action corresponds to:
(a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
(b) All elements of a serious crime defined by national law.

The draft law contains a list of other offenses deemed as terrorist acts. The list draws the offenses from international conventions ratified by Tunisia, focusing on various aspects of the fight against terrorism. These include the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; the International Convention against the Taking of Hostages; and the International Convention for the Suppression of the Financing of Terrorism and other conventions.

The draft law defines as criminal offenses a range of acts, including crimes committed on board aircraft; offenses against safety at airports serving civil aviation; offenses related to maritime navigation and fixed platforms; use and discharge of biological, chemical, or nuclear weapons and other substances from a ship or fixed platform; transportation of weapons and other substances on board a ship; offences against internationally protected persons and the taking of hostages.

The formulation of the draft law suggests that the listed offenses are not linked to the overall general definition of terrorism and that they represent a separate type of terrorist acts. While the list is drawn from international conventions ratified by Tunisia, they still should closely follow guidelines on the definition of terrorist acts. In particular, these offenses need to satisfy the general three test elements outlined above: the means used must be deadly; the intent must be to cause fear among the population or to compel a government or international organization to do or to refrain from doing something; and the aim must be to further an ideological goal.

Several listed offenses do not satisfy this test. For example, article 17 of the draft law states that anyone who intends to control or seize a civil ship by whatever means will be punished with 10 to 20 years in prison. This definition could lead to the condemnation of peaceful environment activists who attempt to stop a ship from conducting illegal fishing or any other activity harmful to the environment.

The law has also a section defining membership in a terrorist group or helping or supporting terrorists. Articles 29 to 32 provide for prison terms of 6 to 12 years for anyone who intentionally:

- Joins in any way a terrorist organization or a terrorist agreement or receives training inside or outside Tunisian territory aimed at committing a terrorist attack;
- Intentionally joins such a terrorist organization or agreement outside of Tunisian territory;
- uses Tunisian territory to recruit a person or group with the aim to commit one of the terrorist offenses specified in this law inside or outside Tunisian territory or to commit one of the acts against another country or its citizens;
- Provides weapons, explosives, ammunition or other materiel and means to a terrorist organization or to persons in relation with a terrorist act defined in this law;
- Makes available competency or expertise to such terrorist organizations; intentionally divulging or providing, directly or indirectly, a terrorist organization or agreement with information aiming at helping the commission of a terrorist act or to cover up such an act;
- Creates false documents for a terrorist group or persons in relation to terrorist acts;
- Donates money knowing that its aim is to finance terrorist groups or agreement or a person with relation to a terrorist act.

These requirements for charging a person with participation in a "terrorist" enterprise are an improvement over the 2003 law, which had an overly broad definition of membership in a terrorist group. Article 13 of the 2003 law criminalized "…[b]elonging to an organization or entity, whatever its form and the number of its members, that has, even if coincidentally or incidentally, used terrorism as a means of action in the realization of its objectives." There was no requirement for the accused to have been aware of the terrorist nature of the organization or intended to adhere to an organization involved in terrorism.

The 2003 standards encompass members of a very large group that met the requirements, and/or members of a group that had used "terrorism" only "coincidentally or incidentally." In both cases individuals could be sentenced to long prison terms even if they had not been shown to have had any role in a terrorist act. The new definitions are more specific and include the elements of knowledge and intent necessary for criminal liability.

Overly broad definition of "praising" terrorism

Consistent with recognized limitations on the right to freedom of expression, governments may prosecute speech that incites criminal acts—speech that directly encourages the commission of a crime, is intended to result in criminal action, or is likely to result in criminal action—whether or not criminal action does, in fact, result. Yet laws that impose criminal punishment for what has been called "indirect incitement"—for example, justifying or glorifying terrorism—can encroach on expression protected under international human rights law.

The draft law has two articles relating to incitement or praising terrorism. Article 5 provides that "any person publicly calling for the perpetration of acts of terrorism when these calls, by nature or due to context, may constitute real execution threats, shall be considered a perpetrator of acts of terrorism and shall be sentenced to half the sanctions provided for in this type of crimes." This article is aligned with international human rights norms as it links the criminalization of the expression with the real threat of execution of a terrorist act.

Article 28 punishes with prison terms of one to five years and a 5,000 to 10,000 dinar (US $2960 to $5920) penalty anyone who has "publicly and in any way praised a terrorist crime, the perpetrator of a terrorist crime, an organization or an alliance connected with terrorist crimes, their members or their activities."

This article raises many concerns regarding its potential encroachment on freedom of expression. Its formulation is even broader than in the 2003 law. Article 12 of that law imposed prison terms of 5 to 12 years and a fine on anyone who: …[c]alls for the commission of terrorist infractions, or to join an organization or to enter into an agreement related to terrorist infractions, or uses a name, a term, or a symbol or any other sign in order to justify a terrorist organization, or one of its members or its activities."

Article 28 could be used to penalize individuals or groups for legitimate freedom of expression. For example, a person could risk imprisonment if they use a term or symbol that is deemed supportive of terrorism, regardless of whether doing so results in any concrete act of terrorism.

Under Article 19 par 3 of the ICCPR, restrictions on freedom of speech may only be imposed if they are provided by law and are necessary for (a) respect of the rights or reputations of others; and (b) the protection of national security or of public order, or of public health or morals.

The UN Human Rights Committee, in its general comment on the ICCPR's article 19, wrote:

> States parties should ensure that counterterrorism measures are compatible with paragraph 3 [of article 19]. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to an unnecessary or disproportionate interference with freedom of expression.

The former special rapporteur had said that protecting national security or countering terrorism cannot be used to justify restricting the freedom of expression unless the government can demonstrate that:

- The expression is intended to incite imminent violence;
- It is likely to incite such violence; and
- There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

The special rapporteur further said that such expression needed only to cause an objective danger of a terrorist offense being committed whether or not [the speech] was "expressly" advocating a terrorist offense.

The special rapporteur thus proposed the following definition of incitement to terrorism:

> It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.

Having clear and specific standards on the definition of "incitement to" or "praising of" terrorism is particularly important in light of public comments from Tunisian politicians and leaders of police unions who attempt to brand as "terrorist" lawyers who defend "alleged terrorists" or activists who criticize security forces for their human right violations during anti-terrorist operations.

For example, in a news conference in December 2013, the National Federation of Police Unions said that Imen Triki, a human rights activist and president of the nongovernmental group Freedom and Equity, serves as a cover for terrorists and protects them. Triki had earlier that month released a report documenting security force abuses during their counterterrorism operations. The broad definition of "praising" terrorism could easily be used to brand as a terrorist anyone who defends the right of accused terrorists to humane treatment.

Death Penalty

The new draft law would allow anyone convicted of a terrorist act resulting in death to be sentenced to capital punishment. The current law provides for life imprisonment as a

maximum sentence for terrorism related offenses. Human Rights Watch opposes capital punishment under all circumstances, as a practice unique in its cruelty and finality.

In 2013, following similar past resolutions, the United Nations General Assembly called on countries to establish a moratorium on the use of the death penalty, progressively restrict the practice, and reduce the offenses for which it might be imposed, with the view toward its eventual abolition. Tunisia has maintained a moratorium on executions since 1991.

Incommunicado Detention

The new draft law would allow police to hold suspects in pre-charge incommunicado detention (known as garde-à-vue) for up to 15 days with a prosecutor's consent. During that time the police need not bring the suspect before a judge or allow him or her access to a lawyer or family member. This makes a suspect more vulnerable to torture or ill-treatment because the isolation reduces the chance of third parties detecting evidence of abuse, It also increases the likelihood of oppressive questioning in the absence of a lawyer, undermining the right to an effective defense.

Article 38 of the proposed law would empower judicial police officers to detain suspects for up to five days after they inform the relevant prosecutor. The general prosecutor of the first instance tribunal in Tunis would be able to authorize a suspect's further detention for up to 10 more days so long as he or she specified the legal and factual grounds for doing so. After 15 days, police would need to bring a detainee before an investigative judge who could release the suspect without charge, grant him or her provisional liberty, or commit the individual to pre-trial detention. A suspect will then have the right to access to a lawyer.

Currently, Tunisian law allows authorities to hold suspects—including those accused of terrorism-related crimes--in garde-à-vue for a maximum of six days.

International standards require the judicial review of detention to be "prompt."[1] The UN Human Rights Committee has elaborated on the meaning of "prompt," holding that "forty-eight hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than forty-eight hours should be justified by exceptional circumstances."[2] The Committee has more recently considered that pre-charge custody without judicial review should not exceed 48 hours, non-renewable, and stated that any delay longer than 48 hours must remain absolutely exceptional and be justified by the

[1] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Tunisia on March 183, 1969, art. 9(3).

[2] UN Human Rights Committee, General Comment 8, Article 9, Right to liberty and security of persons (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.7, p. 130.

circumstances.[3] The Human Rights Committee has also said that detainees should have access to a lawyer from the outset of detention.[4]

To reduce the risk of torture and ill-treatment in custody and avoid undermining the right to an effective defense, the draft law should be amended to ensure access to a lawyer from the outset of detention in all cases. The law should also be amended to clarify that all suspects must be brought promptly before a judge, normally within 48 hours. Any delay must be exceptional and justified with reasons. The period between detention and being brought before a judge must not exceed a few days. Any extension of the current garde-a-vue time limit in terrorism cases would be contrary to Tunisia's international obligations.

Fair trial guarantees and due process

The draft law contains several provisions that could have serious implications on the right to a defense. The 2003 law imposes a penalty of one to five years in prison and a fine on "anyone, even those bound by professional secrecy, who do not immediately inform the relevant authorities of the facts, information, or intelligence relative to terrorist infractions about which they have knowledge." Only family members are exempt. The provision applies to professionals normally bound by confidentiality, such as defense lawyers, medical workers, or clergy. It jeopardizes the right to lawyer-client confidentiality that is a key component of the internationally guaranteed right to a fair trial.

Unlike the 2003 law, article 35 under the draft law extends the exemption to cover lawyers. However, it backslides on this exemption by including an exception when lawyers have "information that they have knowledge about and that informing the relevant authorities about could prevent the commission of terrorist acts in the future." This broad wording could potentially include any kind of information and could criminalize a wide range of information that the lawyer could have knowledge about that is not tied to specific impending acts of terrorism.

Special protective measures

The draft law provides for special protection for some people, including law enforcement agents in charge of terrorism offenses, victims, witnesses and informers and their families when necessary.

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[3] United Nations Human Rights Committee, General comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, December 16, 2014, "While the exact meaning of "promptly" may vary depending on objective circumstances,95 delays should not exceed a few days from the time of arrest.96 In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing;97 any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.98 Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of illtreatment.99 Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and those limits should also not be exceeded."

[4] UN Human Rights Committee, Concluding Observations on Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28

Closed hearing

Article 68 of the draft law states that the investigative judge or the president of the tribunal can order, in cases of imminent danger, preliminary investigations or a hearing outside of the normal setting while protecting the rights of the accused to a fair trial. The judge can also order a closed hearing.

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) states that, "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." A judge is entitled to order a hearing closed but under specific conditions laid down by article 14: "the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

To avoid giving judges overly broad leeway to close hearings, the draft law should state that these measures could be made only in exceptional circumstances, limited only to the extent necessary and in cases of proven threat or danger to the security and safety of witnesses, victims or judges.

Anonymous witnesses

Article 68 states that the investigative judge or the president of the court could accept "video and audio testimonies of the accused or the witnesses without their physical presence." In that case, the court officials would take all necessary measures not to disclose the identity of the person to be heard.

Article 70 states that "in cases of imminent danger, and when necessary, it is possible to collect all information likely to identify the victim, witnesses or informers or any other person who gave relevant information in statements separate from the main investigative file and recorded in a secret register to be kept by the public prosecutor." The accused or his lawyer can request the relevant judicial authority to disclose the identity of the people referred to in article 70 within 10 days of the date of access to the content of their testimonies.

The judicial authority can order the disclosure of the information when the request appears to be well-founded and there is no credible threat against the life or livelihood of the person to be protected or its family. This decision can be appealed before the indictment chamber. In addition, the measures of protection cannot in any case prevent the accused or his lawyer from access to the content of the testimony and other statements.

The use of anonymous witnesses as specified in article 68 and 70 could jeopardize the rights of the accused to mount an effective defense and curtail a person's ability to challenge the witnesses against them. Article 14 of the ICCPR provides that the accused has the right to examine, or to have examined, the witnesses against them.

The Principles and Guidelines on the Right to a Fair Trial in Africa, adopted by the African Commission on Human and Peoples' Rights, says that: "The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. It further states that: "The testimony of anonymous witnesses during a trial will be allowed only in exceptional circumstances, taking into consideration the nature and the circumstances of the offence and the protection of the security of the witness and if it is determined to be in the interests of justice."

In its 2002 report on terrorism and human rights, the Inter American Commission on Human Rights stated that:

> The right of a defendant to examine or have examined witnesses presented against him or her could also be, in principle, the subject of restrictions in some limited instances. It must be recognized in this respect that efforts to investigate and prosecute crimes, including those relating to terrorism, may in certain instances render witnesses vulnerable to threats to their lives or integrity and thereby raise difficult issues concerning the extent to which those witnesses can be safely identified during the criminal process.
>
> Such considerations can never serve to compromise a defendant's non-derogable due process protections and each situation must be carefully evaluated on its own merits within the context of a particular justice system. Subject to these caveats, procedures might in principle be devised whereby witnesses' anonymity may be protected without compromising a defendant's fair trial rights. Factors to be taken into account in evaluating the permissibility of such procedures include the sufficiency of the grounds for maintaining a particular witness's anonymity and the extent to which the defense is nevertheless able to challenge the evidence of the witness(es) and attempt to cast doubt of the reliability of their statements, for example through questioning by defense counsel.
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> Other pertinent considerations include whether the court itself is appraised of the witness's identity and is able to evaluate the reliability of the witness's evidence, and the significance of the evidence in the case against the defendant, in particular whether a conviction may be based solely or to a decisive extent on that evidence.

The European Court of Human Rights examined the issue of anonymous witnesses and their impact on fair trial guarantees in a number of cases. The ruling of the court depended on the circumstances of the case. For example, in the *Ellis and Simms and Martin v. the United Kingdom* case, the court considered that the following three criteria must be met to be satisfied that anonymous witnesses did not impair the right to a fair trial: first, whether there are good reasons to keep secret the identity of the witness; second, whether the evidence of the anonymous witness was the sole or decisive basis of the conviction; third, whether there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place.

In the case *Van Mechelen v. Netherlands*, the European Court examined a conviction for attempted manslaughter and robbery based on evidence from anonymous police officers. The court expressed a particular concern and highlighted dangers associated with granting anonymity to witnesses who are agents of the state:

> [Tlhe balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State. Although their interests - and indeed those of their families - also deserve protection ..., it must be recognised that their position is to some extent different from that of a disinterested witness or victim. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances.

The Council of Europe, in its recommendation N. R (97) 13 to member states concerning intimidation of witnesses and the rights of the defense, considered also that:

> Where available and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defence. The defence should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.

It further states that "when anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons."

Special investigative measures

The draft law has a section on special investigative measures in counterterrorism operations, such as surveillance. It states that for the needs of the investigation, the prosecutor or the investigative judge may request with a written order surveillance of a person's personal communications for a period of no more than four months renewable once for the same period, through either phone tapping, or by "setting up a technical package aimed at capturing, recording and conveying words and photos of an individual secretly monitored in their private space, and in private or public locations or vehicles." The draft specifies that if the collected information does not lead to criminal procedures or sentences, it will be protected under the law on personal information and data applicable in Tunisia.

These provisions could have important implications for the right to privacy, as enshrined in article 17 of the ICCPR. The former special rapporteur, in one of his reports to the Human Rights Council, recommended that:

> Any interference with the right to privacy, family, home or correspondence should be authorized by provisions of law that are publicly accessible, particularly precise and proportionate to the security threat, and offer effective guarantees against abuse. States should ensure that the competent authorities apply less intrusive investigation methods if such methods enable a terrorist offence to be detected, prevented or prosecuted with adequate effectiveness. Decision-making authority should be structured so that the greater the invasion of privacy, the higher the level of authorization needed.

He further stated that:

> Strong independent oversight mandates must be established to review policies and practices, in order to ensure that there is strong oversight of the use of intrusive surveillance techniques and the processing of personal information. Therefore, there must be no secret surveillance system that is not under the review of an effective oversight.

The provisions regarding special investigative mechanisms do not seem to conform to this requirement in two ways. First, the draft does not specify the circumstances in which surveillance will be allowed, and only uses the vague wording of "in the cases where the needs of the investigation so requires..." That departs from the requirement to allow interference with privacy only in exceptional circumstances and in cases in which there is credible suspicion that serious terrorist attacks will be committed.

Second, the law gives both the prosecutor and the investigative judge supervisory mandate over the taping, surveillance and other investigative technics. Under Tunisian law, *p*rosecutors are under the supervision of the executive branch. Article 22 of the Tunisian code of criminal procedures states that, "the public prosecutor is in charge, under the authority of the justice secretary of state, of ensuring the enforcement of the penal law on the whole territory of the republic." Thus, the prosecutor cannot be considered a fully independent oversight authority for police surveillance.

Improvements over the current counterterrorism law

The draft law contains a number of improvements over the current counterterrorism law adopted in 2003.

Reparation for victims: Article 62 of the new draft law establishes the Tunisian commission for combating terrorism. It will headed by a magistrate to devise a comprehensive strategy to address terrorism. The commission will coordinate with the relevant authorities the necessary medical care and social assistance for the victims of terrorism, who will have free medical care in public hospitals. In addition, they will receive special legal aid.

Non-refoulement: In the new draft, article 83 provides for an exception to extradition or deportation when there are "real grounds to believe that the person is at risk of facing

torture or that the extradition request is for the purpose of prosecuting or punishing that person for its colour, race, origin, religion, nationality, gender or political opinions."