The role of judges and prosecutors in combatting torture and other ill-treatment in the MENA region

Saïd Benarbia
Director of the Middle East and North Africa programme, International Commission of Jurists

An independent and impartial judiciary and prosecutorial authority are crucial to ensuring the effective enforcement of the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. However, in most of the Middle East and North Africa (MENA) region, judges and prosecutors have systematically failed to ensure that cases of torture and other ill-treatment are effectively investigated, prosecuted and punished.

This article highlights certain aspects of this failure, including by referring to a limited number of examples from MENA countries for illustrative purposes. This Article does not provide a comprehensive review of the matter.

In most MENA countries, detainees are rarely provided with adequate guarantees against torture and other ill-treatment, including the right to legal counsel from the moment of arrest and the right to challenge the lawfulness of detention. Many detainees are subject to prolonged incommunicado detention and sometimes to prolonged solitary confinement, both of which can amount to torture or other ill-treatment. In situations where the fact and/or location of the detention is undisclosed, the situation may amount to an instance of enforced disappearance, which is a crime under international law. Allegations of torture and other ill-treatment made by detainees are rarely investigated. Those responsible are almost never held to account, criminally or civilly, and victims' rights to effective remedies and to reparation continue to be largely denied. Further, where a detainee alleges, or where there are otherwise reasonable grounds to believe that he or she has been subjected to torture and other ill-treatment, the authorities generally will not provide independent medical examinations conforming to international standards, including those set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol). In addition, "confessions" obtained as a result of torture or other ill-treatment are regularly admitted as evidence by courts. Before such evidence is admitted, courts generally fail to require prosecution services to prove beyond reasonable doubt that the "confessions" were obtained by lawful means and voluntarily from the accused.

For MENA countries to meet their obligations under international law, including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), to prevent, investigate, prosecute and punish acts of torture and other ill-treatment, they should end policies and practices of secret detention and prolonged incommunicado and other arbitrary detention, which are common in the region.

In Syria, the use of secret and prolonged incommunicado detention has been widespread and systematic, and includes holding detainees in unofficial and secret places of detention and denying their right to contact family members and to have access to legal counsel and to a court. In Libya, unofficial detention facilities continue to operate under the effective control of armed groups and outside any rule of law framework. Acts of torture and other ill-treatment are widespread in these facilities. Detention in these facilities might amount to an instance of enforced disappearance.

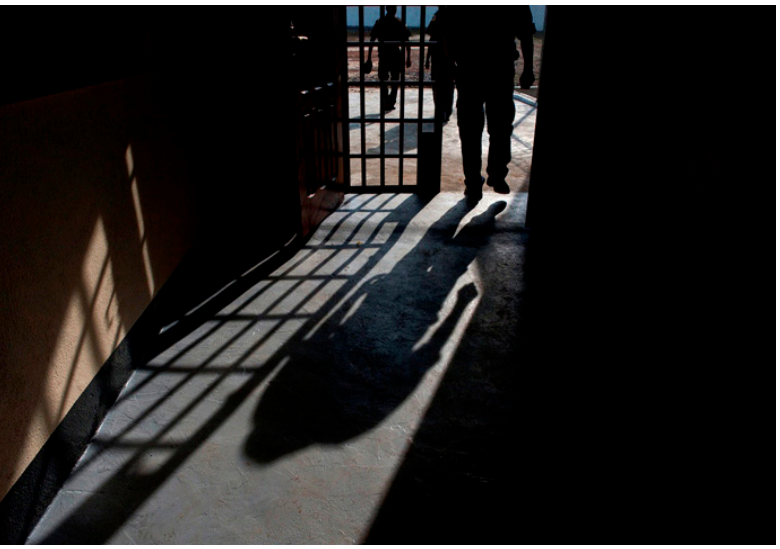
The Working Group on Arbitrary Detention has stressed that "secret and/or incommunicado detention constitutes the most heinous violation of the norm protecting the right to liberty of human being under customary international law. The arbitrariness is inherent in these forms of deprivation of liberty as the individual is left outside the cloak of any legal protection." [§60 of the Working Group on

association for the prevention of torture

This article was originally published in the Middle & East-North Africa e-bulletin N°6 of summer 2014, published by the Association for the Prevention of Torture (APT). The article reflects the view of the author alone and not necessarily those of the APT. For a full archive of MENA e-bulletins see www.apt.ch/en/resources/mena-e-bulletin/

Arbitrary Detention report of 24 December 2012, A/HRC/22/44, §60]

To meet their obligations under international law, MENA States must ensure that all detainees are held and registered in official detention facilities, including by disclosing: their identity; the date, time and place of their detention; the identity of the authority that detained and interrogated them; the grounds for their detention; and the date and time of their admission to the detention facility. In order to comply with these obligations, MENA states should undertake comprehensive reforms of the framework relating to detention.



Indeed, in many MENA countries, acts of torture and other ill-treatment have been facilitated, and sometimes even exacerbated, by domestic laws relating to detention. In Morocco, for example, the Counter-Terrorism Act, N°03-03 of 28 May 2003, permits the extension of the length of garde à vue (detention in police custody) in "terrorism" cases to 96 hours, renewable twice upon the authorisation of the public prosecutor. Furthermore, during the garde à vue, prosecutors, at the request of the police, may also delay the detained person from contacting a lawyer for up to 48 hours after the commencement of the first renewal period. Therefore, a "terrorist" suspect might be prevented from communicating with a lawyer for the first 6 days of garde-à-vue. Under international standards, anyone arrested or detained has the right to be assisted by a lawyer without delay and to communicate and consult with his/her lawyer without interception or censorship and in full confidentiality. This right may be delayed only in exceptional circumstances and must comply with strict criteria determined by law. In any event, the person deprived of their liberty should have access to a lawyer within 48 hours of their arrest or detention.

An effective means to combat policies and practices of arbitrary detention, torture and other ill-treatment and enforced disappearance is to ensure that detention is subject to independent judicial review. Under international law and standards, all detained persons have the right to challenge the lawfulness of their detention and to be brought before a judge or a judicial authority within 48 hours of their arrest. However, in many of the MENA States, detention is subject to review by the Office of the Public Prosecutor (OPP). It is notable that in these States, prosecutors are under the authority of the Minister of Justice. As such, they cannot be considered as officers authorised to exercise judicial power. The Human Rights Committee considered that "it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with". The Committee argued that it was "not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9(3)". [For further details, see Human Rights Committee, *Vladimir Kulomin v. Hungary*. Communication N°521/1992, 22 March 1996. CCPR/C/56/D/521/1992, §11.3.]

In many MENA countries, the subordination of the OPP to the executive has resulted in a lack of prompt, independent and impartial investigations into allegations of torture and other ill-treatment. Prosecutors regularly refuse to register complaints of ill-treatment or torture. In the limited cases where inquiries have been ordered subsequent to such complaints, investigations have been unreasonably prolonged and have failed to address the responsibility of superiors for the conduct of their agents.

Such practices breach the obligations of these States under international law, including the CAT and the ICCPR. Under Article 12 of this convention, "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction". This obligation is also reflected in Principles 33 and 34 of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment. In addition, Article 13 of the CAT recognises the right of individuals to make a complaint regarding allegations of torture and "to have his case promptly and impartially examined by, its competent authorities". Those carrying out

the investigation must, among other things, seek to "recover and preserve evidence, including medical evidence, related to the alleged torture to aid in any potential prosecution of those responsible" and, to this end, should order a medical investigation as soon as possible.

In this context, the Committee Against Torture has recognised that, "Securing the victim's right to redress requires that a State party's competent authorities promptly, effectively and impartially investigate and examine the case of any individual who alleges that she or he has been subjected to torture or ill-treatment. Such an investigation should include as a standard measure an independent physical and psychological forensic examination as provided for in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)." [See Committee Against Torture, General Comment N°3 (2012), §25.]

In the case of *Khaled Ben M'Barek v. Tunisia*, concerning the death of Faisal Baraket due to police torture, the Committee Against Torture noted significant shortcomings on the part of the judge, the Public Prosecutor, and the Minister of Justice. In particular, the Committee stated that the Public Prosecutor had committed a breach of the duty of impartiality required of him by his obligation to give equal weight to both accusation and defence "when he failed to appeal against the decision to dismiss the case". The Committee went on to note: "In the Tunisian system the Minister of Justice has authority over the Public Prosecutor. It could therefore have ordered him to appeal, but failed to do so". [See *Khaled Ben M'Barek v. Tunisia*, Committee Against Torture Communication N°60/1996, Views of 10 November 1999, UN Doc. CAT/C/23/D/60/1996, §11.10.] More recently, in the report of his visit to Tunisia in 2012, the UN Special Rapporteur on torture noted, "a pattern of a lack of timely and adequate investigation of torture allegations by prosecutors or investigative judges". [See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tunisia, 2 February 2012, UN Doc. A/HRC/19/61/Add.1, §29.]

In its concluding observations on Egypt, the Committee Against Torture pointed to the "many consistent reports received concerning the persistence of the phenomenon of torture and ill-treatment of detainees by law enforcement officials, and the absence of measures to ensure effective protection and prompt and impartial investigations." [See Conclusions and recommendations of the Committee Against Torture, Egypt, 23 December 2002, UN Doc. CAT/C/CR/29/4, §5.] A Fact-Finding Commission was established by the ousted President, Mohamed Morsi, to investigate human rights abuses committed from 25 January 2011 until 30 June 2012. The Commission, generally considered as impartial and credible, documented many cases of individuals: "arrested by military police and intelligence officers and subjected to torture and other ill-treatment in military prisons"; "who died from torture while in military custody"; and "who died from torture while in military prisons and were then buried as "unknown" after the authorisation of the public prosecution services". The Commission submitted its report to the Prosecutor General with a view to investigating all cases documented in the report. So far, the Prosecutor General has failed to investigate, order the investigation of or commence any criminal proceedings in relation to, the documented abuses. [For further details see the ICJ's submission to the Universal Periodic Review of Egypt.]

When prosecutors fail to discharge their duties by adequately investigating and prosecuting acts of torture and other ill-treatment, courts are under a duty to protect the rights of the persons deprived of their liberty not to be subjected to these acts. Courts must investigate or order the investigation of allegations of torture and other ill-treatment. They must not admit as evidence statements and "confessions" alleged to have been obtained as a result of torture or other ill-treatment. They should also require, before the admission of such evidence, that the prosecution prove beyond reasonable doubt that the "confessions" were obtained by lawful means.

In the "UAE 94 case", 94 individuals were prosecuted before the State Security Chamber of the UAE Supreme Court on charges of "opposing the Constitution and the basic principles of the UAE ruling system and establishing and managing an organization with the aim of committing crimes that harm State security". On 6 May 2013, 71 of the detainees addressed a complaint to the President of the Court asking him to investigate the incidents of torture to which they had been allegedly subjected. The methods of torture they referred to in the complaint included severe beatings, pulling out the detainees' hair, sleep deprivation, exposure to extreme light during the day and night, death threats and other threats, insults and other verbal abuse, and prolonged solitary confinement that

lasted, in some cases, more than 236 days. One of the accused described to the Court the beatings he received and stated that as a result of these beatings, he urinated blood and his leg swelled to the extent that he was unable to walk.

Neither the President of the Court nor the prosecutor investigated or ordered investigation into the allegations made by many of the detainees during the hearings and in the complaint. Neither the President of the Court nor the prosecutor ordered any medical examination of the detainees who alleged that they were subjected to acts of torture or other ill-treatment. Furthermore, "confessions" alleged to have been obtained as a result of these acts were admitted as evidence by the Court. Before allowing the admission of such evidence, the President of the Court failed to require the prosecution to prove beyond reasonable doubt that these "confessions" were obtained voluntarily and not by coercive means. Sixty-nine of the accused were convicted on 2 July 2013 by the State Security Chamber and sentenced to serve terms of imprisonment ranging between 5 and 15 years. (For more information about the UAE 94 case, see ICJ report, *Mass convictions following an unfair trial: The UAE 94 case*.]

Preventing and eradicating acts of torture and other ill-treatment in the MENA region requires holding the perpetrators of these acts to account and ensuring the rights of victims to effective remedies and reparation. It also requires comprehensive reform of the criminal justice systems, including laws and policies on detention, evidence, and forensic medicine. Ultimately, however, these reforms will be illusive if, as illustrated by the UAE 94 case and numerous other cases, judges and prosecutors fail to carry out their functions independently, impartially and in defence of the absolute right of the persons deprived of their liberty not to be tortured or ill-treated.