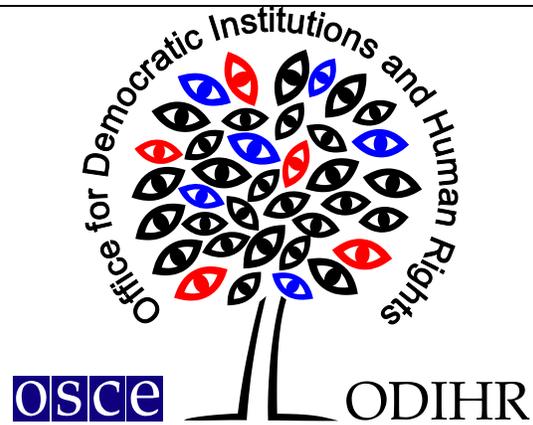


Warsaw, 9 December 2013  
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**OPINION ON THE DRAFT LAW OF TUNISIA  
RELATED TO THE FIGHT AGAINST TERRORISM  
AND PREVENTION OF MONEY LAUNDERING**

**Based on an unofficial English translation of this draft Law**

*OSCE/ODIHR Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism and Prevention of Money Laundering*

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***OSCE/ODIHR Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism and Prevention of Money Laundering***

**I. INTRODUCTION**

1. *By letter of 8 November 2013, the Ministry of Human Rights and Transitional Justice of the Republic of Tunisia requested an OSCE/ODIHR Opinion on the draft Law Related to the Fight against Terrorism and Prevention of Money Laundering of Tunisia.*
2. *This Opinion is provided in response to the above request.*

**II. SCOPE OF REVIEW**

3. The scope of the Opinion covers only the above-mentioned draft Law Related to the Fight against Terrorism and Prevention of Money Laundering of Tunisia (hereinafter “the draft Law”). Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation regulating the fight against terrorism and prevention of money laundering. The ensuing recommendations are based on international legal and human rights standards on the fight against terrorism and the prevention of money laundering, as found in the international agreements and commitments ratified and entered into by the Republic of Tunisia.
4. The Opinion is based on an unofficial translation of the draft Law. Errors from translation may result.
5. This Opinion is without prejudice to any written or oral recommendations and comments to this or other related provisions that the OSCE ODIHR may make in the future.

**III. EXECUTIVE SUMMARY**

6. While it is laudable that the draft Law adopts a comprehensive approach to the fight against terrorism, and money laundering, and even contains a special section on victim support, certain gaps have been identified, as have individual provisions that could benefit from improvement. In particular, key definitions are not included, or remain unclear, as do other provisions involving measures that could interfere with the human rights of individuals. Moreover, the draft Law does not include clear appeals procedures in such cases. In order to ensure the compliance of the draft Law with international and domestic human rights standards, it is thus recommended as follows:

***1. Main Recommendations***

- A. to ensure that all acts mentioned in the law constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, and to reformulate the definition of terrorism in the draft Law accordingly; [pars 18-22]

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- B. to remove, or substantially revise, Article 28 of the draft Law to ensure that the freedom of expression is not substantially curtailed; [par 35]
- C. to clarify the meaning of Article 10 as to the level of discretion of the judiciary in determining the extent of certain sanctions, and specify this aspect in other provisions of the draft Law as well, e.g. Articles 14-18, 20-24, and 29; [pars 39-40]
- D. to enhance Articles 51 and 58 to specify exactly in which situations the measures contemplated therein are permitted, and which body will be responsible for taking them, and to consider placing such competences and oversight responsibilities only in the hands of the judiciary or, in the case of oversight, in those of a similarly independent body; [pars 46-48]
- E. to specify that closed hearings contemplated in Article 67 shall be the exception to the rule and outline clearly in which cases this shall be permissible [pars 53-56]
- F. to ban extradition and expulsion in cases where there are substantial grounds for believing that there is a risk of irreparable harm by listing such cases under Articles 12 and 82, and include in the draft Law remedies by which individuals can appeal against decisions on expulsion and extradition; [pars 61-64]
- G. to substantially amend Article 92 by clearly linking all prohibited funds and assets to terrorists, terrorist groups and money-laundering, while bearing in mind key principles of the right to freedom of association; [par 68]
- H. to ensure that all measures affecting the right to property foresee the possibility for the affected individuals and organizations, as well as affected third parties, to appeal such decisions to a court or other independent body with the power to impose effective remedies; [par 72]

***2. Other Recommendations***

- I. to refer not to a certain gender (“he” or “she”), but to formulate all articles of the draft Law in a gender-neutral manner; [pars 17, 42]
- J. to amend Article 3 as follows:
  - 1) Clarify the definition of “financing illegal activities” and align it with relevant international standards; [par 23]
  - 2) ensure that the definition of “transnational crime” does not include crimes committed on the national territory; [par 24]
- K. to enhance the wording of Article 5 by including therein references to the intention of incitement to immediate acts of terrorism, and creating a direct and immediate connection to the likelihood or occurrence of violence; [par 34]

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- L. to define the term “administrative control” either directly or by reference in the draft Law, specify which entity is in charge of imposing such administrative control and introduce into the draft Law effective legal remedies to guard against the possibility of abuse of such measures; [pars 25 and 36]
- M. to clarify Article 8 par 2 (preventing an individual to reside in a specific area for a certain period) in light of every individual’s freedom of movement; [par 37]
- N. to clearly define relevant terms pertaining to the recruitment and training of individuals and groups to commit terrorist acts, and to the participation in such trainings in Articles 29 and 30; [pars 26-27]
- O. to amend Article 33 as follows:
  - 1) Outline in greater detail what type of information on possible future acts of terrorism should be reported; [par 42]
  - 2) Ensure that the wording of this provision is as specific as possible, while bearing in mind that an attorney must only provide such information as is necessary for the prevention of specific impending acts of terrorism; [par 43]
  - 3) Include specific references to relevant legislation on professional secrecy provisions related to other professions and consider further exceptions or clarifications related to such professions; [par 44]
- P. to clarify, in the context of Article 53 of the draft Law, who will be responsible for conducting wire-tapping; [par 49]
- Q. to include more specific criteria in Article 54 for the use of “infiltrators” and to ensure accountability of such infiltrating officers in Article 56; [par 51]
- R. to expand Article 60 to also include the case of discontinued criminal investigations; [par 50]
- S. to specify in which cases, if at all, military courts would be competent to hear cases involving terrorism, and to keep these cases to a minimum [par 52]
- T. to ensure that Article 70 of the draft Law specifies more clearly that the use of anonymous witnesses should be exceptional in nature and strictly necessary for a legitimate aim; [par 60]
- U. to specify in the draft Law and other relevant legislation the limits set for the strict accounting and reporting requirements outlined in Article 93 [par 69]
- V. to allow for an appeals procedure against decisions of the Financial Analyses Commission to temporarily freeze funds; [par 74] and

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W. to consider other measures in support of victims of terrorism, such as appointing family investigative liaison officers which provide victims with regular reporting on the progress of court trials following a terrorist attack; giving representatives of victims' associations the right to participate in criminal trials in support of victims; and setting up an assistance centre with a website and a telephone helpline to help victims. [par 75]

**IV. ANALYSIS AND RECOMMENDATIONS**

**1. International Framework**

7. The fight against terrorism is not only a domestic, but also an international effort which is governed by the framework of the United Nations' (UN) Global Counter-Terrorism Strategy.<sup>1</sup> International standards on the fight against terrorism are enshrined in a large number of international legal instruments to which Tunisia is a party. These focus on different aspects of the fight against terrorism: while the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents<sup>2</sup> focuses on attacks against specific protected persons, the International Convention against the Taking of Hostages<sup>3</sup> and the International Convention for the Suppression of Terrorist Bombings<sup>4</sup>, as well as the Convention on the Marking of Plastic Explosives for the Purpose of Detection<sup>5</sup> are more aimed at the protection of all the population as a whole.
8. More specifically, the International Convention for the Suppression of the Financing of Terrorism<sup>6</sup> centres on the financial assets of terrorist organizations, while the International Convention for the Suppression of Acts of Nuclear Terrorism<sup>7</sup>, and the Convention on the Physical Protection of Nuclear Material<sup>8</sup>, both focus on the use of hazardous materials for the purposes of terrorism.

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<sup>1</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement>

<sup>2</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted on 14 December 1973, ratified by Tunisia on 21 January 1977, available at <http://treaties.un.org/doc/db/Terrorism/english-18-7.pdf>.

<sup>3</sup> International Convention against the Taking of Hostages, adopted on 17 December 1979, acceded to by Tunisia on 18 June 1997, available at <http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf>.

<sup>4</sup> International Convention for the Suppression of Terrorist Bombings, adopted on 15 December 1997, acceded to by Tunisia on 22 April 2005, available at <http://treaties.un.org/doc/db/Terrorism/english-18-9.pdf>.

<sup>5</sup> Convention on the Marking of Plastic Explosives for the Purpose of Detection, adopted on 1 March 1991, acceded to by Tunisia on 28 May 1997, available at <http://treaties.un.org/doc/db/Terrorism/Conv10-english.pdf>

<sup>6</sup> International Convention for the Suppression of the Financing of Terrorism, adopted on 9 December 1999, ratified by Tunisia on 10 June 2003, available at <http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf>

<sup>7</sup> International Convention for the Suppression of Acts of Nuclear Terrorism, adopted on 13 April 2005, ratified by Tunisia on 28 September 2010, available at <http://treaties.un.org/doc/db/Terrorism/english-18-15.pdf>

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9. Finally, another category of conventions focuses particularly on the hijacking of aircrafts by terrorist organizations, and on violent acts committed at airports. These include the Convention on Offences and Certain Other Acts Committed on Board Aircraft<sup>9</sup>, the Convention for the Suppression of Unlawful Seizure of Aircraft<sup>10</sup>, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation<sup>11</sup>, and the Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.<sup>12</sup> Similar instruments exist to ban violent acts committed on ships, or fixed maritime platforms, in particular the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation<sup>13</sup>, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.<sup>14</sup>
10. The international framework also includes UN Security Council Resolution 1373 (2001) on Threats to international peace and security caused by terrorist acts<sup>15</sup> and ensuing Security Council resolutions<sup>16</sup> on similar topics, as well as several resolutions adopted by the UN General Assembly on a number of different matters related to the fight against terrorism.<sup>17</sup>
11. The 2008 UN Global Counter-Terrorism Strategy specifies that measures to ensure respect for human rights for all and the rule of law are the fundamental basis of the fight against terrorism.<sup>18</sup> International co-operation and any measures

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<sup>8</sup> Convention on the Physical Protection of Nuclear Material, adopted on 3 March 1980, acceded to by Tunisia on 8 April 1993, available at <http://treaties.un.org/doc/db/Terrorism/Conv6-english.pdf>

<sup>9</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted on 14 September 1963, ratified by Tunisia on 25 February 1975, available at <http://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf>

<sup>10</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, adopted on 16 December 1970, ratified by Tunisia on 16 November 1981, available at <http://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf>

<sup>11</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted on 23 September 1971, ratified by Tunisia on 16 November 1981, available at <http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf>

<sup>12</sup> Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted on 24 February 1988, ratified by Tunisia on 7 June 1994, available at <http://treaties.un.org/doc/db/Terrorism/Conv7-english.pdf>

<sup>13</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted on 10 March 1988, acceded to by Tunisia on 6 March 1998, available at <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>

<sup>14</sup> Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, adopted on 10 March 1988, ratified by Tunisia on 6 March 1998, available at <http://treaties.un.org/doc/db/Terrorism/Conv9-english.pdf>

<sup>15</sup> UN Security Council Resolution 1373 (2001), S/RES/1373 (2001), available at [http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf)

<sup>16</sup> For an overview, see <http://www.un.org/en/terrorism/sc-res.shtml>

<sup>17</sup> For an overview, see <http://www.un.org/en/terrorism/resolutions.shtml>

<sup>18</sup> See Pillar IV of the UN Global Counterterrorism Strategy, available at <http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml#poa4>

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that States undertake to prevent and combat terrorism and money-laundering must therefore comply with their obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular regarding human rights law and international humanitarian law.<sup>19</sup> In the case of Tunisia, these obligations include the UN human rights conventions which it has ratified<sup>20</sup>, and among these especially the International Covenant on Civil and Political Rights (ICCPR)<sup>21</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>22</sup> At the regional level, the African Charter on Human and People's Rights (ACHPR)<sup>23</sup> is also of relevance.<sup>24</sup>

12. In OSCE commitments<sup>25</sup>, the OSCE participating States have also condemned terrorism and agreed to take effective measures to prevent and suppress it; participating States moreover stressed that strong democratic institutions and the rule of law are the foundation for such protection. In 2001, OSCE participating States passed the Bucharest Plan of Action for Combating Terrorism<sup>26</sup>, which also states that the combat against terrorism shall be conducted fully respecting international law, including international human rights law. In the Athens Ministerial Council Decision on Further Measures to Support and Promote the International Legal Framework against Terrorism<sup>27</sup>, participating States further recognized the need to implement offence provisions from universal anti-terrorism conventions and protocols into national criminal, and, where applicable, also administrative and civil legislation, making them punishable by appropriate penalties. This aimed to ensure that perpetrators, organizers, supporters and sponsors of terrorist acts would be brought to justice within the rule of law, and facilitate relevant international legal co-operation. The OSCE participating States have reaffirmed their commitments to protect and respect human rights while

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<sup>19</sup> United Nations Global Counter-Terrorism Strategy, para. 3, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement>

<sup>20</sup> For an overview, see <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

<sup>21</sup> International Covenant on Civil and Political Rights, adopted on 19 December 1966, ratified by Tunisia on 18 March 1969, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, ratified by Tunisia on 18 March 1969, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>

<sup>23</sup> African Charter on Human and People's Rights, adopted on June 1981, ratified by Tunisia on 16 March 1983, available at <http://www.achpr.org/instruments/achpr/> 27

<sup>24</sup> For a general overview of human rights obligations in the fight against terrorism in the OSCE framework, see OSCE/ODIHR, *Countering Terrorism, Protecting Human Rights: a Manual*, available at <http://www.osce.org/odihr/29103>

<sup>25</sup> See the Concluding Document of Madrid — The Second Follow-up Meeting, Madrid, 6 September 1983

<sup>26</sup> Annex to the Ministerial Council Decision No. 1 on Combating Terrorism, Bucharest, 3-4 December 2001

<sup>27</sup> Ministerial Council Decision No. 2/09 of 2 December 2009.

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countering terrorism in the 2012 Consolidated Framework for the Fight against Terrorism.<sup>28</sup>

13. This Opinion is based on these and other relevant instruments and documents to which Tunisia is a party. It focuses on key commitments in the area of human rights, and should not be seen as a full review of all issues raised by the draft Law or in the area of counter-terrorism or money-laundering generally.
14. The draft Law contains many positive and welcome provisions. In the interest of brevity, this Opinion will however focus only on specific areas where improvements could be made.

**2. General Comments**

15. Overall, the draft Law has a quite comprehensive scope, dealing with various aspects of combating terrorism, including criminal aspects, but covering also protection and assistance to victims. While this is welcome, it is nonetheless noted that large parts of the draft Law dealing with criminal law matters will need to be reviewed for their consistency with basic elements of the Criminal Code.
16. In this context, Article 4 would appear to suggest that provisions in the draft Law take precedence over provisions in the Criminal Code, and the Criminal Procedure Code. It is recommended to conduct a detailed assessment of the effects that this provision will have in practice, to avoid inconsistencies in legislation.
17. Aside from matters relating to the scope and effects of the draft Law, it is noted that the wording of provisions throughout the document is largely gender-neutral, though there are some exceptions (e.g. Article 33), which may also be due to unclear translation. Overall, the drafters of the law should ensure that gender-neutral wording is used throughout.

**3. Definitions and the Principle of Legal Certainty**

18. The draft Law is made up of several sections, the first of which contains preliminary provisions outlining the scope of the draft Law, and key definitions used in it. It is noted that while the list of definitions contained in Article 3 includes definitions of terrorist organizations and alliances, and specifies other terms such as “flying” and “in-service” aircrafts, nuclear plants and biological weapons, it does not include a definition of “terrorism”, or of “terrorist acts”.

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<sup>28</sup> OSCE Consolidated Framework for the Fight against Terrorism, adopted by Decision no. 1063 of the Permanent Council, at its 934th Plenary Meeting on 7 December 2012, available at: <http://www.osce.org/pc/98008>.

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19. The definition of an act of terrorism is not specified until later in the draft Law, namely in Article 13, which defines an act of terrorism as follows: “[a]ny person attempting by any means to do the following shall be considered a perpetrator of an act of terrorism: First: kill a person or several people, or inflict them considerable physical damage; Second: blast facilities of diplomatic and consular missions, and international organizations; Third: Do substantial damage to the environment, putting residents’ lives and health at risk; Fourth: Ruin public or private property, vital resources and infrastructures, transportation means, communication networks, information and computer systems or public facilities; when the criminal act fulfills a personal or group project aiming by nature and by context to terrorize the population or to force a state or an international organization to do or not to do an action.”
20. It is noted in this context that international human rights law requires States, in the area of criminal liability and punishment, to state criminal offences clearly and precisely.<sup>29</sup> At the same time, international law itself offers little guidance on how to do so in the case of terrorist offences, as it does not foresee a universally accepted definition of terrorism. However, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism has suggested a definition, which is based on UN Security Council Resolution 1566<sup>30</sup>:

“Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

2. The action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something; and
- (3) The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or

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<sup>29</sup> UN Human Rights Committee, General Comment 29, para. 7, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/71eba4be3974b4f7c1256ae200517361](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361)

<sup>30</sup> UN Security Council Resolution 1566 (2004), S/RES/1566 (2004), para. 3, available at <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement>

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(b) All elements of a serious crime defined by national law.”<sup>31</sup>

The Special Rapporteur has also noted that it is important for States to ensure that terrorism and associated offences are properly defined, accessible, formulated with precision, applicable to counter-terrorism alone, non-discriminatory, and non-retroactive.<sup>32</sup>

21. Since the definition of terrorism has a considerable impact on the rest of the draft Law, including criminal law provisions, it is important that it be clear and unambiguous, and not excessively wide in scope. The formulation in Article 13, however, has the potential to capture a very large number of possible acts and omissions since it does not confine itself to acts which meet the three cumulative elements indicated above. Acts covered by the definition are not limited to serious crimes such as hostage taking, or violent acts aiming to injure or kill members or segments of the population, but also include less serious acts such as damage to public or private property, infrastructure, and/or public facilities.
22. This could potentially include various forms of protest. While such actions may not aim to terrorize the population, they would still aim to “force the state or an international organization to do or not to do an action”; for example, where protesters want to convince the government to perform a certain act, and damage some public property in the process, or commit acts of civil disobedience. It is therefore recommended to ensure that all acts mentioned in the draft Law constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, and to reformulate the definition of terrorism so as to reduce the possibility of an excessively wide interpretation of this term.<sup>33</sup> This could be ensured by reducing the definition of terrorist acts to serious crimes, in particular hostage-taking, crimes aimed at causing death or serious bodily injury, and lethal or serious physical violence. This definition should then be moved to Article 3.
23. Moreover, it is noted that Article 3 does not include a clear definition of financing illegal activities. While Article 91 of the draft Law includes some elements of such definition, this provision would benefit from certain improvement. Some guidance may be provided by the International Convention for the Suppression of Financing of Terrorism, which defines offences under the Convention as the direct or indirect, unlawful and wilful provision or collection of funds with the intention of or in the knowledge that they will be used, in full or in part, to carry out illegal

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<sup>31</sup>Report of the Special Rapporteur of 22 December 2010, A/HRC/16/51, para. 28, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>

<sup>32</sup> *Ibid.*, para. 27.

<sup>33</sup> *Ibid.*

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- acts, or any other acts intended to cause death or serious bodily injury to civilians, or other persons not taking part in an armed conflict. Additionally, the purpose of such acts, by nature or context, shall be to intimidate a population, or compel a government or international organization to act, or abstain from action. It would be preferable if such definition could be included in Article 3, along with the definition of money laundering (currently set out in Article 85 of the draft Law).
24. Article 3 of the draft Law also includes the definition of “transnational crime”, which appears to also include crimes committed on the national territory (first indent). Unless a result of unclear translation, this part of Article 3 should be deleted, as a crime committed in Tunisia would not *per se* qualify as a transnational crime.
25. Another term found in various provisions of the draft Law is “administrative control” (see Articles 6, 8 and 90), which is however not defined anywhere in the draft Law. A provision, especially if it outlines what appears to be a sanction, without any definition opens up the possibility of abuse. For reasons of legal certainty, it is recommended that the term “administrative control” be defined either in the draft Law or by clear reference to another, existing law which defines the term. It should also be specified which entity is in charge of imposing administrative control under the draft Law. In addition, effective legal remedies, such as an appeal to court for those upon whom administrative control has been imposed, should be included to guard against the possibility of abuse of such measures.
26. Under Articles 29 and 30, the participation in training with the aim of committing terrorist acts and the recruitment and training of individuals or groups of individuals to commit terrorist acts shall be sanctioned with six to twelve years’ imprisonment, and monetary fines. While criminalizing the training and recruitment of individuals for the commission of terrorist acts is in line with international standards, both terms, as well as the terms “trainers” and “leaders” need to be more clearly defined.<sup>34</sup>
27. At the same time, it would additionally enhance clarity of the draft Law if it would clearly define which behavior would lead to criminal liability for participating in such training.

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<sup>34</sup> As a good practice, see Articles 6 and 7 of the Council of Europe Convention on the Prevention of Terrorism, CETS 196, adopted on 16 May 2005, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm>

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**4. Freedom of Opinion and Expression**

28. Chapter One of the draft Law focuses on the “fight against terrorism and conviction”, and has a section one on general provisions. Under this section, Article 5 of the draft Law provides that “[a]ny person publicly calling for the perpetration of acts of terrorism when these calls, by nature or due to context may constitute real execution threats, shall be considered a perpetrator of acts of terrorism and shall be sentenced to half the sanctions provided for in this type of crimes.” Later on in the draft Law, under section two on “criminal acts and sentences provided”, Article 28 stipulates that “one to five year imprisonment and a five to ten thousand dinar penalty shall be applied on any individual publicly and in any way praising a terrorist crime, the perpetrator of a terrorist crime, an organization or an alliance connected with terrorist crimes, their members or their activities.”
29. In this context, it is noted that the UN Security Council has called on States to “take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters.”<sup>35</sup> At the same time, the Security Council has also stressed that “States must ensure that any measures taken in this context must comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.”<sup>36</sup>
30. Both Article 5 and Article 28 raise concerns with regard to the right to freedom of expression.<sup>37</sup> As such, under Article 19 par 3 of the ICCPR, restrictions may only be imposed if they are provided by law and are necessary for (a) respect of the rights or reputations of others; and (b) the protection of national security or of public order, or of public health or morals.<sup>38</sup> Such restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.<sup>39</sup> In particular, State parties to the ICCPR should ensure that counter-terrorism measures are compatible with Article 19 par 3, and that anti-terrorism offences are clearly defined to ensure that any ensuing sanctions or other interference with rights do not lead to unnecessary or disproportionate interference with freedom of

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<sup>35</sup> UN Security Council Resolution 1624 (2005) , S/RES/1624 (2005), para. 3, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/510/52/PDF/N0551052.pdf?OpenElement>

<sup>36</sup> *Ibid.*, par 4.

<sup>37</sup> Article 19 ICCPR, Article 9 par 2 ACHPR.

<sup>38</sup> *Ibid.*

<sup>39</sup> UN Human Rights Committee, General Comment 34, Freedom of Opinion and Expression, para. 22, available at <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>

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expression.<sup>40</sup> The UN Human Rights Council has also stated that restrictions should never be applied, amongst others, to discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.<sup>41</sup>

31. Moreover, the UN Special Rapporteur on Freedom of Opinion and Expression has pointed out that imprisoning individuals for seeking, receiving and imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under Article 19, par 3, of the ICCPR.<sup>42</sup> Generally, the right to freedom of expression also extends to the expression of views and opinions that offend, shock or disturb.<sup>43</sup> This right applies both offline and online. The Special Rapporteur has likewise reiterated that protection of national security or countering terrorism cannot be used to justify restricting the freedom of expression 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.<sup>44</sup>

32. With regard to what would constitute incitement, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism limits this to acts where a certain conduct, regardless of whether terrorist offences are expressly advocated for, “causes a danger that one or more such offences may be committed”.<sup>45</sup>

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<sup>40</sup> *Ibid.*, para. 46.

<sup>41</sup> UN Human Rights Council Resolution 12/16, Freedom of Opinion and Expression, A/HRC/RES/12/16 12 October 2009, para. (p), available at

[http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/12/L.14/Rev.1](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/12/L.14/Rev.1)

<sup>42</sup> UN Special Rapporteur on Freedom of Opinion and Expression, Report to the UN Human Rights Council, A/HRC/17/27, 16 May 2011, Para. 36.

<sup>43</sup> *Ibid.*, para. 37.

<sup>44</sup> *Ibid.*, referring to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, available at <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>

<sup>45</sup> Report of the Special Rapporteur, 22 December 2010, A/HRC/16/51, para. 32, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf> See also the preamble of UN Security Council Resolution 1624 (*infra*, footnote 31), in which the Security Council recalls “the right to freedom of expression reflected in Article 19 of the Universal Declaration of Human Rights adopted by the General Assembly in 1948 (“the Universal Declaration”), [...] “the right to freedom of expression in Article 19 of the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966 (“ICCPR”)” and states that “any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR,”

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33. Both Articles 5 and 28 include the term “terrorism”, which, as noted above, is covered by an excessively wide definition in this draft Law. This may well lead to an equally wide, and possibly arbitrary application of the law, once passed, and raises concerns as to whether restrictions to the freedom of expression contained in these articles will really be necessary and proportionate.
34. As to Article 5 specifically, there is a need to further clarify its wording to ensure that it does not cover an excessively wide range of statements. This provision already specifies that an individual calling for the perpetration of acts of terrorism will only be considered a perpetrator of terrorism if such call holds a real threat of execution. However, it would be advisable to further align the wording with the recommendations of the UN Special Rapporteur on Freedom of Opinion and Expression by stating that such calls shall intend to incite to imminent acts of terrorism, and by requiring a direct and immediate connection between the call and the likelihood or occurrence of such violence. It is recommended to redraft Article 5 accordingly, while taking care to focus on the imminent occurrence of terrorism in particular, not on all forms of incitement to violence, which are presumably dealt with in other provisions of Tunisian law.
35. Article 28 of the draft Law sanctioning public praise for terrorist crimes, perpetrators, or organizations, would essentially appear to deal with past acts, which means that it would not fall under the definition of incitement to violence outlined by the Special Rapporteur. Formulated as it is, this provision runs the risk of excessively broad application considering its wording, in particular the inclusion of the term “in any way praising”, which could lead to the criminalization of a very wide range of statements, even such which would arguably not pose a concrete danger. To ensure that this provision does not substantially curtail the freedom of expression, which also covers statements that are likely to shock and offend, see par 31 *supra*, it is recommended to remove, or substantially revise Article 28 of the draft Law.

**5. Level of Sanctions**

36. Under Chapter One, the main sanctions for actions related to terrorism are prison sentences and fines. However, Article 6 also speaks of “administrative control”, which shall be enforced on perpetrators of acts of terrorism for a period of five to ten years. As stated earlier under par 25 *supra*, the nature of such control should be specified, either directly, or by reference to legislation where it is defined (possibly the Criminal Code).
37. Moreover, Article 8 par 2 would appear to imply the existence of another sanction, namely preventing an individual to reside in a specific area for a certain period (here it is up to five years). This type of sanctions could potentially raise

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- concerns with regard to every individual's freedom of movement under Article 12 of the ICCPR, and should likewise be explained, either in this draft Law, or by referring to other legislation where it is specified.
38. Article 10 provides that "the most severe sanction prescribed for acts of terrorism shall necessarily be applied" when committed by a list of particular types of individuals, organizations or in certain specific circumstances. Although this provision is not problematic *per se* from the viewpoint of international standards, its legal meaning is not fully clear.
39. In particular, it is not apparent whether Article 10 is meant to be a mandatory sentencing regime, thereby removing the courts' discretion in deciding the level of punishment from the judiciary in the circumstances mentioned therein, or whether it instead intends to merely provide general guidance to judges sentencing individuals in the criminal cases listed in the draft Law. It is recommended to clarify the meaning of Article 10, in particular the level of the discretion exercised by the judiciary in the determination of the extent of sanctions for different provisions of the draft Law. It should be borne in mind that, from the viewpoint of proportionality of punishment, it may not be desirable to remove judicial discretion for serious terrorist acts.
40. In this context, it is further noted that while certain offences listed in the draft Law contain a range of possible years of imprisonment, and fines, others, e.g. killing or injuring people, blowing up diplomatic or consular missions or international organizations, or doing substantial harm to the environment (see Article 13 of the draft Law), as well as aggravated circumstances of certain offences (where they resulted in death, physical impairment, or permanent disability) appear to already be fixed. Also here, this approach should be revisited; examples of relevant provisions are Articles 14-18, 20-24, and 29.

**6. The Duty to Inform the Authorities about Possible Future Acts of Terrorism**

41. Under section two on criminal acts and sentences provided, Article 33 sets out punishment "even for reason of professional secret" for individuals who fail to immediately inform the relevant authorities about acts they may have come across or information they may have heard about plans or possibilities to commit acts of terrorism. It exempts certain close family members from this obligation, as well as lawyers with regard to secrets they may have access to "in the framework of their mission", with an exception for "information they may come across and which transmission to relevant authorities may prevent future acts of terrorism".

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42. It appears that the wording used in Article 33, namely “about acts he may have come across or information he may have heard about plans or possibilities to commit acts of terrorism” is vague and might capture a very wide variety of possible activities. This could potentially lead to individual criminal liability for failing to report almost any type of information, including rumors. It is recommended that the draft Law specify more clearly what type of information should be reported. In this context, bearing in mind the formulation of Article 33, it is reiterated that the draft Law should not refer to a certain gender (“he” or “she”), but should be formulated in a gender-neutral manner.
43. Additionally, the exemption for lawyers does not appear to be sufficient to protect the confidentiality of attorney-client communications. The right for lawyers to be able to meet their clients in private and to communicate with them in conditions that fully respect the confidentiality of their communications is an integral part of the right to a fair trial under Article 14 of the ICCPR.<sup>46</sup> The obligation to report “future acts of terrorism” contemplated in Article 33 would restrict that right. Although the aim of Article 33 is in itself legitimate, it is recommended, in order to ensure that all individuals feel that they can speak to their attorneys in full freedom, that the wording of this provision be as specific as possible. In particular, it should be noted in the draft Law that the attorney must only provide such information as is necessary for the prevention of specific impending acts of terrorism, and that all other information remains protected by attorney-client privilege.
44. Furthermore, the exception “for reasons of professional secret” is very broad, and, depending on other legislation in force in Tunisia, may cover a wide variety of professional secrecy provisions related to other professions, such as the medical profession, various types of government officials and others. It is recommended to include specific references to this relevant legislation in Article 33. Consideration may also be given to introducing further exceptions or clarifications related to other professions which may be under a duty to keep professional secrets, so as to ensure that it is clear which professions are affected by the duty to report mentioned under this provision. Exceptions to such professional secrecy obligations should be formulated narrowly.

## **7. Surveillance**

45. Under section seven on private investigations, Article 51 provides that “[i]n cases of required additional investigations, it is possible to resort to phone-tapping that

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<sup>46</sup> UN Human Rights Committee, General Comment 32, para. 34, available at .  
<http://www1.umn.edu/humanrts/gencomm/hrcom32.html>

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shall be authorized and justified in writing by the Attorney General or by the examining magistrate.” Article 58 provides for the possibility of setting up a “technical package aimed at capturing, recording and conveying words and photos of an individual or of several individuals secretly monitored in their private space, and in private or public locations or vehicles.”

46. These provisions constitute interferences with the right to privacy.<sup>47</sup> As such, measures undertaken thereunder will need to be justified under the provisions of relevant international instruments. This means that they should not be “unlawful” or “arbitrary”.<sup>48</sup> The term “unlawful” means that no interference can take place except in cases envisaged by law, which must itself comply with the provisions, aims and objectives of the ICCPR.<sup>49</sup> Thus, interferences that are based on law may still be arbitrary, if the respective law is not in accordance with the provisions, aims and objectives of the ICCPR, and is not reasonable in the particular circumstances,<sup>50</sup> or indeed unjust, unpredictable or unreasonable.<sup>51</sup> The law authorizing interference with privacy rights must specify in detail the precise circumstances in which such interference is permitted.<sup>52</sup> In addition, the measures contemplated in such provisions must be particularly precise and proportionate to the security threat, and offer effective guarantees against abuse.<sup>53</sup> All such interferences with the right to privacy must be authorized through an independent body, which should also supervise such measures (ahead of time or *ex post facto*).<sup>54</sup> Also, these types of interferences shall be measures of last resort, which shall only be used if other, less intrusive means are not available.
47. With regard to the above, it is noted that Articles 51 and 58 merely state that wire-tapping or other electronic surveillance shall take place “whenever required by the investigation”. Both provisions should be clarified to specify exactly in which situations these measures are permitted (presumably this relates to well-founded suspicion of the commission of serious terrorist crimes).
48. The authorization of the measures contemplated in Articles 51 and 58 can, according to the draft Law, be given not only by a court, but also by the Attorney

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<sup>47</sup> Article 17 ICCPR.

<sup>48</sup> Article 17 ICCPR.

<sup>49</sup> UN Human Rights Committee, General Comment 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, para. 3, available at <http://www.refworld.org/docid/453883f922.html>

<sup>50</sup> See *ibid.*, para.4.

<sup>51</sup> UN Human Rights Committee, views on communication N° 35/1978, *Aumeeruddy-Cziffra and Others v. Mauritius*, 9 April 1981 (A/36/40, annex XIII, para. 9.2 (b) 2 (i) 8).

<sup>52</sup> *Ibid.*

<sup>53</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, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37.pdf>, Para. 60.

<sup>54</sup> *Ibid.*, Para. 62.

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General. Instead of placing these bodies on an equal footing, it may be useful to indicate in which cases which body will be responsible. At the same time, the competent law drafters may consider placing this competence only in the hands of the judiciary, thereby ensuring all such decisions are taken by a body that is independent from the executive, as required above.<sup>55</sup> Likewise, a court or similarly independent body should exercise oversight over the implementation of these measures.<sup>56</sup>

49. Under Article 53 of the draft Law, the party in charge of wire-tapping shall draft a report, which will include data that has been “collected, copied or recorded”, as well as “learnt, read and understood” (presumably, this relates to the evaluation of the data collected). In this context, it is noted that “the party in charge of phone-tapping” is a very vague formulation. Perhaps it would be helpful to clarify who will be responsible for conducting wire-tapping; presumably, this will be the police, but in the interests of transparency, this point should be clarified.
50. Under par 2 of Article 53, if data collected in this way does not result in criminal proceedings or a conviction, then it shall be protected based on legislation in force on the protection of personal data. Since the draft Law does not specify the extent of the protection provided by such legislation, it is reiterated once more that private data collected for the purposes of criminal investigations shall be destroyed once criminal investigations are discontinued. Currently, Article 60 of the draft Law specifies that this is only possible once the final judgment has been issued, or where public proceedings are time-barred; this provision should be expanded to also include cases where criminal investigations have been discontinued.
51. Based on Article 54, investigations could also require the use of “infiltrators”. Also here, it may be advisable to include more specific criteria as to when such a step will be permissible. It is noted that under Article 56, infiltrators shall not be

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<sup>55</sup> In this context, it is noted positively that Article 23 of the draft Constitution of Tunisia, its version of 1 June 2013, protects privacy and the inviolability of the home, and states that these rights shall only be restricted in cases provided by law, and based on a judicial decision.

<sup>56</sup> In this context, see OSCE/ODIHR, Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers, available at <http://www.osce.org/odihr/108930>, in particular page 38, in which it is recommended that laws set out the categories of persons whose telephones may be tapped; spell out the nature of the offences justifying the use of tapping; indicate the duration of the measure; explain the procedure for drawing up the summary reports containing intercepted conversations; identify the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and the defence; and clarify the circumstances, including a time-limit, in which they are to be erased or destroyed, in particular following discharge or acquittal of the accused. See also the Report of the UN Special Rapporteur on protection of human rights and fundamental freedoms while countering terrorism on the right to a fair trial in the fight against terrorism, A/63/223, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/451/82/PDF/N0845182.pdf?OpenElement>

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held liable for actions required by infiltrating activities. To ensure accountability of such officers, it is recommended to specify in Article 56 specific actions for which infiltrators will be held liable, such as abuse of power (excessive use of force), entrapment, or acting as agents provocateurs.<sup>57</sup>

**8. Closed Court Hearings and the Right to a Fair Trial**

52. Under Articles 46 and 77 of the draft Law, the Tunis primary court shall be responsible for examining terrorist crimes and related offences. Article 46 specifies that it shall be the “only court among other judicial or military courts” to do so. In this context, it should be borne in mind that under established international practice, terrorist crimes shall only be examined by military courts in exceptional, well-defined cases. Any exceptions to this rule should be strictly limited, and based on law, in addition to being necessary and proportionate to the intended aim.<sup>58</sup> The draft Law should thus specify in which cases, if at all, military courts would be competent to hear cases involving terrorism; based on the concerns stated above, these cases should be kept to a minimum.
53. Section 9 of the draft Law provides for a number of measures to protect court proceedings in the anti-terrorism context, as well as individuals involved in these proceedings. Although many of the protection measures taken in favor of witnesses and other individuals are clearly useful, it is recommended to make a number of amendments to key provisions to protect the rights of suspects in criminal cases.
54. In particular, Article 67 provides that “[t]he legal entity in charge shall decide by itself or at the request of the Attorney General’s Representative to hold secret sessions”. International standards on the right to a fair trial, more specifically Article 14 of the ICCPR, provide that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and *public hearing* by a competent, independent and impartial tribunal established by law” (emphasis added). Such publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and the society at large.<sup>59</sup>
55. While courts do have the power to exclude all or part of the public from hearings, this shall only happen for reasons of morals, public order or national security in a

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<sup>57</sup> Ibid, pages 43-44.

<sup>58</sup> UN Human Rights Committee, General Comment 32, par III; Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, no. 63/223, par 27

<sup>59</sup> UN Human Rights Committee, General Comment 32, para. III.

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democratic society, when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice (Article 14 par 1 of the ICCPR). Moreover, even in cases where the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interests of juveniles requires otherwise, or where the proceedings concern matrimonial disputes or the guardianship of children.<sup>60</sup>

56. Although restrictions to the right to a public hearing are therefore possible in certain, strictly limited circumstances, they should be of an exceptional nature. It is therefore recommended that the draft Law clarify that closed hearings shall be the exception to the rule and specify clearly in which cases this shall be permissible (presumably this will be the case where national security, or the rights of others so require). The draft Law should also specify that in cases where courts decide to restrict public access to a hearing, they shall issue a decision with a proper justification outlining the reasons for this step.

**9. The Use of Anonymous Witnesses**

57. Under section nine on protection mechanisms, Articles 68 to 70 provide for the possibility of using anonymous witnesses. Under Article 69, “[i]n case of an imminent threat and whenever required”, all data and information that could disclose the identity of a victim, witnesses or others informing concerned authorities about the crime, shall be kept in special classified reports archived in special (separate) files. This file shall be signed and kept by the Tunis Attorney General.
58. According to Article 70, suspects or their lawyers can request the competent judicial entity to disclose the identity of such individuals within ten days “from learning about their declarations.” The competent court may then lift the confidentiality measure mentioned above, and disclose the identity of the respective individual if the request is sufficiently justified, and evidence shows that the individual, his/her assets and family, and his/her family’s assets will not be at risk. The decision taken may be appealed at the level of the Court of Criminal Appeal within four days from its publication (the Attorney General) or from its notification date (defending party). An additional safeguard is contained in Article 71 of the law, which specifies that “[p]rotection measures shall in no case prevent suspects and their lawyers from the right to read depositions and

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<sup>60</sup> UN Human Rights Committee, General Comment 32, para. III.

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- other documents included in the case file, in compliance with provisions of article 194 of the Penal Procedures Code.”
59. Under international human rights law, specifically Article 14 par 3 (e) of the ICCPR, accused persons have the right to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important to ensure an effective defense and thus grants the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.<sup>61</sup>
60. The use of anonymous witnesses contemplated by Articles 68-70 of the draft Law significantly reduces this opportunity for the defense, since defense counsel is thus not able to question the credibility or motives of the individual testifying against a suspect or an accused individual. Considering the possible imbalance that this may cause between defense and prosecution, it is recommended that Article 70 of the draft Law specify more clearly that the use of anonymous witnesses should be exceptional in nature and strictly necessary for a legitimate aim, and that courts should refrain from maintaining the anonymity of witnesses if it deems this to be unnecessary and not in the interests of justice.

**10. Extradition and Expulsion**

61. Under Article 12 of the draft Law, “[f]oreigners convicted of terrorist acts shall be expelled and deported from the Tunisian territory as soon as they complete their sentence.” They shall be banned from re-entering Tunisia for ten years in case of committed offences, and for life in case of felonies.
62. Under section 12 on the extradition of criminals, Article 82 deals with extradition for terrorist crimes, provided that such crimes are committed outside of Tunisia against a foreigner, or against foreign interests by a foreigner or stateless person located in Tunisia. According to par 3 of this provision, foreigners or stateless persons may not be extradited if there is clear evidence that they will be tortured in the state requesting extradition, or that the extradition request is “meant to sue or sanction a person for racial, religious or gender reasons.”
63. A number of international legal provisions to which Tunisia is party are relevant here, including the UN Convention Against Torture<sup>62</sup>, which, in its Article 3 par

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<sup>61</sup> UN Human Rights Committee, General Comment 32, para. V.

<sup>62</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, acceded to by Tunisia on 23 September 1988, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

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1, provides that “[n]o State Party shall expel, return (*“refouler”*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. This relates to Article 7 of the ICCPR, which provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.<sup>63</sup> Under these provisions, States shall refrain from expelling, extraditing or otherwise returning individuals to other states where they would be in danger of torture or cruel, inhuman or degrading treatment or punishment.<sup>64</sup> This is also in line with state obligations under Article 2 of the ICCPR, which require that State Parties respect and ensure the rights listed therein for all persons on their territory and under their control.<sup>65</sup>

64. In order to comply with these provisions, it is recommended that the draft Law ban extradition and expulsion in cases where there are substantial grounds for believing that there is a risk of irreparable harm, including torture, cruel, inhuman or degrading treatment or punishment, or also the serious risk of violations of the right to life, fair trial and liberty and other important human rights. A list of such grounds preventing expulsion and extradition should be introduced under Articles 12 and 82. The draft Law should also include a remedy by which individuals can appeal against decisions on expulsion and extradition.

**11. Provisions on the Fight against Terrorism and Money Laundering in Light of the Freedom of Association**

65. Article 92 of the draft Law provides that moral, in other words legal entities shall take a number of measures to combat terrorism, in particular that they should refuse donations or financial assistance from unknown origins, from illegal (criminal) activities, or from individuals, entities, organizations or structures known for their involvement in or connection with terrorist crimes. Additionally, such entities should refuse membership fees exceeding the legally defined ceiling, as well as “other donations or financial assistance” and funds from abroad (unless

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<sup>63</sup> Article 7 ICCPR.

<sup>64</sup> UN Human Rights Committee, General Comment 20, para. 9, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

<sup>65</sup> UN Human Rights Committee, General Comment 31, para. 12, available at <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f> . See, in this context, the Convention for the Suppression of the Financing of Terrorism, cited *infra*, footnote 5, (Article 15:

“Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.”

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through an intermediate agent based in Tunisia). Finally, they shall refuse any cash donations amounting to or exceeding five thousand dinars. This provision is complemented by Article 32, which sanctions donating and/or collecting funds knowing that they will be used to finance terrorist activities, as well as hiding or dissimulating the origins of illegally gotten funds, real estate, revenues or profits.

66. These measures listed under Article 92 constitute significant interferences with the freedom of association, protected by Article 22 of the ICCPR. The protection afforded by this international law provision extends to all activities of an association, including fundraising activities. Therefore, funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with Article 22.<sup>66</sup> Other United Nations treaty bodies have likewise emphasized the obligation of States to allow civil society to seek, secure, and utilize resources, including from foreign sources. The UN Committee on Economic, Social, and Cultural Rights highlighted this issue when it expressed “deep concern” with Egypt’s Law No. 153 of 1999, which “gives the Government control over the right of NGOs to manage their own activities, including seeking external funding.”<sup>67</sup> The OECD’s Financial Action Task Force (FATF), when citing best practices in relation to its Recommendation 8 on combating the abuse of non-profit organizations in the context of money laundering and the financing of terrorism, also noted the importance of ensuring that targeted legislation and regulations should not harm the legitimate activities of such organizations.<sup>68</sup>
67. Under Article 22 par 2 of the ICCPR, any restrictions to the freedom of association must be prescribed by law, necessary in a democratic society in the

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<sup>66</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, of 24 April 2013, A/HRC/23/39, para. 16, available at

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf)

<sup>67</sup> See CESCR, Concluding observations of the Committee on Economic, Social and Cultural Rights – Egypt, UN Document E/C.12/1/Add.44, May 23, 2000, paragraph 19, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.44.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.44.En?Opendocument); see also Human Rights Council Resolution 22/6, 21 March 2013, available at <http://daccess-ods.un.org/TMP/3520549.53575134.html> and the UN Declaration on Human Rights Defenders, article 13: “everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration”; also the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8 March 1999, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement>

<sup>68</sup> See Best Practices: Combating the Abuse of Non-Profit Organizations (Recommendation 8), limited update to reflect the revised FATF Recommendations and the need to protect NPO s’ legitimate activities, issued by the FATF in June 2013, Chapter III on Respect for the Legitimate Activities of NPOs, par 11, at [http://www.fatf-gafi.org/media/fatf/documents/reports/Combating\\_the\\_abuse\\_of\\_NPOs\\_Rec8.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Combating_the_abuse_of_NPOs_Rec8.pdf). See also the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, the FATF Recommendations, issued in February 2012, at [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

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interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Furthermore, such restrictions should be proportionate to their intended aim.

68. The measures contemplated in Article 92 of the draft Law, especially when applied cumulatively, constitute a very wide-ranging interference with the ability to collect and raise funds, thereby directly impacting the ability of such entities to undertake meaningful activities. Although specifically targeted measures aimed at cutting off terrorist financing and money-laundering are certainly possible under international human rights law, the measures contemplated here appear to be drafted in an overly broad nature, capturing a very wide range of possible sources of funding. In particular, while the refusal of funds emanating from unknown origins, or from criminal terrorist activities, appears reasonable and in line with international standards, obliging legal entities to refuse “other donations or financial assistance”, without specifying any link to terrorist activities, or all donations exceeding a certain amount, would appear to go too far. It is recommended to substantially revise these parts of Article 92, by clearly linking all prohibited funds and assets to terrorists, terrorist groups and money-laundering, while bearing in mind key principles of the right to freedom of association, and the general principle of proportionality.
69. It is also noted that in Article 93 of the draft Law, legal entities have strict accounting and reporting requirements, especially with regard to funds received from abroad. This does not apply to entities whose annual receipts and expendable savings do not reach limits defined by the Minister of Finance. In the interests of transparency, these limits should be set out in law, not decided individually by the Minister of Finance. The draft Law, and other relevant legislation, should be amended accordingly.

**12. Measures Affecting the Right to Property**

70. Under Chapter Three on “common provisions for the fight against terrorism and money laundering”, and section one on preventing illegal financial channels, Article 95 specifies that “[w]hen there are suspicions about specific moral entities’ connection with individuals, organizations or activities related with terrorist crimes defined in the present Law, or when moral entities violate preventive governance rules concerning book keeping and accountings, the Minister in charge of Finance shall be liable to require preliminary authorizations before they can receive overseas financial transfers.”
71. Likewise, Article 96 allows the Minister of Finance to freeze funds held by individuals or organizations believed by security authorities to be connected to

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- terrorist crimes, after consulting with the Governor of the Central Bank. Entities with funds frozen in this manner may ask the Minister to revoke this decision, if wrongfully taken, and the Minister is obliged to do so if he or she cannot prove a linkage with terrorist crimes.
72. These measures would appear to raise concerns with regard to the right to property, which is protected by Article 14 of the African Charter on Human and People's Rights (ACHPR). To ensure that there is some review mechanism relating to these measures, it is recommended to introduce into the draft Law an adequate remedy, by foreseeing therein the possibility for the affected individuals and organizations to appeal such decisions to a court or other independent body with the power to impose effective remedies. In order to avert any unintended effects of these measures, it would also be advisable to extend this remedy to third parties whose assets may have been (directly or indirectly) affected in a disproportionate manner.
73. It is noted that in investigations relating to alleged crimes of money laundering, laid down in Articles 100-129 of the draft Law, the competent Financial Analyses Commission may, after receiving information about suspicious operations and transactions that may have direct or indirect connections to terrorist crimes, also temporarily authorize banking and other financial institutions to freeze funds (Article 120). The concerned party, presumably the owner of the funds, shall not be informed, and, according to Article 125, there is no appeal against such decisions.
74. Given the quite invasive nature of such a decision (even if it is only temporary), it would be preferable to allow for a requisite appeals procedure, especially since Article 126 implies that, if the Attorney General proceeds to investigate, funds will remain frozen as long as the competent court does not object. Indeed, Article 127 goes even further by stating that the Attorney General may ask the competent court to issue a decision on freezing funds even in the absence of a statement on suspicious operations and transactions. In such cases, the very basis for a court decision becomes questionable. It is recommended to review these provisions once more to ensure certain safeguards for potentially innocent individuals or entities; in this context, it is advised to include the possibility of remedies against both temporary and permanent freezing of funds, and to require that such interferences in the right to property will be supported by relevant statements indicating that illegal transactions related to terrorist activities may have taken place.

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**13. Victims of Terrorism**

75. It is welcome that section 10 of the draft Law specifically recognizes the rights of victims of terrorism and grants certain specific rights to such victims. As a matter of good practice, other measures may be considered here as well, such as appointing family investigative liaison officers which provide victims with regular reporting on the progress of court trials following a terrorist attack; giving representatives of victims' associations the right to participate in criminal trials in support of victims; and setting up an assistance centre with a website and a telephone helpline to help victims.<sup>69</sup>

*[END OF TEXT]*

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<sup>69</sup> For these and further suggestions, please see UN Office on Drugs and Crime (UNODC), *The Criminal Justice Response to Support Victims of Acts of Terrorism*, available at [http://www.un.org/en/terrorism/ctitf/pdfs/victims\\_rights\\_e-book\\_en.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf) and OSCE/ODIHR, *Background Paper on Solidarity with Victims of Terrorism*, available at <http://www.osce.org/odihr/19356>