

## ARTICLE 19

# Legal Analysis: Tunisia Draft Bill on the Fight Against Terrorism and the Prohibition of Money Laundering

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**ARTICLE 19** is concerned that the Tunisian Draft Bill on the fight against terrorist offences and money laundering, currently being discussed in the Parliament, fails to meet the requirements of international standards on freedom of expression. In particular, some of its provisions could prevent journalists from covering events and issues related to the workings of government and politics. Hence, unless it is amended, the Draft Bill will potentially curb the free flow of information and the public discussion of matters of general interest.

The Draft Bill on the fight against terrorist offences and money laundering<sup>1</sup> (Draft Bill) adopted by the government on 25 March 2015, is currently being discussed by a joint commission within the Assembly of Peoples' Representatives (APR) before submitting it for general discussion in the Plenary session. Since January 2014 a previous version of this Draft bill was submitted to the National Constituent Assembly by the government at that time. This version was a subject of political controversy. The new government elected on February 2015 introduced amendments to the draft bill. The revised draft law is the subject of our analysis.

ARTICLE 19 reviewed the Draft Bill for its compliance with international standards on freedom of expression.

ARTICLE 19 welcomes the fact that the Draft Bill opens with a clear reminder to the authorities in charge of its application that they must respect constitutional and international guarantees in the field of human rights, refugees protection and humanitarian law (Article 2).

We also recognize that the definition of a terrorist offence adequately targets acts accomplished with the intention of 'bringing terror unto the population' or of 'compelling a State or an international organization' to adopt a certain course of action (Article 13).

It is also positive that the National Commission on the fight against terrorism has to "follow up on UN institutions' resolutions related to terrorism" and translate them into relevant national directives (Article 64). We also appreciate that, under the same provision, the National Commission has to cooperate with non-governmental organisations. It is true, however, that a reference to international human rights laws and international human rights bodies could usefully fit into Article 64.

More generally, there still is concern that many provisions of the Draft Bill need to be revised in order to meet the requirements of international law. Our key concerns with the Draft Bill are highlighted below.

### **International standards on freedom of expression and anti-terrorism**

Under international law, the right to freedom of expression is not guaranteed in absolute terms. Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), to which Tunisia is a party, requires that restrictions on the right must be strictly and narrowly construed and must not put the right itself in jeopardy. The means for evaluating whether a restriction is justified is articulated as a three-part test which stipulates that restrictions must be:

- **Prescribed by law:** to be characterised as a law, a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Ambiguous or overly broad restrictions on freedom of expression, deficient in elucidating their exact scope, are impermissible;

- **In pursuit of a legitimate aim:** exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as rights or reputations of others, national security or public order, or the protection of public health and morals. Where the fight against terrorism is concerned, the legitimate aim of protecting national security may justify restrictions to freedom of expression but, in any case, where a State enacts limits on freedom of expression, the burden is on that state to show a direct and immediate connection between that expression and the legitimate ground for restriction; and
- **Necessary and proportionate to the aim pursued:** there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. The proportionality requirement further means that a restriction on expression must not be over-broad, and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome, and is not more intrusive than other instruments capable of achieving the same result: as a principle, the least restrictive measure should be preferred.

The protection of freedom of expression in the context of combating terrorism has been a matter of significant debate for a number of years, both internationally and at domestic levels. Specifically, under international law, it is well recognized that human rights, including free expression, must be respected in the fight against terrorism, and must not be arbitrarily limited.

For example, the UN Security Council Resolution 1456 (2003) states that:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.<sup>ii</sup>

The UN Human Rights Commission has also issued resolutions reminding nations to “refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression in ways which are contrary to their obligations under international law.”<sup>iii</sup> This has been similarly recognized by the African Union.<sup>iv</sup>

Furthermore, the *Johannesburg Principles on Freedom of Expression and National Security*, a set of principles on freedom of expression and national security developed by a group of experts from around the world and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, offer useful guidance for the application of international standards on freedom of speech to legislation that aims at fighting terrorism.<sup>v</sup>

## Comments to the Draft Bill

### *Incitement to terrorism*

The Draft Bill describes terrorism as the accomplishment of a number of acts ('killing a person or a group of persons, causing severe physical damage to a person or a group of persons, causing damages to embassies or diplomatic buildings, causing environmental harm that threatens life or health of the population, or damaging public or private property, crucial resources, infrastructures, means of transport and communication, computer networks or

public services') with the intention of 'bringing terror unto the population' or of 'compelling a State or an international organization' to adopt a certain course of action (Article 13).<sup>vi</sup> The Bill then proceeds to enumerate the acts that are considered terrorist offences.

While the definition does not *per se* raise any issue under international law, some of the specific offences are not compatible with the protection of freedom of expression.

The Draft Bill penalizes public incitement to terrorism where it can 'possibly create a danger' because of its context or nature (Article 5). For a restriction on freedom of speech in the name of national security to be found compatible with international standards, the causal link between an act of speech and its violent, illegal consequences needs to be much stronger than a mere possibility. In other words, there needs to be an intentional, direct and immediate connection between the expression and the likelihood of such violence. Principle 6 of the Johannesburg Principles provides an adequate guidance for an amendment to Article 5:

Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Article 19 considers that States should apply a variety of legal means, including civil, administrative and other measures, in the prohibition of incitement. The application of criminal law penalties should be limited to addressing only the most severe forms of incitement.

Article 29 penalizes the threatening to commit any of the offences defined in the Draft Bill, where the threat aims at compelling an individual or organization to adopt a certain course of conduct. In a similar approach to that of the comment on Article 5, the Draft Bill could (preferably) state that only a *credible* threat of imminent violence would be punishable.

### ***Criminalising the glorification and praising of terrorism***

Article 30 of the Draft Bill prohibits publicly, in a clear and straightforward manner, praising or glorifying an act of terrorism, the individuals who committed it, or a terrorist organization.

ARTICLE 19 finds that such broad terminology is so vague as to fail the requirement that restrictions on freedom of expression should be provided by law. The interpretation of terms such as “praises” or “glorification” is likely to be highly subjective. We believe that they must be distinguished from the term “incite” as outlined above.

We also recall that the Principle 8 of the Johannesburg Principles specifically states that:

Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest.

We are thus concerned that these provisions are likely to lay unnecessary obstacles for journalists to cover news related to allegedly terrorist activities, or to convey critical views of the government's attitude towards such activities. It would impact negatively upon the public's right to receive information and ideas – including controversial ideas – on such topics. As detailed above, speech related to activities defined as terrorism should be penalized only when it intentionally, directly and imminently incites to acts of violence.

### ***Protection of sources and information***

Article 35 of the Draft Bill penalizes any person, even individuals under a duty of professional secrecy, who does not immediately relay to the authorities 'facts or information related to terrorist activities' that have taken place or that could be averted. Family members and lawyers (to some extent) are exempted.

Article 36 also introduces sanctions for any witness who would not abide by the 'requirements of testimony related to a terrorist offence'.

ARTICLE 19 is concerned that this provision contradicts the right of journalists to protect their confidential sources, which is essential to ensure the free flow of information to journalists and the public. It has been specifically recognized by most major international inter-governmental bodies, including the United Nations, African Union, Council of Europe, Organisation of American States, and the Organization for Security and Co-operation in Europe, as well as in a number of domestic laws. This includes the right for journalists' and media organisations not to disclose the identities of their confidential sources; not to provide information gathered in the course of journalism and not to be forced to testify. The rights can only be overridden in extraordinary circumstances, only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means.

These requirements also apply in the context of anti-terrorist actions as at other times.<sup>vii</sup> While the prevention of terrorism is an obvious public interest which in some cases can result in the disclosure of information, it must be also balanced against the public's right to be informed.

We recommend that the Draft Bill recognize the right of journalists to protect their confidential sources of information.

### ***Surveillance***

Under Section V of the Draft Bill, "when the requirements of the investigation justify", the state prosecutor or the investigating magistrate may resort to special techniques of investigation, namely the interception of communications (Articles 52-54), the infiltration of an undercover police officer (Article 55-58), and the conducting of audiovisual surveillance (Article 59). Measures of this sort may be implemented for any of the offences in the domain of application of the law, including for speech currently considered as terrorist offence. In other words, these special techniques could potentially be used in the investigation of the offence of incitement (Article 5), threat (Article 29), praise or glorification of terrorism (Article 30), refusal to relay information to the authorities (Article 35) or to give testimony (Article

36). ARTICLE 19 is concerned that the provisions in Section V might thus lead to invasive surveillance of the media.

The right to private communications is strongly protected in international law, in particular Article 17 of the ICCPR.

It is generally acknowledged that there is a strong connection between privacy and freedom of expression, and that the invasion of privacy has a chilling effect on free speech and the capacity of the media to perform its role. Section V of the Draft Bill could possibly serve as the legal basis for highly intrusive police operations that would negatively impact the right of the media to impart information and ideas and the right of the public to receive such information and ideas.

In this respect, we recall that the UN Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism noted that:

59. [T]he right to privacy can be subject to restrictions or limitations under certain exceptional circumstances. This may include State surveillance measures for the purposes of administration of criminal justice, prevention of crime or combating terrorism. However, such interference is permissible only if the criteria for permissible limitations under international human rights law are met. Hence, there must be a law that clearly outlines the conditions whereby individuals' right to privacy can be restricted under exceptional circumstances, and measures encroaching upon this right must be taken on the basis of a specific decision by a State authority expressly empowered by law to do so, usually the judiciary, for the purpose of protecting the rights of others, for example to secure evidence to prevent the commission of a crime, and must respect the principle of proportionality.<sup>viii</sup>

Article 19 recognizes that the Draft Bill has surrounded the recourse to the special techniques of investigation with certain safeguards, such as the intervention of the state prosecutor or the investigating magistrate. However, these guarantees should be reinforced in order to meet the requirements of international law as summed up above. We recommend that the Draft Bill include a provision insisting that the use of special techniques of investigation must respect the requirements of international law in the fields of privacy, as well as of freedom of expression and the right to information. We also suggest the replacement of the mention of the “requirements of the investigation” with a reference to “absolute necessity” and “the absence of any other less intrusive means to achieve a similar result”.

In addition, we reiterate our observations relating to the necessity of further refinement to the provisions of the Draft Bill relating to incitement, praise and glorification, and to the refusal to relay information to the authorities. Re-wording these provisions in order to make them compatible with the international protection of freedom of expression will avert the risk that the special techniques of investigation will be used in relation with protected expression.

### ***Disclosure of information in the public interest***

In addition to the consideration that highly intrusive, special techniques of investigation could potentially be employed to organize surveillance of media or journalism activities, Article 60 makes it an offence (punishable by a 10-year prison sentence) to knowingly disclose information related to an operation involving special investigative techniques.

Such a legal threat may have a negative impact upon the freedom of journalists to seek and impart information about police operations, including knowledge as to whether police forces operate in respect of international standards on human rights. Article 58 also harms the right of the public to receive information on such topics.

Article 60 could also be used to deter potential whistleblowers either from leaking information to journalists or bringing it into the public light themselves.

Principle 7 of the Johannesburg Principles offers adequate guidance for potential amendment of this in stating that expression that 'is directed at communicating information about alleged violations of international human rights standards or international humanitarian law' cannot be considered a threat to national security.

Article 19 recommends that the wording of Article 60 be revised in order to include a reference to requirements of international standards on freedom of expression and right to information.

Finally, Article 6 (on subjecting any person convicted of a terrorist offence to a 3-to-10-year administrative surveillance), Article 33 (on various forms of assistance to terrorist activities), Article 34 (on providing financial support to 'persons, organizations or activities related to terrorist offences'), Article 78 (on prosecution for acts committed outside of the country 'against Tunisian interests'), and Article 93 (on the prohibition of all forms of financial support to persons, organizations or activities related to terrorist offences), raise similar causes for concern when applied to expression currently described as terrorist offence under the draft bill. Unless the provisions related to incitement, praising and glorification, and the refusal to relay information to the authorities, are properly re-worded, provisions such as Article 6, Article 33, Article 34, Article 78 or Article 93 might be used as a means to exercise unacceptable pressure over journalists and media organizations.

## Recommendations

In conclusion, Article 19 recommends the review of the Draft Bill, to ensure its conformity with international standards on freedom of expression. In particular:

- In Article 5, the reference to public incitement to terrorism that can “possibly create a danger” due to its context or wording should be replaced with internationally accepted terminology, namely an *intention* to incite imminent violence, the *likelihood* that the expression would incite such violence, and a *direct and immediate connection* between the expression and the likelihood of such violence;
- Recommendations for Article 5 also apply in relation Article 30 of the Draft Bill and its use of *broad and vague terms* such as “glorify” or “praise”;
- Article 29 should state that only a *credible* threat of imminent violence would be punishable;
- In relation to Articles 35 and 36, the Draft Bill should include a clear statement that the law recognizes the right of journalists to protect their *confidential sources* of information;
- Section V of the Draft Bill should open with a provision that insists that the use of special techniques of investigation must respect the requirements of international law in the fields of privacy as well as of freedom of expression and right to information;

- In Section V, the mention of the “requirements of the investigation” should be replaced in favour of a reference to “absolute necessity” and “the absence of any other less intrusive means to achieve a similar result”;
- Article 60 should be revised in order to include a reference to the requirements of international standards on freedom of expression and right to information.

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<sup>i</sup> We have worked on the basis of the unofficial translation established by the Tunisian office of DCAF – Geneva. The text is available at <http://www.legislation-securite.tn/fr/node/34061> (last consulted 1 April 2015).

<sup>ii</sup> Resolution 1456 (2003), para 6. See also General Assembly resolution 60/288 of 20 September 2006 on Global Counter-Terrorism Strategy

<sup>iii</sup> Commission on Human Rights resolution 2003/42; Commission on Human Rights Resolution, 2004/42; The right to freedom of opinion and expression; or Human Rights Resolution 2005/38.

<sup>iv</sup> African Commission on Human and Peoples’ Rights, Resolution on the Protection of Human Rights and the Rule of Law in the Fight Against Terrorism, meeting at its 37th Ordinary Session held in from 21 November - 5 December 2005

<sup>v</sup> [Johannesburg Principles on National Security, Freedom of Expression and Access to Information](#), adopted October 1995.

<sup>vi</sup> See the Joint Declaration [on defamation of religions, and anti-terrorism, and anti-extremism legislation](#) of the special rapporteurs of the UN, the Organisation for Cooperation and Security in Europe, the Organisation of American States and the African Commission on Human and Peoples’ Rights, 9 December 2008

<sup>vii</sup> *Ibid.*

<sup>viii</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/13/37, 28 December 2009.