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Submission by the International Commission of Jurists (ICJ) on the impact of the draft law on counter-terrorism of the Kingdom of Bahrain on its obligations under the United Nations Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)

The ICJ is grateful for the opportunity to address the members of the Committee with regard to a recently introduced draft law on counter-terrorism in Bahrain.

It is respectfully submitted that this law – if adopted – would greatly reduce safeguards against torture, cruel or inhuman and degrading treatment or punishment and negatively affect the implementation of the Convention against Torture in Bahrain.

Introduction

In March 2005, the Government of Bahrain introduced a new draft law on counter-terrorism before the legislature. The proposed legislation, introduced under an "urgent procedure" according to Article 95 of the Code of House of Deputies, has been sent to the Council of Representatives and the Shura Council.

It should be recalled that under international law the Kingdom of Bahrain would be fully responsible for breaches of the Convention against Torture for acts of the Executive, the Legislative and the Judiciary. The ICJ believes that it is vital for the Committee against Torture to intervene at this stage to assess the impact of the draft law on counter-terrorism on the implementation of Bahrain's obligations under the Convention. The Committee's recommendation would provide valuable guidance to allow the State party to bring the draft law on terrorism in line with international human rights standards.

This is in line with the Committee's practice, as illustrated in the recent discussion of the state report of Colombia. The Committee had expressed its concern that "measures adopted or *being adopted* by the State party against terrorism and illegal armed groups could encourage the practice of torture. In this regard the Committee expresse[d] its concern, in particular , at: [...] (b) Constitutional reform *bill* N° 223/2003, which, *if adopted*, would seem to confer judicial powers on the armed forces and enable persons to be detained and questioned for up to 36 hours without being brought before a judge".¹

The ICJ acknowledges the right and duty of Bahrain to protect the persons under its jurisdiction from terrorist acts. As stated in the ICJ Berlin Declaration, "[a]ll states have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons, from acts of terrorism".² However, Bahrain

¹ See CAT/C/CR/31/1, para. 8: Colombia, 4 February 2004. Emphasis by the ICJ.

² See ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, adopted on 28 August 2004 by 160 jurists, from all regions of the world, meeting as commissioners, honorary

“must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law” as reiterated by the Commission on Human Rights in its resolution 2005/80 of 21 April 2005. The Committee against Torture has stressed, that in combating threats of terrorism state parties must bear in mind that most of the obligations undertaken by ratifying the Convention are of a non-derogable nature and that “the obligations contained in Article 2 (whereby “no exceptional circumstances whatsoever may be invoked as a justification of torture”), 15 (prohibition of confessions extorted by torture as evidence) and 16 (prohibition of cruel, inhuman or degrading treatment or punishment) must be observed in all circumstances.”³

The ICJ is concerned that the draft law on terrorism would, if adopted, run contrary to the positive steps taken towards reform in Bahrain in the recent years.⁴ The ICJ, as well as national NGOs⁵, have serious concerns about the negative impact on implementation of the Convention against Torture of such a draft law on terrorism. The draft counter-terrorism law contains broad definitions of terrorism and terrorist organisations which threaten freedoms such as freedom of assembly and expression or the right to strike; widens the scope of applicability of the death penalty, and grants special prosecutorial powers with regard to such crimes. The draft law transfers authority over key aspects of the investigation from the judiciary to the prosecution, including the authority to order up to 90-days of detentions on the basis of secret and undisclosed evidence. It also increases the prosecutorial powers with regard to interception of communications of all kinds and recording of events in public and private places. In parts the draft law incorporates features of the Legislative Decree on State Security Measures, repealed in 2001, which had led to serious allegations of torture, cruel and inhuman treatment or punishment.⁶

Key issues of concern:

1. Broad and unspecific definitions

Article 1 of the draft law provides that:

“In the implementation of the provisions of this law, terrorism means any threat or use of force or violence, whatever the motives or the purposes, resorted to by the criminal in carrying out either an individual or collective criminal project, in order to disable the provisions of the constitution or the laws or the rules, to disrupt the public order; to expose to danger the safety and security of the kingdom; or to harm the national unity or the security of the international community, if the act harms individuals or disseminates among them horror or panic or puts in danger

members, national Sections and affiliated organisations at the International Commission of Jurists (ICJ) Biennial Conference of 27-29 August 2004, in Berlin. The ICJ Declaration sets out eleven core principles that states must give effect to while countering terrorism. The text of the Declaration is available at http://icj.org/news.php3?id_article=3503?en

³ See Statement of the Committee against Torture: 22 November 2001, CAT/C/XXVII/Misc.7 (Other Treaty-Related Document). See also Committee against Torture, Concluding observations: Russian Federation, CAT/C/CR/28/4 para.4, 06 June 2002; CAT, Committee against Torture, Concluding observations: Egypt, CAT/C/CR/29/4 paras.4 and 6 (i), 23 December 2002; Committee against Torture, Concluding observations: Spain, CAT/C/CR/29/3 para.7, 23 December 2002; Committee against Torture, Concluding observations: Yemen, CAT/C/CR/31/4 para.5 and 7 (f), 05 February 2004.

⁴ See the report of the UN Working Group on Arbitrary Detention on its mission to Bahrain, E/CN.4/2002/77/Add.2 of 5 March 2002.

⁵ See for example page 3 of the alternative report submitted by the Bahrain Human Rights Society.

⁶ See the report of the UN Working Group on Arbitrary Detention on its mission to Bahrain, E/CN.4/2002/77/Add.2 of 5 March 2002, pp. 6-9.

their lives, freedoms or security; or damages the environment; the public health; the national economy; the public or private facilities, buildings and properties; or their occupation or obstructing their work, or obstructing the public authorities or religious buildings or educational faculties from doing their work".⁷

The ICJ is concerned that the definition of terrorism refers to broad and general concepts that could allow the criminalization of the exercise of rights that are internationally recognised such as freedom of assembly, freedom of expression or the right to strike, and the stifling of peaceful opposition. For instance, under the definition provided by the draft law on terrorism, a demonstration leading to clashes between some demonstrators and the police forces could be considered as terrorism and the demonstrators, instead of being dealt with under the ordinary criminal law, could be charged with terrorism and sentenced to life imprisonment. Finally, the use of vague, imprecise or nebulous concepts in the definition could run contrary to the cornerstone principle of criminal law *nullum crimen, nulla poena sine lege*.

In addition, Article 6 of the draft law on counter-terrorism provides that:

"[w]hoever creates, establishes, organizes or manages, in violation of the provisions of the law, an association, body, organization, group, gang or a branch thereof; or has a leading position therein, for the purpose of calling, by whatever means, for obstruction of the provisions of the constitution or the laws or preventing the state's institutions or the public authorities from carrying out their duties; or the attack against the individual liberties of the citizens or any other freedoms and public rights guaranteed by the constitution and law; or to harm national unity, if terrorism was among the means used to achieve or execute the objectives called by the association, body, organization, group, gang or the branch of one of them; shall be punished by the death penalty".⁸

Similarly, the use of broad and unspecific language in the definition of an "association, body, organization, group, gang or a branch thereof" engaging in terrorism is problematic as its application might lead to the prohibition of political parties, social movements and NGOs. The vague wording of this provision is especially disturbing in light of recent reports that the Government of Bahrain has arrested human rights activists or government critics and closed down NGOs, including human rights NGOs⁹. Such a provision could be abused to muzzle political or social opposition.

2. Erosion of judicial safeguards against torture

The draft law would reduce effective safeguards against torture, cruel, inhuman and degrading treatment or punishment in anti-terrorism cases by limiting judicial oversight over arrest and detention. Article 2 of the UN Convention against Torture obliges state parties to take effective legislative, administrative, judicial or other measures to prevent torture.

Such safeguards are also set out in the International Covenant on Civil and Political Rights (ICCPR), in particular Articles 7, 9, 10 and 14; the Body of Principles for the Protection of

⁷ Non official translation of the draft law of Bahrain on counter-terrorism presented by the Government of Bahrain to the house of deputy as urgent issue according to article 95 of the code of The House of Deputies.

⁸ Non official translation of the draft law of Bahrain on counter-terrorism.

⁹ See the arrest of human rights activist, 'Abd al-Hadi al-Khawaja and the closure of the Bahrain Center for Human Rights in September 2004.

all Persons under Any Form of Detention or Imprisonment; the Standard Minimum Rules for the Treatment of Prisoners and the Declaration on the Protection of All Persons from Enforced Disappearances, in particular Article 10.

Furthermore, the Constitution of the Kingdom of Bahrain enshrines important safeguards in Article 19:

- a. Personal freedom is guaranteed under the law.
- b. A person cannot be arrested, detained, imprisoned or searched, or his place of residence specified or his freedom of residence or movement restricted, except under the provisions of the law and under judicial supervision.
- c. A person cannot be detained or imprisoned in locations other than those designated in the prison regulations covered by health and social care and subject to control by the judicial authority.
- d. No person shall be subjected to physical or mental torture, or inducement, or undignified treatment, and the penalty for so doing shall be specified by law. Any statement or confession proved to have been made under torture, inducement, or such treatment, or the threat thereof, shall be null and void.”

However, Article 29 of the draft law on counter-terrorism provides that:

“[a]s an exemption to the provisions of the Law on Penal Procedure, the Public Prosecution acquires the additional authority of the judge of Lower Court provided in the Law on Penal Procedure, and the consultative authority of the Higher Court, as provided in article no.148 of the Law, when investigating crimes according to this law. The order of detention is issued by the Public Prosecutor or his alternate within a total period of detention that doesn’t exceed ninety days. Without obstructing either the provisions of article 89 (3) of the constitution or article 43 of the Law on the Judicial Authority issued by the decree No.42 of 2002, in investigating the cases mentioned in the paragraph above, the Public prosecutor is not bound by article 12 of the Law on Penal Procedure”.¹⁰

The above-mentioned provision would transfer important authority over arrest and detention normally vested in the judiciary to the Public Prosecutor. In particular, it would be the Public Prosecutor and not the judiciary that would have the power to extend pre-trial detention beyond the initial 7 days under the regular procedure (see articles 147 and 148, Code of Criminal Procedure). Under the counter-terrorism law the Public Prosecutor would be able to issue detention orders of up to 90 days.

Moreover, according to Article 30 of the draft law on counter-terrorism:

“[i]n case sufficient proof exists against the accused, or he has been caught red-handed in a crime cited in this law, the judicial arrest officer may detain the accused for a period not more than 14 days. When necessary, the officer may ask the Public Prosecution to permit him to extend the detention period. In this case, when necessary and for reasons of investigation or for the security of the society, the Public Prosecution may give permission to extend the detention period for no more than 14 additional days.

¹⁰ Non official translation of the draft Law of Bahrain on terrorism.

The judicial arrest officer is required to hear the accused and send him to the Public Prosecution after the end of the period mentioned in the paragraph above.

The Public Prosecution must interrogate the accused after no more than three days and then decide whether to keep him in pre trial detention or release him.”¹¹

The envisioned provision would allow an individual to be held in police custody for up to 14 days upon the decision of a “judicial arrest officer” and an additional 14 days upon decision of a public prosecutor. The “judicial arrest officer” is not a member of the judiciary and is not vested with the same guarantees of judicial independence. He is only an officer with special competencies in investigation under the authority of the Public Prosecution.¹²

The introduction of this provision would increase the risk of torture, cruel, inhuman treatment or punishment in custody. The Committee against Torture has in particular expressed concerns about the considerable extension of the time limit for police custody, the period during which the risk of torture is greatest, both in criminal law and in anti-terrorist legislation.¹³ The requirement to be brought promptly before a judge or an officer authorized to exercise judicial authority is a fundamental safeguard against torture and other forms of ill-treatment.

First, a 14 days period before any review of the order of arrest is excessive and violates the obligation to be brought “promptly” before a judge or an officer authorized to exercise judicial authority. The UN Special Rapporteur on Torture has recommended that the time by law to obtain a judicial warrant of pre-trial detention (...), in any case, should not exceed a period of 48 hours.¹⁴ Moreover, the law would allow an additional 14 days of police custody upon order of the Public Prosecutor without requiring the suspect to be brought physically before him.

Second, neither a judicial arrest officer nor the Public Prosecutor can be considered an “officer authorized to exercise judicial authority” in the meaning of Article 9 § 3 ICCPR. As highlighted by the UN Human Rights Committee, 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 has in particular recognized that a public prosecutor does not enjoy the necessary institutional objectivity and impartiality necessary to be considered an “official authorized to exercise judicial power”.¹⁵

Third, the ICJ is further concerned over draft Article 31 which provides that “[i]nformation provided by security sources to extend the period of detention mentioned in the first paragraph of article 30 of this law is confidential to the Public Prosecution and it is forbidden to reveal the information or to reveal the names of those who presented it.”

It is unclear whether Articles 29 and 30 of the draft law would supersede the provisions contained in the code of criminal procedures regarding the remedy of *habeas corpus*. This is

¹¹ Non official translation of the draft Law of Bahrain on terrorism.

¹² See Book Two, Chapter One, articles 43 to 50 of the Code of Criminal Procedure.

¹³ See for example Committee against Torture, Concluding observations: Morocco, CAT/C/CR/31/2, para.5 (b), 05 February 2004.

¹⁴ Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/57/173 of 2 July 2002, para.19 and 21.

¹⁵ Human Rights Committee, Kulomin v Hungary, CCPR/C/56/D/521/1992, 1 August 1996, para. 11.3.

particularly critical as the pre-trial detention could be extended by the sole decision of the Prosecutor to 90 days. Moreover, the potential secrecy of the evidence and the anonymity of witnesses would raise serious questions as to the potential effectiveness of any such remedy.

In light of the above, the ICJ urges the Committee against Torture to seek clarification on the scope and modalities of the exercise of the right to *habeas corpus*. Equally, the Committee should seek clarification about other important safeguards, such as the right to be informed of the charges, the right to inform family and the right to access to a lawyer of ones own choosing.

In summary, the ICJ considers that the counter-terrorism draft law would expose those suspected of terrorism to a greater risk of torture and ill-treatment. It would grant excessive powers to the Public Prosecutor, unreasonably extend police custody and pre-trial detention and limit ways to effectively challenge arrest and detention. The ICJ wishes to reiterate the conclusions of the UN Special Rapporteur on Torture that the following basic legal safeguards should remain in any legislation relating to arrest and detention, including any type of anti-terrorist legislation, as these safeguards guarantee the access of any person in detention to the outside world and thus ensure his or her humane treatment: the right to *habeas corpus*, the access to a lawyer within 24 hours from the time of arrest, and the right to inform a relative or friend about the detention.¹⁶

The ICJ respectfully invites the Committee to assess the extent to which the draft law, if adopted, would create an environment prone to committing torture and other forms of cruel, inhuman or degrading treatment.

¹⁶ Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/57/173 of 2 July 2002, page 2. See also Human Rights Committee, General Comment 20 on Article 7 of the ICCPR, 10 Mars 1992, para. 11 and Principle 6 of the ICJ Berlin Declaration stating: «States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. States have the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a right to *habeas corpus* or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision". The text of the Declaration is available at http://www.icj.org/news.php3?id_article=3503?en