



## Letter to the Tunisian Parliament

### concerning draft organic law no. 22/2015 relative to the fight against terrorism and prevention of money laundering

Ladies and gentlemen members of the Assembly of the Representatives of the People,

Our organizations do not intend to minimize the necessity for a strong response with regard to security and the prevention of acts of terrorism, which are increasingly numerous in several countries, both in northern and southern regions of the planet. However, a discourse and public policies that would aim to oppose security and the respect for human rights are inadequate to achieve the objective of protecting citizens and the armed forces.

The increased terrorist threat has led to adoption or tightening of a large number of related laws in several countries. Often debated and adopted in a climate of fear and anger following an act of terrorism that shocked public opinion, these texts very often include provisions that infringe on public and individual rights.

While the draft organic law relative to the fight against terrorism and prevention of money laundering is being examined by the Assembly of the Representatives of the People, we wish to draw your attention to certain articles that are contrary to international standards for the protection of human rights. Law no. 2003-75 of 10 December 2003, relative to support of international efforts to fight terrorism and prevent money laundering, was recognized both by the public authorities and civil society as including numerous violations of international standards and criteria relative to human rights. The new draft law currently being discussed must not reproduce the destructive consequences generated by the above-mentioned law.

Our observations thus aim to ensure that the provisions of the law comply with the principles of the rule of law, as well as with international human rights standards.

#### **I. Provide more accurate definitions in line with international standards (Art. 13, 5 and 30)**

Definitions of terrorism or certain incriminations such as the glorification of terrorism that are too broad and not accurate risk leading to proceedings that do not fall within the sphere of the

fight against terrorism and result in a tightening of certain basic liberties or rights such as freedom of expression or the right to peaceful assembly.

### **Define the concept of terrorism more clearly (Art. 13)**

Article 13 is too broad in the proposed text and it appears necessary to better define its content to ensure that all the acts mentioned in the law constitute offenses corresponding to the definitions included in the international agreements and protocols relative to terrorism ratified by Tunisia. It is therefore important to take inspiration from the definition proposed by the United Nations Special Rapporteur relative to the promotion and protection of Human Rights and basic liberties in the fight against terrorism<sup>1</sup> (hereafter referred to as the Rapporteur).

#### ⇒ **Recommendation:**

Redraft the definition of terrorism so that the latter includes the following three cumulative criteria:

The act:

- 1) *Must constitute one of the serious crimes such as intentional taking of hostages or the use of lethal means or serious violence against the population or segments of it.*
- 2) **With** *an intention to spread terror among the population or a particular group or force the government or an international organization to accomplish an act or abstain from so doing.*
- 3) **And** *with a view to advancing an underlying political or ideological objective.*

#### ⇒ **Recommendation:**

Article 13 “sixthly” defines as terrorist offenses the act of “*prejudicing private and public property, vital resources, infrastructures, means of transport and communication, IT systems or public services.*” Such a definition could allow the repression of certain acts that are not really of a terrorist nature. Simple peaceful demonstrations accompanied by a certain amount of disorder could be qualified as acts of terrorism. This is all the more disturbing because article 13 does not mention the element of intention to cause, among others things, death or serious injuries or take hostages, as required in the international definitions of terrorism. For this reason we recommend removal of the article 13 “sixthly” section.

### **Link the specific terrorist offenses described in articles 14 to 28 to the general definition of terrorism.**

The draft law defines as criminal offenses a series of acts of violence committed on board aircraft, offenses against security in airports serving civil aviation, offenses linked to maritime shipping and on board fixed platforms located on the continental shelf, transport of arms and other substances on board ships, offenses against persons benefiting from international protection and the taking of hostages. Thus, any person who endangers the security of an airport by engaging in “*an act of violence against a person*” may be sentenced to 20 years in prison. The wording of the draft law suggests that the above-mentioned offenses are not linked to the general definition of terrorism contained in article 13 and that they represent

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<sup>1</sup> A/HJRC/16/51 - <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/179/34/PDF/G1017934.pdf?OpenElement>

separate offenses, which would risk broadening the concept of terrorism to include miscellaneous criminal acts.

⇒ **Recommendation:**

Specify that the offenses mentioned in articles 14 to 28 are terrorist offenses only when they fulfill the general conditions listed in article 13 of the draft law.

**Define the concept of incitement to terrorism (Art. 5)**

As far as incitement to terrorism is concerned, it is necessary to refer to the international standards relative to freedom of expression summarized by Principle no. 6 of the Johannesburg Principles<sup>2</sup>:

*“The expression may not be punished as a threat to national security unless the 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.”*

For this purpose, the incitement to terrorism offense model proposed by the Special Rapporteur (A/HRC/16/51) constitutes a source of inspiration for revising the draft law: *“It is an offense to broadcast or make a message available to the public by any other means, deliberately and illegally, with the intent to incite commission of a terrorist offense when such behavior creates a danger that one or more of the offenses may be committed, regardless of whether or not it expressly recommends the commission of terrorist offenses.”*

Specific criminal intent to incite commission of an offense and the necessity to restrict the offense to the sole hypotheses where there is a direct and immediate link between the expression and the acts of violence or potential acts of violence are lacking in the definition in article 5.

⇒ **Recommendation:**

We propose that article 5 mentions the intentional and public nature of the “incitement to commit a terrorist act” offense with the addition that this act must be of a nature such as to directly and immediately result in commission of such an offense.

**Define the concept of apology for terrorism (Art. 30)**

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<sup>2</sup> Johannesburg Principles relative to national security, freedom of expression and access to information, adopted by a group of experts gathered in South Africa on 1 October 1995 and endorsed by the United Nations High Commissioner for Human Rights: <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>

Article 13 is alarming with respect to freedom of expression because of its vague and inaccurate wording and opens the way to possible arbitrary abuses. Any individual who makes a statement directly or indirectly touching on the subject of terrorism could be accused of such an offense. Still more alarming is the fact that the article does not require that such statements be directly linked to the probability of the occurrence of a terrorist act.

⇒ **Recommendation:**

Since apology for terrorism is an indirect form of incitement to terrorism, we recommend addition of the criteria indicated by the Special Rapporteur and those specified by the above-mentioned Johannesburg Principles (Principle 6 relative to expression that may threaten national security).

⇒ **Recommendation:**

Article 30 should specify a causal link between the apology (homage or glorification) and the threat or probability that this act may lead to the commission of a violent act or terrorist attack.

**II. Abolish the death penalty (Art. 5, 9, 13, 14, 15, 16, 17, 18,19, 20, 21, 22, 23, 24, 25, 26, 27 and 28)**

Tunisia has been a *de facto* abolitionist since 1991 and has voted each year since 2011 in favor of the United Nations General Assembly resolution calling for a moratorium on application of the death penalty. Inclusion of this inhuman penalty in the draft law constitutes a step back with regard to Tunisia's international commitments and flies in the face of the growing international dynamic in favor of abolishing the death penalty.

⇒ **Recommendation:**

Abolish the death penalty for all crimes, including those linked to terrorism.

**III. Prevent violations during police custody and guarantee the right to a fair trial (Art. 38, 40, 68, 70 and 35)**

The draft law introduces several provisions in contradiction with the Tunisian Constitution and international human rights law. Indeed Article 27 of the Constitution specifies that "*any defendant is presumed innocent until proven guilty in the context of a fair trial ensuring all guarantees necessary to his defense during the prosecution and trial phases.*" Article 29, for its part, specifies that "*the prisoner is immediately informed of his rights and the charges brought against him. He has the right to be represented by a lawyer.*"

### **Reduce the risks of serious human rights violations in the context of police custody (Art. 38 and 40)**

In the absence of certain guarantees, police custody exposes prisoners to risks of serious violations and, in particular, ill-treatment and torture; violations that sadly marked the ousted regime and, alas, remain a reality today. Articles 38 and 40 of the draft law do not provide the necessary guarantees to put an end to this legacy, particularly in the absence of a reform of the Code of criminal procedures by introduction of the right to a lawyer as from the first hours of police custody. These articles specify a police custody period of up to 15 days without any right to a lawyer, which is likely to increase the number of human rights violations.

#### ⇒ **Recommendation:**

Ensure access to a lawyer as from the start of police custody in all cases and ensure that all suspects are brought before a judge promptly, usually within 48 hours. Any extension of the custody period must be exceptional, justified by serious motives and pronounced by an independent legal authority after a check on conditions of detention.

### **Limit recourse to closed hearings and anonymous testimony (Art. 68 and 70)**

Article 68 of the draft law specifies that the legal authority in charge of the trial can decide to organize closed hearings. Article 70 specifies that, if circumstances require, all data likely to identify victims, witnesses and any other person who may have been tasked with alerting the competent authorities in whatever capacity may be masked and cannot be disclosed to the accused and his lawyer.

One of the fundamental requirements of any fair trial, as defined by international standards, is the publicity of hearings. Closed hearings must remain exceptional and closely supervised for a limited period of the trial. The same applies for anonymous testimony the recourse to which must be exceptional and without it impeding the rights of the defense.

#### ⇒ **Recommendation:**

Modify article 68 by specifying that hearings for defendants must be public and that the judge has the right to order a restricted hearing only under exceptional circumstances, justified by the protection of legal procedure, the victims and the witnesses and on condition that holding a public hearing would represent a real danger for the different parties. In order to guarantee the fairness of the process, any restriction on the right to a public hearing for national security reasons must be accompanied by appropriate mechanisms for examining and monitoring the hearings.

#### ⇒ **Recommendation:**

Amend articles 68 and 70 to ensure that information provided by anonymous witnesses can only be used as evidence during a trial under exceptional circumstances and that it must be subject to strict conditions in order to respect the rights of the defense and ensure a fair trial. Under no circumstances whatsoever may this information be used as the sole legal grounds for a verdict.

#### **IV. Improve supervision of security interceptions and protect professional secrecy (Art. 35, 36, 52, 59 and 60)**

##### **Protect professional secrecy (Art. 35 and 36)**

Articles 35 and 36 condemn the withholding of information relative to the commission of a terrorist offense. Certain professions are particularly targeted by these provisions, namely journalists, lawyers and people working in the health field. In particular, these provisions risk infringing the exercise of freedom of information because they ignore press freedom requirements, particularly the right of journalists to maintain the confidentiality of their sources of information.

⇒ **Recommendation:**

Remove the indication “*even bound by professional secrecy*” from paragraph 1 of article 35.

⇒ **Recommendation:**

Modify paragraph 3 of article 35 by adding that journalists will also be the subject of an exception for secrets to which they have access during the course of their activity or while accomplishing missions.

⇒ **Recommendation:**

Revise articles 35 and 36 in such a way as to ensure freedom of the press and the right of journalists to confidentiality of sources. In particular, it is important to specify that only a judge can order the lifting of source confidentiality and only under extraordinary circumstances when there are no other means of maintaining a predominant public interest.

##### **Maintain the right to public debate (Art. 60)**

Article 60, which criminalizes anyone who “*knowingly discloses information relative to interception, infiltration or audiovisual surveillance operations or collected data*”, is likely to prevent journalists from gathering and publishing information on major subjects of general interest, including information relative to the manner in which police authorities respect basic rights. In addition, this article is likely to dissuade potential whistleblowers from providing journalists with information or making the said information public. The 7<sup>th</sup> Johannesburg Principle specifies that information, which “*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.

⇒ **Recommendation:**

Revise the wording of article 60 to protect journalists, the right to confidentiality of sources and whistleblowers’ rights, as required by international freedom of expression standards.

##### **Protect personal privacy (Art. 52 and 59)**

Articles 52 and 59 make it possible to “*intercept suspects’ communications by virtue of a decision written and reasoned by the public prosecutor or the investigating judge.*” By specifying the possibility to wiretap any suspect by order of the investigating judge or prosecutor, thanks to assistance from the Agence Technique des Télécommunications (ATT), these articles represent a threat to the personal privacy of citizens and also to the protection of sources by opening the door to invasive surveillance of society as a whole. The right to respect of personal privacy is protected by article 17 of the Covenant on Civil and Political Rights. It is generally acknowledged that there is a strong link between respect of the right to personal privacy and the right to freedom of expression: threats to the right to respect of personal privacy thus have a paralyzing effect on freedom of expression and the capacity of the media to play their role in a democratic society.

⇒ **Recommendation:**

Specify that the most intrusive investigative measures, such as “*recording*” and “*surveillance*” will be ordered under exceptional circumstances and only by judicial judges, adding to the indication “*when the necessities of the investigation require*” restrictive motives for recourse to these techniques, such as the need to intercept a criminal project in progress or unmask persons involved in acts of terrorism.

**V. Forbid refoulement of foreign nationals if in danger of being subjected to serious human rights violations (Art. 12 and 83)**

Article 12 specifies the deportation of foreign nationals convicted of terrorist offenses after serving their sentence in Tunisia without taking into account the non-refoulement principle.

According to article 83, foreign nationals cannot be deported when there are serious reasons to believe that the individual risks being subjected to torture or when the deportation request seeks to prosecute or punish a person “*because of his race, color, origin, sex, nationality or political opinions.*” Article 83 specifies only certain guarantees relative to respect of the non-refoulement principle. In addition, these guarantees are only specified in the case of deportation for the purpose of prosecution or serving a custodial sentence and do not take into account the deportation of foreign nationals convicted of terrorist offenses who have served their sentence in Tunisia.

⇒ **Recommendation:**

Modify article 12 in order to add the explicit ban on deportation of foreign nationals where there are serious reasons to believe that the person subject to deportation risks being subjected to serious human rights violations, including: torture or cruel, inhuman or degrading treatment, a trial using confessions or evidence obtained by means of torture or other ill-treatment, arbitrary detention, forced disappearance, arbitrary deprivation of life or the death penalty.

Modify article 83 in such a way as to also include the risk of serious human rights violations in addition to torture, including: the risk of cruel, inhuman or degrading punishments or treatment, a trial using confessions or evidence obtained by means of torture or other ill-

treatment, arbitrary detention, forced disappearance, arbitrary deprivation of life or the death penalty as grounds for not deporting foreign nationals.

Thank you for your time and consideration.

***List of signatory organizations:***

Amnesty International

ARTICLE 19

ASF

Carter Center

FIDH

HRW

OMCT

REMDH

RSF



For more information, you can refer to comments of the draft organic law no.22/2015 relative to the fight against terrorism and prevention of money laundering and separate analyzes made by:

## **l'OMCT :**

[http://www.omct-tunisie.org/wp-content/uploads/2014/06/Commentaire-projet-de-loi-contre-terrorisme\\_201408\\_fr.pdf](http://www.omct-tunisie.org/wp-content/uploads/2014/06/Commentaire-projet-de-loi-contre-terrorisme_201408_fr.pdf)

## **ARTICLE 19**

<https://www.article19.org/data/files/medialibrary/37930/Anti-terrorism-Analysis-AR-version.pdf>

<https://www.article19.org/data/files/medialibrary/37930/Tunisia-Anti-terrorism-Analysis-EN-version-2.pdf>

## **HRW**

[https://www.hrw.org/sites/default/files/related\\_material/memo.2015.04.08.Tunisia%20Counterterrorism%20Law.eng\\_.pdf](https://www.hrw.org/sites/default/files/related_material/memo.2015.04.08.Tunisia%20Counterterrorism%20Law.eng_.pdf)

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