



General Assembly

Distr.: General
17 January 2019
English
Original: French

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

Opinion No. 77/2018 concerning Mr. Sabeur Lajili (Tunisia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 12 April 2018 the Working Group transmitted to the Government of Tunisia a communication concerning Mr. Sabeur Lajili. The Government replied to the communication on 7 June 2018. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

4. Mr. Lajili is a Tunisian citizen. Born in 1966, he resided in Tunis prior to his detention. He is currently being held at El Mornaguia central prison in Tunis. Mr. Lajili is a Commissioner General of Police and was previously the Director of the National Counter-Terrorism Unit and the Director of Tourism Security in Tunis.

Arrest and detention

5. According to the source, Mr. Lajili was arrested on 30 May 2017. He is accused of undermining State security by forging links with Libyan nationals through a Tunisian businessman while acting on behalf of the intelligence services within the framework of the new strategy to combat terrorism and organized crime.

6. The source alleges that on 23 October 2016, the businessman appeared on a television programme and reportedly stated that the Head of the Tunisian Government had threatened to imprison him and have him charged with fraud, embezzlement and money-laundering. The businessman then reportedly said that the Head of Government “could not put even a goat behind bars”.

7. The source explains that on 2 November 2016, the Secretary of the National Counter-Terrorism Unit filed a complaint with the public prosecution service alleging that the businessman in question had visited Mr. Lajili at the Unit’s headquarters and asked him to intervene on behalf of a Tunisian smuggler. The smuggler had reportedly been accused of conducting money exchange and transfer operations, and taking commission on them, on behalf of a person detained in Libya who was suspected of involvement in a criminal gang, organized crime and arms sales funded by Islamic State in Iraq and the Levant (ISIL).

8. According to the source, on 25 May 2017 the public prosecution service referred the complaint made by the Secretary of the National Counter-Terrorism Unit to the Prosecutor of the Military Tribunal for investigation. On 26 May, the Prosecutor of the Military Tribunal made a submission to the military investigating judge requesting the opening of a judicial investigation against the businessman and against Mr. Lajili for undermining State security. On the same date, according to the source, the investigating judge issued a detention order for the businessman, who had been admitted to the military hospital.

9. The source also reports that on 29 May 2017, the investigating judge by rogatory letter requested the Central Investigation Brigade of the National Guard to arrest Mr. Lajili and to interview the person who had made the complaint and the Director and Head of Investigations, who is head of department in the same Unit.

10. On 30 May 2017, Mr. Lajili was questioned at his home and interviewed by the investigating judge, who also served him with a detention order. The source explains that Mr. Lajili was arrested by armed officers at 2.15 a.m. and that his lawyer was not present when the detention order was served.

11. The source claims that under questioning, Mr. Lajili stated that his superior officer had instructed him to establish links with a Libyan lawyer through the businessman in question in order to gather information about Tunisian members of ISIL being held in Sabrata prison in Libya. These statements were reportedly corroborated by Mr. Lajili’s superior officer.

12. According to the source, Mr. Lajili’s lawyer made several applications for his release pending trial, on 9 June, 10 August and 16 October 2017, and lodged an appeal on 13 June against the decision rejecting the first request. All of these motions were dismissed.

13. The source further claims that on 19 July 2017, Mr. Lajili’s lawyer filed a complaint against the investigating judge in charge of the case on the grounds that one of the other defendants in the case had not been interviewed. In addition, on 21 August, a complaint was filed with the Supreme Judicial Council against the Procurator-General and the President of the Ninth Investigating Chamber of the Tunis Court of Appeal, both of whom were suspected of receiving instructions from the Government to keep Mr. Lajili in

detention without just cause and of allowing the executive branch to interfere in judicial matters.

14. The source alleges that on 27 October 2017, Mr. Lajili's lawyer requested a meeting with the Minister of Justice to present a medical report showing that Mr. Lajili required medical treatment for a tumour at a specialist facility. No response was received.

15. The source further explains that on 6 November 2017, Mr. Lajili's lawyer transmitted to the investigating judge a request for the case to be transferred to the antiterrorism branch of the judicial police for reasons of lack of jurisdiction over the counts in question. The request was dismissed, and that decision was appealed on 13 November before the Ninth Investigating Chamber of the Tunis Court of Appeal. On 6 December, the Ninth Investigating Chamber transferred the appeal to the Tenth Investigating Chamber, which is the only body competent to rule on cases falling within the jurisdiction of the Military Tribunal of First Instance. However, the source indicates that the Procurator-General of the Tunis Court of Appeal intervened to keep the case before the Ninth Investigating Chamber, referred the appeal back to it and set the hearing for 13 December 2017.

16. The source states that on 14 November 2017, Mr. Lajili was admitted to hospital and underwent surgery. A medical report from July 2017 had recommended that Mr. Lajili's tumour should be removed by August 2017 at the latest.

17. The source also claims that the detention order issued for Mr. Lajili expired on 26 November 2017. Nevertheless, on 28 November Mr. Lajili was discharged from hospital and returned to El Mornaguia prison.

18. According to the source, Mr. Lajili's lawyer filed a complaint of arbitrary detention with the Tunisian Minister of Justice and the National Authority for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 1 December 2017. On 2 December, the investigating judge sent an explanatory note to El Mornaguia prison regarding Mr. Lajili's continued detention. On 4 December, the detention order was extended by the military investigating judge, with retroactive effect from 26 November 2017. The source alleges that the following day, the investigating judge served Mr. Lajili with a new detention order pertaining to a second case, without just cause and without a lawyer present, in an attempt to regularize his detention.

19. According to the source, on 7 December 2017 Mr. Lajili's lawyer filed an appeal against the investigating judge's decision to dismiss the application for Mr. Lajili's release.

20. The source alleges that Mr. Lajili's lawyer has serious concerns about the legality of the proceedings and possible government interference in judicial matters. On 12 December 2017, and pursuant to article 294 of the Tunisian Code of Criminal Procedure, he therefore made a request for the case to be transferred to another court of appeal for reasons of public order and a reasonable suspicion of bias. On 13 December, the application for the proceedings to be suspended until the Court of Cassation had ruled on the request to transfer the case to another court of appeal was dismissed, as was the application for Mr. Lajili to be granted provisional release following his surgery.

21. Lastly, on 15 March 2018 the lawyer submitted a request to the investigating judge for Mr. Lajili to be allowed an essential post-surgical medical examination, but this was denied.

Legal analysis

22. The source argues that domestic remedies are ineffective and that the proceedings have been excessively lengthy and arbitrarily prolonged. The source alleges that the investigating judge has displayed a lack of concern with regard to the handling of the case and compliance with time frames. Although Mr. Lajili appeared before a judge on 30 May 2017, a second suspect in the case was not summoned to testify until two months later.

23. In this context, the source explains that, in Tunisian legislation, the provision that is akin to article 9 of the Covenant is article 84 of the Code of Criminal Procedure, which stipulates that pretrial detention is an exceptional measure. However, there are no facts,

indications or evidence to support the claims that Mr. Lajili committed or instigated the commission of any offence or to justify the arbitrary extension of investigation time limits.

24. In addition, the source asserts that, although the detention order had already expired, the investigating judge in charge of the case arbitrarily extended it without just cause or any legal basis. According to the source, it was for that reason that the Prosecutor of the Military Tribunal split the case into two – Cases No. 4919 and No. 4920, which both concern the same facts – after the submission. Dividing the case in two would give the prosecutor greater flexibility to file charges against more individuals with direct or indirect links to the accused businessman. After the detention order expired, and in order to regularize the extension of the first detention order issued in connection with Case No. 4919, which would otherwise have been invalid, the investigating judge issued a new detention order against Mr. Lajili in connection with Case No. 4920. The fact that this was done without a lawyer present constitutes a violation of article 80 of the Tunisian Code of Criminal Procedure. In other words, according to the source, the second detention order, issued in connection with Case No. 4920, was served without Mr. Lajili being questioned and without his lawyer present, and it relates to events unconnected to him. Moreover, the source claims that the report resulting from the investigation of the case did not reveal any incriminating or exculpatory evidence.

25. In addition, the source alleges that Mr. Lajili has been held in inhuman, degrading and humiliating conditions, underpinning the procedural defects that have arisen throughout the process.

26. Firstly, the source indicates that the investigation that began on 2 November 2016 was launched in response to the insults the businessman had directed at the Head of Government on television on 23 October 2016. The Secretary of the National Counter-Terrorism Unit was allegedly encouraged by an adviser to the Head of Government to file the complaint that led to Mr. Lajili's arrest. For the source, these circumstances invalidate the charge laid against Mr. Lajili and render it inadmissible, since it amounts to a settling of scores between the businessman and the Head of Government.

27. The source next alleges that, under article 110 of the Tunisian Constitution, the military courts have jurisdiction over military offences. However, the proceedings against Mr. Lajili relate to undermining State security, which is an ordinary offence and therefore is not within the remit of the military tribunals. According to the source, the case was referred to the military courts because the ordinary courts are overseen directly by the Judicial Council, which is independent, while the military tribunals fall directly under the executive branch and would comply with the instructions of the Head of Government, to the detriment of defendants.

28. The source also claims that the Procurator-General who received the complaint was given instructions, and that a motion has been filed requesting his recusal from the case. The Procurator-General would not in fact be competent to hear direct summonses, whereas public prosecutors can initiate proceedings. The source notes that the initial complaint that formed the basis for the investigation was not filed with the Procurator-General until seven months after the alleged offence. The source concludes that, since there was no urgency and Mr. Lajili was not caught in flagrante delicto, there is no reason why a senior State official known for his rigour and patriotism should have been arrested in the circumstances described above, and that the investigation is a means of settling scores.

29. Lastly, under article 85 of the Tunisian Criminal Code, the time limit for Mr. Lajili's detention has been exceeded. As he was first detained on 30 May 2017, the six months permitted under article 85 expired on 26 November 2017. A request for his compulsory release was filed on 4 December 2017 but was dismissed even though the permitted period had expired. Mr. Lajili has remained in detention on the grounds that the case has been referred to the Investigating Chamber and that the investigation requires the extension of his detention order. However, according to the source, there is no provision for these grounds either in legislation or in case law; on the contrary, under article 85 the investigating judge is obliged to release Mr. Lajili. The source therefore concludes that the detention is arbitrary.

30. The source also explains that it was against the backdrop of this serious situation of wrongful detention without legal basis since 26 November 2017 that the investigating judge went to the prison with a pre-prepared deposition, questioned Mr. Lajili and served him with a detention order in the absence of his lawyer. The source also indicates that Mr. Lajili's state of health does not permit him to remain in detention, particularly since his recovery has been hindered by a lack of post-operative care.

31. The source also argues that Mr. Lajili's right to be presumed innocent has been violated, since no incriminating evidence or reasonable suspicions to support the charges of undermining State security have come to light in the course of the questioning, investigations and interviews with witnesses and experts. The case thus involves abuse of power, dysfunction in the military judicial system, an unfair trial and arbitrary detention.

32. In conclusion, according to the source, Mr. Lajili is a victim of violations by the Tunisian Government under articles 9, 10 and 14 (2) and (3) (a), (b), (c) and (d) of the Covenant.

Response from the Government

33. On 12 April 2018, the Working Group transmitted to the Government the communication containing the allegations outlined above. The Government replied on 7 June, within the 60-day time limit.

34. The Government first provides a recapitulation of the allegations against Mr. Lajili and the proceedings in Cases No. 4919 and No. 4920. With regard to Case No. 4919, the Government explains that the businessman visited Mr. Lajili at his office at the National Counter-Terrorism Unit outside working hours and that they discussed matters relating to State security. On that occasion, Mr. Lajili allegedly divulged confidential information. In addition, the Government alleges that, at the businessman's request, Mr. Lajili sought to unduly influence a sensitive case being handled by the Unit, by attempting to arrange the release of a suspect. According to the Government, the security-related nature of Mr. Lajili's work meant that he was not permitted to forge links with foreign nationals. With regard to Case No. 4920, the Government explains that the national security services had discovered that a Tunisian businessman had established links with a number of foreign military and political leaders with a view to influencing political and diplomatic decision makers in Tunisia. The investigations allegedly revealed that this businessman was involved in criminal activities.

35. In connection with Case No. 4919, the Government indicates that, on 26 May 2017, the Prosecutor of the Permanent Military Tribunal of First Instance in Tunis opened an investigation against Mr. Lajili, the businessman and any other person shown to have undermined the external security of the State, committed an act of treason or acted as an accomplice under articles 32 and 60 bis (1), ter and quater (2) and (4) of the Criminal Code. On 29 May, the investigating judge issued an instruction to proceed to investigate and arrest Mr. Lajili. On 30 May, Mr. Lajili was brought before the investigating judge by the Central Investigation Brigade. The judge conducted a hearing the same day, after first explaining the offences Mr. Lajili was suspected of and the applicable legislation, and informing him of his right to be assisted by a lawyer. However, the Government indicates that Mr. Lajili chose to answer questions without assistance from a lawyer. The Government states that he admitted that: (a) he had been instructed by the Director-General of the intelligence services to receive a visit from a Libyan national; (b) the businessman had facilitated the Libyan national's entry to Tunisia; and (c) the businessman and the Libyan national had visited his office late at night to discuss confidential information relating to State security. The Tunisian Government considers that the Libyan national presents a potential security risk.

36. The Government then indicates, as reported by the source, that the applications Mr. Lajili's lawyer filed requesting his interim release were dismissed.

37. The Government also explains that, on 6 November 2017, Mr. Lajili's lawyer filed a motion requesting the investigating judge, on grounds of lack of jurisdiction over such cases, to refer the case to the judicial arm of the antiterrorism unit. The investigating judge dismissed the motion, and an appeal was filed. The Military Indictment Division of the

Tunis Court of Appeal dismissed the appeal; that decision was upheld by the Court of Cassation.

38. The Government then explains that, in connection with the motion requesting a referral, Case No. 4919 was sent to the Military Indictment Division of the Tunis Court of Appeal on 19 November 2017. On 2 December, as the case was still before the Military Indictment Division, the investigating judge wrote to the administration of the civilian prison to inform it that Mr. Lajili's detention order continued to be valid.

39. According to the Government, the investigating judge took the case back from the Indictment Division on 4 December 2017 and ordered an initial four-month extension of Mr. Lajili's detention, to be applied retroactively from 26 November 2017. On 25 March 2018, the investigating judge extended Mr. Lajili's detention a second time for a further four months. On 16 April, the investigating judge closed the investigation and referred Mr. Lajili to the Military Indictment Division of the Tunis Court of Appeal, where his case will be tried.

40. The Government also explains that, in its decision of 22 May 2018, the Military Indictment Division of the Tunis Court of Appeal found that, pursuant to articles 61 ter (2) and 62 of the Criminal Code, the charges against Mr. Lajili amounted to the undermining of the State's external security during peacetime through recklessness, negligence or non-compliance with regulations that allegedly gave rise to the disclosure of information entrusted to him, and that such disclosure could have led to the total or partial revelation or divulgence of secret information relating to national security. According to the Government, Mr. Lajili is the main suspect and it has been decided that he will be tried by the Criminal Chamber of the Tunis Military Tribunal of First Instance. An application for judicial review of that decision was filed on 29 May 2018.

41. With regard to Case No. 4920, the Government explains that, on 26 May 2017, pursuant to article 123 of the Code of Military Justice, a judicial investigation of the businessman was launched in connection with charges of service in a foreign army during peacetime. On the basis of the outcome of that investigation, on 5 December the same charges were laid against Mr. Lajili. A date for his hearing was set the same day, but he reportedly refused to leave prison to appear before the investigating judge. The judge then went to the prison to inform Mr. Lajili of the charges being laid against him, the applicable legislation and his right to be assisted by a lawyer during the hearing. According to the Government, Mr. Lajili refused to answer questions without his lawyer present. On 25 April 2018, Mr. Lajili was taken from prison to be questioned in the presence of his lawyer. Mr. Lajili and his lawyer requested that the hearing be postponed. On 30 April, Mr. Lajili was questioned in the presence of his lawyer, and the investigating judge decided to grant him interim release. That decision was appealed by the public prosecution service. On 2 May, the Military Prosecutor's appeal was sent to the Military Indictment Division for review. The Government states that Mr. Lajili is considered to be free unless the Indictment Division upholds the Military Prosecutor's appeal against the decision to release him.

42. The Government indicates that, contrary to the source's claims, Cases No. 4919 and No. 4920 relate to different events.

43. In connection with the claims regarding the jurisdiction of the military tribunals, the Government states that this matter has been resolved by the Court of Cassation pursuant to articles 4 and 5 of the Code of Military Justice and article 22 of Act No. 82-70 of 6 August 1982, the Internal Security Forces (General Regulations) Act. Under these provisions, because Mr. Lajili was Director of the National Counter-Terrorism Unit at the time of the offence, he was deemed to be a member of the internal security forces and was therefore subject to the jurisdiction of the military tribunals. This is also stipulated in article 110 of the Tunisian Constitution, although military offences are not precisely defined. The purpose, nature and location of the offence must be taken into account. Article 22 (1) of Act No. 82-70 provides that cases involving officers of the internal security forces suspected of committing offences in the performance of their duties fall within the jurisdiction of the military tribunals when such events relate to duties in the fields of internal or external State security and the maintenance of public order.

44. With regard to the guarantees of a fair trial before the military tribunal and the tribunal's independence, the Government claims that all such guarantees are respected in accordance with article 22 of Act No. 82-70 and inasmuch as it is possible to bring a civil action and to appeal all decisions of the military investigating judge before the Investigating Chamber, which is subject to the oversight of the Court of Cassation. The Government adds that legal assistance was available to Mr. Lajili. In addition, the Government argues that the procedures before the military tribunals are similar to those of the judicial courts. The same applies to the powers of the Military Prosecutor's Office and the investigating judge. Lastly, the Government contests the allegation of a lack of independence, since the businessman's provocation of the authorities and the insults he directed against them do not concern Mr. Lajili. In addition, appeals against the decisions of investigating judges are lodged with the Investigating Chamber, which reports directly to the Court of Appeal and, consequently, to the judicial courts, demonstrating the independence of the military tribunal.

45. With regard to Mr. Lajili's continued detention, the Government states that the decision is lawful and that his detention fulfils the condition provided for in article 85 of the Code of Criminal Procedure. Although it cannot breach the confidentiality of the investigation, the Government claims that there are multiple pieces of evidence indicating that Mr. Lajili committed the alleged offence. His detention is justified by the seriousness of the offence committed, which is one of the State security offences punishable by the death penalty. This offence is considered the most serious, and pretrial detention is therefore necessary to ensure that the investigation is conducted properly, that the accused does not have any contact with witnesses and that he does not evade justice.

46. The Government further indicates that the maximum length of pretrial detention is applicable in this case. Under article 85 of the Code of Criminal Procedure, it may not exceed 14 months (6 months, plus two extensions of 4 months each). Since Mr. Lajili has been in detention since 30 May 2017, he must be released on 25 July 2018; he will automatically be released on that date if he has not appeared before the Criminal Chamber.

47. Lastly, the Government indicates that, contrary to the allegations made by the source, Mr. Lajili requested and received medical care at the military hospital in July 2017. Following the confirmation of the medical diagnosis, surgery was scheduled for 30 August but he reportedly refused it and was returned to prison on 7 September. As part of the follow-up, he had access to his medical file and was examined by a specialist doctor on 9 October with a view to undergoing surgery. Mr. Lajili's lawyer garnered media attention by describing his condition as serious and potentially life-threatening. The Government reports that Mr. Lajili underwent a successful operation on 14 November. After the recovery period, he was returned to prison and monitored by a doctor. The Government claims that there is no connection between his illness and his detention. With regard to admittance to a private clinic, the Government states that it informed him in a letter dated 17 April 2018 that, under article 17 of Act No. 2001-52 of 14 May 2001 on the organization of prisons, the State is required to provide free medical assistance without preferential treatment. Detainees may therefore select a public or military hospital of their choice.

Further information from the source

48. After receiving a copy of the Government's response, the source submitted additional information on 9 July 2018.

49. With reference to the Tunisian Government's assertion that, owing to the nature of their work, officials in the security services are not permitted to forge links with foreign nationals, the source states that, in line with the principle that offences can be punished only as prescribed by law, criminal convictions should be handed down only in accordance with clearly defined criminal legislation. The source alleges that the Government has not specified the legal basis for the charges laid. The importance of security cooperation is well established, including in the areas of sharing intelligence and making geopolitical and strategic information available to the Government. Furthermore, the geopolitical context of the region, particularly since the fall of the Gaddafi regime, necessitates increased vigilance and prevention work on the part of the Tunisian security services.

50. According to the source, the television programme illustrates the threats made by the Head of Government and his intention to have the businessman arrested and charged with fraud, embezzlement and money-laundering. The source claims that after the public prosecution service received instructions to initiate proceedings, it sought to alter the direction of the case and bring charges that better suited the political circumstances. The potential victim was then brought before the courts for undermining State security. The source explains that this is a political offence and describes it as a “catch-all” charge used as an instrument of repression. The authorities are seeking to quash all opposition. Such offences are dealt with by specialized courts.

51. The source alleges that the Government has not indicated the nature of the additional secondary evidence that led to the arrest and continued detention of the potential victim. The confidentiality of the investigation cannot be used to justify the withholding of information, given that the Working Group is bound by the same principle. The concealment of the truth confirms the arbitrary nature of the detention.

52. According to the source, following the instruction sent to the military judge by the investigating judge on 30 May 2017, a search was carried out during the night even though no evidence had been uncovered and the suspect had not been caught in flagrante delicto. The investigating judge did not advise the potential victim of his rights and reportedly informed the Criminal Division that a public defender had been appointed. The victim should have been held in police custody until a lawyer had been appointed; however, according to the source, no lawyer was available because of the timing of the hearings. In the source’s opinion, these moves give rise to cause for concern, especially since the judge was reportedly instructed by his superiors to have Mr. Lajili placed in custody.

53. The source reports that the businessman did not at any time offer to facilitate access to Tunisia for the Libyan lawyer, who, contrary to the Tunisian Government’s claims, was not subject to any restrictions. According to the source, the purpose of the meeting at Mr. Lajili’s office was to verify the Libyan national’s credibility and ask him for information about Tunisians being held in Libyan detention centres who had sworn allegiance to ISIL.

54. The source alleges that the Ninth Investigating Chamber of the Tunis Court of Appeal is under the influence of the Procurator-General, who gives his opinion on every political case. According to the source, applications for release are automatically refused without grounds. Mr. Lajili’s lawyer filed complaints against the President of the Ninth Chamber and the Procurator-General of the Court, and requested the recusal of the latter.

55. The source indicates that the Government did not respond to concerns about the lack of questioning and the delay in taking a statement from Mr. Lajili’s superior. Furthermore, according to the source, it appears that the complaint against the Procurator-General has either not been examined or has been shelved. The source indicates that the change in legal status from vulnerable witness to accused person relates to Mr. Lajili’s superior rather than to Mr. Lajili himself. In that connection, the military judge summoned Mr. Lajili’s superior as a witness without seeking a request from the public prosecution service and served him with a detention order.

56. The source states that, although Mr. Lajili’s lawyer applied to the Ministry of Justice for an accelerated procedure on 27 October 2017, the Ministry did not respond until 17 April 2018, after it had been informed of the submission of the present communication to the Working Group on 19 March 2018.

57. The source claims that, contrary to the arguments put forward by the Tunisian Government, the Court of Cassation did not uphold the decision of the Investigating Chamber and refused to rule on the merits of the appeal, declaring itself incompetent without outlining the reasoning behind its decision. The source then indicates that the Tribunal had no jurisdiction over this case. The Procurator-General allegedly wanted the Ninth Investigating Chamber to take up the case despite the Tenth Chamber having recently been awarded jurisdiction. The executive allegedly exerted control over the case through the Procurator-General.

58. The source also reports that, contrary to the claims of the Tunisian Government, the Minister of Justice refused to allow Mr. Lajili to be admitted to a private clinic that would

provide clean and hygienic post-surgical care. Health-care provision in public hospitals is inadequate, and specialist recovery care for different illnesses is not available owing to the large numbers of patients. According to the source, these shortcomings justify Mr. Lajili's family's request to transfer him to a private clinic where he would receive the best care, which he would pay for himself. The source states that, in addition to rejecting this request, the Minister of Justice also reportedly refused to allow Mr. Lajili to receive treatment in a public hospital specializing in his illness. An initial post-operative examination had been scheduled for February 2018 but was postponed until April because of a strike in public hospitals. In the source's view, Mr. Lajili's health has been jeopardized, especially given that he has not been allowed the necessary consultation regarding the suitability of chemotherapy. According to the source, these obstacles to treatment constitute planned torture on the part of the Tunisian Government.

59. The source claims that, despite the Tunisian Government's assertion that the investigating judge extended the detention orders issued for the other detainees, in fact only Mr. Lajili's detention order was extended. The referral of the case to the Investigating Chamber does not exempt the investigating judge from his obligations under article 85 of the Code of Criminal Procedure. There can be no derogation from these public policy provisions, even when detention is extended. Article 85 (3) allows for the extension of detention, provided that it is justified in the interests of the investigation, that the public prosecution service is consulted and that the extension is implemented by a reasoned order. For ordinary offences, only one extension may be granted, for a maximum duration of three months. The extension request must be presented formally and in writing, complete with date and signature, and must be accompanied by the opinion of the public prosecution service and the reasoned order. According to the source, the lack of compliance with these conditions in the present case proves the arbitrary, discretionary and absolute nature of the detention. The letter sent to Mr. Lajili on 2 December 2017 allegedly carried no legal weight since it did not meet all the conditions described above. The extension of Mr. Lajili's detention amounts to abduction. The source indicates that the judge retroactively extended the detention order that expired on 26 November 2017. On 22 May 2017, the Investigating Chamber allegedly changed the offence with which Mr. Lajili was charged from treason to divulging military secrets, which is punishable by 5 years' imprisonment. The time limits for pretrial detention, as provided for in article 85 of the Code of Criminal Procedure, were reset as a result of the new charge. The source explains that Mr. Lajili has currently been detained for 13 months and should be released, given that he has been held for longer than the 9 months permitted for pretrial detention under article 85.

60. The source argues that there are no grounds for Mr. Lajili's detention order, since the investigations and inquiries conducted at the request of the investigating judge have not uncovered any evidence relating to the charges filed against him.

61. According to the source, the Ninth Investigating Chamber of the Tunis Court of Appeal, which is under the influence of the Procurator-General of the Court, did not rule on the irregularities raised by Mr. Lajili's lawyer.

62. The source alleges that the Government's response to the allegations regarding the impartiality of military justice is not convincing and that, on the contrary, it confirms the political nature of the case and the fact that there are other extrajudicial actors behind it.

63. The source indicates that the decisions of investigating judges are in theory subject to appeal before the Investigating Chamber, pursuant to articles 87 and 107 of the Code of Criminal Procedure. The Investigating Chamber has no oversight of the decisions of the investigating judge, with the exception of appeals against dismissals of requests for the release of a detainee or against the remand of a suspect charged with serious offences. The source alleges that, in practice, the investigating judge did not act of his own accord but followed arbitrary instructions from his supervisor in collusion with the Prosecutor of the Military Tribunal and the Procurator-General whose recusal from the case had been requested. It is also alleged that the judge prolonged the closure of the investigations excessively, particularly in view of the delay in questioning the complainant and Mr. Lajili's supervisor, whose testimony is of crucial importance with regard to statements made by the potential victim.

64. The source claims that, in the opinion of Mr. Lajili's lawyer, the investigating judge modified the charges filed by the new Investigating Chamber, No. 36, contending that Mr. Lajili had not committed treason but rather had intentionally divulged secret information relating to national security.

65. The source also contests the refusal by the Ministry of Justice to allow direct family visits. However, he notes that Mr. Lajili has been allowed limited access to a private clinic, where he has received a better standard of care.

66. The source further indicates that, under the new Constitution of 2014, the legislation invoked as the basis for according jurisdiction over the case to the Military Tribunal cannot be applied until it has been revised. According to the source, several irregularities are apparent. The offences have not been updated; furthermore, in the absence of special derogation, they obstruct the normal work of the internal security forces. The interference and arbitrary prosecutions are a reflection of the contempt in which the security forces are now held. The source regrets the delay in the establishment of the Constitutional Court, which is to be the only body competent to examine whether legislation is compatible with the Constitution. Lastly, the source also regrets the absence of any reasoning provided by the Court of Cassation to justify its dismissal of the appeal regarding the preliminary issue of the lack of competence of the military tribunal.

67. The source also suspects that the case is a political one: if the serious offence of undermining State security could have been substantiated, the Procurator-General would have taken immediate action. However, he did not in fact initiate proceedings until seven months later. The source considers that the Tunisian Government has not responded to the question, raised by the source in the communication, regarding the deposition that the investigating judge prepared before going to the prison to transmit it to the detainee.

68. According to the source, the investigating judge's decision to release Mr. Lajili in the present case can be explained by the pressure exerted on the Tunisian Government by the Working Group and the media, and the fact that the investigation and hearings have failed to prove that the accused had any involvement in the case.

69. The source has continued to keep the Working Group informed of developments in the case; no new allegations have been raised.

Discussion

70. The Working Group thanks the parties for their cooperation and presents below its review of the allegations and the conclusions it has drawn.

71. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68).

72. Upon receipt of the information submitted by the source, the Working Group noted a number of contradictions in the dates in different documents. However, these contradictions do not affect the substance of the claims inasmuch as the situation itself is public knowledge and the source has submitted several consistent pieces of information regarding Mr. Lajili's continued detention. The *prima facie* credibility of the claims is thus established. The Government has itself provided a chronology of the proceedings that corroborates the source's statements and reinforces this credibility. The disagreements between the parties lie in their interpretation of the situation and in the legal arguments.

73. Before turning to the categories relevant to the alleged arbitrary detention in this case, it should be noted that the parties agree that there is a link between the case against Mr. Lajili and the businessman. Indeed, Mr. Lajili is accused of undermining national security through his alleged collusion with the businessman. The disagreement between the parties rests on the businessman's accusation against the Head of Government being the explanation for the substance of the criminal case. Despite this disagreement, which lies at the heart of this case and gives rise to numerous speculations, the Working Group is nevertheless in a position to issue an opinion on the procedure, which itself does not appear

to be the subject of deep disagreement between the parties, taking into account the aspects on which the Government has chosen not to comment.

74. With regard to category I, the source claims that the arrest and detention of Mr. Lajili lack any legal basis and that his pretrial detention has been prolonged excessively outside the legal framework.

75. The source claims that the offence referred to by the Government is vague and a “catch-all” charge, particularly given that the Government failed to provide any information to support the charges, citing the need to ensure the confidentiality of the investigation and protect national security concerns. The Working Group is convinced that the State has a legal obligation to provide evidence to support its position and must not rely on secret information that prevents it from communicating with the Working Group. The Working Group is also aware that factors related to domestic policy are probably involved; however, it is incumbent on the State to dispel any doubt by being transparent, even if in doing so certain pieces of evidence need to remain confidential. The Working Group has faced such a situation before. This argument has even greater weight if the claims of State secrecy have prevented the accused from accessing the information. However, since the source did not raise this point, the Working Group will not consider it as an argument against the State.

76. In addition, and on the same point, the Working Group is not convinced by the Government’s assertion that Mr. Lajili’s functions did not involve contact with foreign nationals. The facts as reported by the source appear sufficiently consistent to make a case that the Government was unable to contest since it did not present evidence to the contrary. However, the Working Group does not need to go as far as the source suggests and conclude that there was a conspiracy to falsely accuse Mr. Lajili.

77. Article 9 of the Covenant requires States to issue a warrant to justify the arrest and subsequent detention of an individual. It also requires the State to inform individuals of the reasons for their arrest so that they can exercise their right to challenge its lawfulness. Given that the State has not provided the Working Group with evidence of such justification, and that such justification has not been provided to Mr. Lajili, the Working Group concludes that the State has failed in its obligations in this regard.

78. The source further claims that the pretrial detention of Mr. Lajili has exceeded the time limits prescribed by Tunisian law read in the light of international law. The argument is based on provisions of national law; however, the contradictions between the information provided by the parties does not allow the Working Group to adopt a position on this question. Accepting the position of the Government would be the most prudent option. Unfortunately, even in accepting this position, namely that pretrial detention cannot exceed 14 months (6 months plus two extensions of 4 months each), the Working Group is obliged to note that the situation in question does not comply with the national guidelines. The Government claims that a case must be tried within 14 months, as though that would mark the end of pretrial detention, which should be understood as detention until such time as a verdict is pronounced in connection with the charges on which the criminal proceedings rest. If pretrial detention must not exceed 14 months, as the Government claims, an initial decision on the merits should therefore have been taken during this period. In the present case, as of 25 July 2018, 14 months after the arrest, the substantive debate had not yet begun. Furthermore, the Working Group is not convinced that the division of the case into two cases, for which no clear explanation has been provided by the Government, constitutes grounds for calculating the duration of pretrial detention differently. It is therefore clear, even from the Government’s perspective, that the maximum permitted duration of pretrial detention has been exceeded and that the detention therefore no longer has any legal basis. This situation, considered in combination with the earlier conclusion, renders Mr. Lajili’s continued detention without legal basis and therefore arbitrary under category I.

79. With regard to category III, the source claims that the accused has not had access to legal assistance at all times, even though the military justice system lacks independence and the Government’s interference in it has been proven.

80. In its reply, the Government states that Mr. Lajili allegedly waived his right to have a lawyer present but provides no evidence to support this claim. When an accused person waives such an important right, it is essential for the authorities to document it. In the

present case, the absence of evidence to support the Government's assertion does not allow the Working Group to deem it credible. The Group therefore concludes that the accused's right to have his lawyer present during his interrogation, as provided for in article 14 (3) (d) of the Covenant, was violated.

81. The source maintains that the military justice system is not independent. Allegations of bias in military justice systems are common, and a number of international law standards have been developed to govern this specialized type of justice system.¹ However, beyond its general assessment, the Working Group is concerned about the nature of the alleged offence. On the one hand, the offence is vaguely defined, leaving open the possibility of imprecise charges that could lead to the misuse of procedures. On the other hand, the Working Group is not convinced that the offence is of a military nature such that it would fall under the jurisdiction of a military judge. The Government has not provided sufficient evidence of the competence of the military judge or of the substance of the alleged offence and its constituent elements to allay the concerns raised. However, the information reported by the source shows that this violation has been addressed in the national justice system, given that the Court of Cassation reportedly declared the military justice system incompetent to handle the case.

82. The Government also claims that the accused has acknowledged the facts of the matter, but this assertion appears to be inaccurate. According to the Government's own statements, the accused acknowledged that he had met with the businessman but said that he had been given instructions to do so. However, the source reports that Mr. Lajili's supervisor confirmed that he had issued those instructions. It is therefore incorrect to say that Mr. Lajili confessed. A confession must match the criminal charge, which is not the case in this instance. This error is not insignificant, especially in the light of the fact that Mr. Lajili was not accompanied by a lawyer at all times.

83. For these reasons, the Working Group finds that there has been a substantial violation of the right to a fair trial and that Mr. Lajili's continued detention is arbitrary under category III.

84. Lastly, the Working Group is concerned about Mr. Lajili's state of health and his reportedly critical condition.² The medical documentation provided attests to the seriousness of his state of health. The refusal to allow Mr. Lajili to have surgery in a private clinic led him to undergo an operation whose chances of success were compromised by a number of subsequent factors reported by the source, namely the lack of post-operative follow-up, the permanent presence of guards in his room, the fact that the lights remained on at all times, intimidation of auxiliary medical staff, the refusal to transmit the medical file, poor hygiene conditions and limited family visits. This treatment contravenes rules 43, 58 and 106 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. A comprehensive investigation of these claims is required. In accordance with its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

¹ See the draft principles governing the administration of justice through military tribunals (Decaux Principles) (E/CN.4/2006/58), the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37) and the annual report of the Working Group on Arbitrary Detention published in 2014 (A/HRC/27/48, paras. 66–71).

² See the urgent appeal of 8 August 2018 (UA TUN 2/2018) (available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24014>), and the Government's response on 29 August 2018 (available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34309>) which details Mr. Lajili's medical treatment.

Disposition

85. In the light of the foregoing, the Working Group renders the following opinion:

The continued deprivation of liberty of Mr. Sabeur Lajili, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III of the Working Group's methods of work.

86. The Working Group requests the Government of Tunisia to release Mr. Lajili without delay and to take the necessary steps to remedy the material and moral damage he has suffered by providing reasonable and appropriate compensation in accordance with article 9 (5) of the Covenant.

87. The Working Group recalls that the Human Rights Council has called for all States to cooperate with the Working Group, to take account of its views and to take appropriate steps to remedy the situation of persons deprived of their liberty, and to inform the Working Group of the steps they have taken. The Working Group therefore requests the full cooperation of Tunisia in the implementation of this opinion to effectively remedy a violation of international law.

88. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture, for appropriate action.

89. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Lajili and to take appropriate measures against those responsible for the violation of his rights.

90. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

91. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Lajili has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Lajili;
- (c) Whether an investigation has been conducted into the violation of Mr. Lajili's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Tunisia with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

92. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

93. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

94. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³

[Adopted on 21 November 2018]

³ See Human Rights Council resolution 33/30, paras. 3 and 7.