

Counter-terrorism provisions of the Penal Code and the Penal Procedure Code

Memorandum

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MEMORANDUM ON BILL NO. 86-14 AMENDING AND SUPPLEMENTING COUNTER-TERRORISM PROVISIONS OF THE CRIMINAL CODE AND THE CRIMINAL PROCEDURE CODE

The National Human Rights Council (CNDH),

Upon a request for opinion referred to the Council on 16 December 2014 by the Speaker of the House of Representatives;

Having regard to Dahir (Royal Decree) No. 1-11-19 of 25 Rabii I 1432 (1st March 2011) establishing CNDH, in particular Article 16;

Having regard to the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments, in particular the principles 22, 24, 25 and 28;

Having regard to the Memorandum of Understanding signed between the House of Representatives and CNDH on 10 December 2014, in particular Article 2;

Having regard to the Constitution, in particular Articles 6 (§2), 21, 22, 23, 38 and Chapter VII;

Having regard to the International Covenant on Civil and Political Rights, in particular Articles 9, 14 and 15;

Having regard to the international instruments related to the fight against terrorism, mainly:

- The Convention on Offenses and Certain Other Acts Committed on Board Aircraft¹, signed at Tokyo on 14 September 1963;
- The Convention for the Suppression of Unlawful Seizure of Aircraft², signed at The Hague on 16 December 1970;
- The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation³, done at Montreal on 23 September 1971;
- The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents⁴, done at New York on 14 December 1973;
- The International Convention against the Taking of Hostages⁵, done at New York on 17 December 1979;
- The Convention on the Physical Protection of Nuclear Material⁶, signed at Vienna on 26 October 1979;
- The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation⁷, done at Montreal on 24 February 1988;
- The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation⁸, done at Rome on 10 March 1988;
- The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf⁹, done at Rome on 10 March 1988;
- The International Convention for the Suppression of Terrorist Bombings¹⁰, done at New York on 15 December 1977;

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- The Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf¹¹, done at Rome on 10 March 1988;
- The International Convention for the Suppression of the Financing of Terrorism¹², done at New York on 9 December 1999;
- The International Convention for the Suppression of Acts of Nuclear Terrorism¹³, done at New York on 14 September 2005.

Having regard to Resolution No. 60/158, adopted on 16 December 2005 by the United Nations General Assembly on the Protection of human rights and fundamental freedoms while countering terrorism;

Having regard to Resolution No. 61/171 adopted on 19 December 2006 by the UN General Assembly on the Protection of human rights and fundamental freedoms while countering terrorism;

Having regard to Resolution No. 68/178 adopted on 18 December 2013 by the UN General Assembly on the Protection of human rights and fundamental freedoms while countering terrorism;

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Having regard to the Global Counter-Terrorism Strategy and its Action Plan adopted on 8 September 2006 by the UN General Assembly under Resolution No. 60/288, in particular its fourth pillar on “Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism”;

CNDH presents its opinion on Bill No. 86-14 amending and supplementing counter-terrorism provisions of the Penal Code and the Penal Procedure Code.

Through this memorandum, the Council seeks to contribute to implementing the concluding observations and recommendations issued to Morocco by the UN treaty bodies, the special procedures mandate-holders, or as part of the universal periodic review.

These mainly include the concluding observations and recommendations relating to Law 03-03 on the fight against terrorism issued by the Human Rights Committee, the Committee against Torture, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on Arbitrary Detention.

They also include CNDH's proposals on the precise formulation of the purpose of terrorist offenses, the definition of training for terrorism, as well as its proposals on the concept of “apology for terrorism” and the proportionality of penalties provided in Bill No. 86-14.

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Considering Morocco's "Partner for Democracy" status with the Parliamentary Assembly of the Council of Europe, granted in June 2011, the CNDH has also considered the reference framework established by the various bodies of the Council of Europe on the fight against terrorism, namely some provisions of the Council of Europe Convention on the Prevention of Terrorism.

ASPECTS TO CONSIDER IN ANY COUNTER-TERRORISM LEGISLATION THAT PROTECTS HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

1. Considering that it is for the legislator to assess the need and usefulness of changing the criminal law in order to strengthen the anti-terrorism legal framework, CNDH wishes to recall some aspects that should be considered for the development of a counter-terrorism legislation that protects human rights and fundamental freedoms.

In this regard, the first point of the UN General Assembly Resolution 60/158, adopted on 16 December 2005, reaffirms that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law".

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In the same vein, the eighth point of the UN General Assembly Resolution 61/171 adopted on 19 December 2006 "Opposes any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law, and urges states to respect the safeguards concerning the liberty, security, and dignity of the person and to treat all prisoners in all places of detention in accordance with international law, including human rights law and international humanitarian law". The same Resolution reaffirms in its ninth point that "it is imperative that all States work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism".

Concerning the national counter-terrorism legislation, CNDH recalls the sixth point of the General Assembly Resolution 68/178 adopted on 18 December 2013, which urges states to "ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law".

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2. CNDH also notes that criminal laws in several advanced democratic countries criminalize terrorist offenses committed abroad by their nationals or individuals resident on their territories. This trend has established a specified jurisdiction allowing the prosecution and conviction of perpetrators of terrorist offenses.

For comparison, Article 54 of the United Kingdom Terrorism Act 2000 provides for the following terrorist-related offenses: "Providing or receiving instruction or training in the making or use of firearms, explosives, radioactive material or weapons designed or adapted for the discharge of any radioactive material, chemical, biological, or nuclear weapons; or inviting another person to receive such training, inside or outside the UK¹⁴".

Regarding the financing of terrorism, the Dutch Act implementing the International Convention for the Suppression of the Financing of Terrorism, which entered into force on 1 January 2002, provides in Article 46 of the Penal Code for criminal sanctions applicable to the financing of terrorism. In addition, Paragraph 14 of Article 4 of the Penal Code stipulates that these acts can be tried under Dutch criminal law and before Dutch courts when committed abroad and directed against a Dutch national or when the suspect is in the Netherlands¹⁵.

The German criminal law, under Articles 129a and 129b of the Penal Code that came into force in August 2002, enables the prosecution of the founding, membership, supporting and recruiting of members or supporters of criminal or terrorist organizations abroad¹⁶.

In France, Act No. 2012-1432 of 21 December 2012 on security and the fight against terrorism makes it possible, under Article 113-13 of the Penal Code¹⁷, to prosecute any French national or individual resident in France for an alleged act of terrorism abroad, without having to wait for an official report of the acts by the foreign State or to establish that the act constitutes an offence in both countries. This provision, introduced in 2012, allows prosecuting and convicting all French nationals or individuals resident in France who go abroad in order, *inter alia*, to attend terrorist training camps¹⁸.

The Belgian law amending the Act of 17 April 1878 containing the Preliminary Title of Penal Procedure Code makes it possible, by virtue of Article 12 of the Preliminary Title of this Code, to prosecute in Belgium the perpetrator of a terrorist offence committed abroad¹⁹, in relation to the prosecution of certain offenses committed abroad, even when not in Belgium. The Act of 18 February²⁰ has introduced Article 140d²¹ which punishes anyone who, in Belgium or abroad, receives instruction or training to commit terrorist offenses²².

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In Austria, Article 64 (Para. I, Subpara. 9) of the Penal Code stipulates that participation in terrorist camps abroad shall be a punishable under Austrian law, irrespective of whether it is a punishable also at the training location abroad²³.

The above comparative experiences show the current trends in the criminalization of terrorist acts committed abroad. They can inspire the Moroccan legislator on strategies to adopt for the legal qualification of these acts. These strategies are generally part of a prudential approach aimed to define, as narrowly as possible, the constituent elements of terrorist offenses.

3. CNDH also recalls the various counter-terrorism legislation recommendations addressed to Morocco by the treaty bodies and the special procedures mandate-holders. The Council invites the legislator to implement and provide for them, not only in Bill 86-14, subject of this memorandum, but also in the expected amendment of the Penal Procedure Code and the Penal Code.

In this regard, the Council recalls that the Committee against Torture noted with concern that "Anti-Terrorism Act No. 03-03 of 2003 does not set out a precise definition of terrorism, as required in order to uphold the principle that there can be no penalty for an offence except as prescribed by law". It recommended that Morocco "revise Anti-Terrorism Act No. 03-03 in order to improve the definition of terrorism set forth therein, reduce the maximum amount of time during which a person can be held in police custody to the absolute minimum and permit access to counsel at the start of the period of detention"²⁴.

In the same vein, the Working Group on Arbitrary Detention recommended that Morocco "amend the Anti-Terrorism Act (No. 03-03) to remedy the vague definition of the crime of terrorism and reduce the period of police custody"²⁵. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment issued the same recommendation, in paragraph 87 (e) of its mission report on Morocco²⁶.

It should also be emphasized that the Committee on the Rights of the Child issued recommendations regarding the criminalization of recruiting and using children by non-State armed groups²⁷.

The Committee further recommended establishing extraterritorial jurisdiction over acts prohibited under the Optional Protocol to the Convention on the Rights of the Child, including the conscription or enlistment of children into armed groups, or their use to participate actively in hostilities²⁸.

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- 4.** Based on these elements, CNDH invites the legislator to consider, when developing counter-terrorism legislation, the cumulative characteristics defined by the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin.

In his 2005 report²⁹, Mr. Scheinin specifies the aspects that must be considered in any strategy to draft penal provisions criminalizing terrorist acts. He suggests that “Terrorist offences” should be confined to instances where the following three conditions cumulatively meet: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism. Similarly, any criminalization of conduct in support of terrorist offences should be restricted to conduct in support of offences having all these characteristics. In the prohibition of terrorist conduct, it is important for States to ensure that prescriptions to that effect are adequately accessible, formulated with precision, applicable to counter-terrorism alone, non-discriminatory and non-retroactive.”

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For CNDH, adopting these aspects, also adopted by UN Security Council Resolution 1566 (2004)³⁰, will not only avoid unnecessary expansion of the scope of criminal law, but also contribute to reducing legal risks inherent in the broad qualification of terrorist offenses.

RECOMMENDATIONS REGARDING SOME PROVISIONS OF BILL NO. 86-14

5. CNDH notes that the wording of Article I of the Bill, which introduces a new article to the Penal Code, broadly meets the criteria of a counter-terrorism legislation that protects human rights and fundamental freedoms. The Council also notes that the drafting of the provisions relating to attempt in the first three paragraphs of Article 218-I was no exception to the general provisions governing attempt in the national criminal legislation (Articles 114-117 of the Penal Code).

6. The Council notes, however, that the phrase “whatever its purpose” is too general, which may cause confuse terrorist offenses and offenses committed by other organized criminal groups in terms of motives, characteristics and goals.

In this regard, the Council recalls that the Appendix to Recommendation Rec (2001) 11 of the Committee of Ministers to Member States of the Council of Europe³¹ defines

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“organized criminal group” as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes, in order to obtain, directly or indirectly, a financial or material benefit”. This definition shows a significant difference with the purpose of terrorist offenses. Point (b) of the characteristics given by the former Special Rapporteur Martin Scheinin specifies that terrorist offenses are committed for the purpose of “provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act”.

Based on these elements, CNDH proposes introducing a provision between the first and second paragraph of Article 218-I-1 to clearly define, in the counter-terrorism legislation, the purpose of terrorist structures within the limits specified in point (b) of the abovementioned characteristics.

7. In the same vein, and to avoid any unnecessary restriction on the right to freedom of movement guaranteed by Article 24 of the Constitution and Article 12 of the International Covenant on Civil and Political Rights, CNDH proposes introducing, between the second and third paragraph of Article 218-I-1, a provision that defines training for terrorism as an act to “provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to committing a terrorist offence, knowing that the skills provided are intended to be used for this purpose”³².

8. Beyond the Bill subject to this memorandum, and to make the anti-terrorism legislation applicable only to the fight against terrorism, CNDH recommends amending the first paragraph of Article 218-I of the Penal Code³³ to make it consistent with the definition of the purpose of terrorist offenses given by the former Special Rapporteur.

9. CNDH, recognizing the potential semantic confusion between the expressions “non-State armed groups” and “terrorist groups”, recommends the legislator to build on the recommendation of the Committee on the Rights of the Child regarding the use and recruitment of children by non-State armed groups, to introduce a provision between the fourth and fifth paragraph of Article 218-I-1 of the Bill that considers the recruitment and use of children by terrorist structures as aggravating circumstances.

10. Regarding Article 2 of the Bill, CNDH notes with concern that the wording of the second paragraph of Article 218-2 of the Bill broadens the scope of the crime of apology for terrorism by adding other synonyms (propaganda, promotion) that undermine the clarity of the definition of this offense. This trend, consistent with the logic of broad

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definition of apology for terrorism set forth in the first paragraph of Article 218-2, has been criticized regularly by UN treaty bodies and the special procedures mandate-holders. In this respect, CNDH recalls a concluding remark of the Human Rights Committee as part of considering the periodic report submitted by Morocco³⁴. The Committee recommended that Morocco amend the Anti-Terrorism Act by clearly defining its scope. To this end, CNDH recommends the legislator to replace, in Article 218-2 of the Penal Code, the word “apology” by the more precise phrase “public provocation to commit a terrorist offense”. The Council proposes to the legislator to draw inspiration from the provisions of Article 5 of the Council of Europe Convention on the Prevention of Terrorism, which defines “public provocation to commit a terrorist offense” as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed”. The same article recommends the member states of the Council of Europe to adopt such measures as may be necessary to criminalize public provocation to commit a terrorist offence “when committed unlawfully and intentionally”.

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In the same context, CNDH proposes replacing the terms “apology”, “propaganda” and “promotion”, set forth in the second paragraph of Article 218-2, with a provision that criminalizes the use of the means provided in the first paragraph to publicly encourage other people to join terrorist groups.

11. The same reasoning applies to the provisions of Article 3 of the Bill amending Article 218-5 of the Penal Code. CNDH proposes replacing the phrase “persuade others” by two expressions that are more precise at the normative level: incitement and provocation as well as enticement in case of minors.

12. Pending the reform of Penal Code and the Penal Procedure Code, CNDH invites the legislator to:

- assess the proportionality of penalties provided in Articles 1 (paragraphs 4 and 5) and 3 of the Bill;
- consider the possibility of making attempt to join terrorist groups, as this attempt is established as a crime in the Bill;
- consider the possibility of providing for alternatives to incarceration and judicial control measures (e.g. electronic tagging) to sanction attempt to join terrorist groups and/or receive training for terrorism;
- explore the possibility of reducing the range of sentences prescribed in Articles 1 (paragraphs 4 and 5) and 3 of the Bill to better frame the discretionary power of the criminal judge.

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13. Finally, CNDH recalls that the development of an anti-terrorism legislation that protects human rights and fundamental freedoms requires reviewing not only the Bill subject of this memorandum but also several provisions of the Penal Code and Penal Procedure Code. CNDH has already published a memorandum on the draft bill of the Penal Procedure Code and a memorandum on alternatives to incarceration. Moreover, CNDH would like to draw attention, in the context of the fight against terrorism, to the need to strengthen the legal protection of persons held in police custody and to need to review the system of the establishment of evidence and the extradition procedure.

Notes

- 1-** Morocco adhered to this Convention on 21 October 1975
- 2-** Morocco adhered to this Convention on 24 October 1975
- 3-** Morocco adhered to this Convention on 24 October 1975
- 4-** Morocco adhered to this Convention on 9 January 2002
- 5-** Morocco adhered to this Convention on 9 May 2007
- 6-** Morocco ratified this Convention on 23 August 2002
- 7-** Morocco ratified this Convention on 15 February 2002
- 8-** Morocco ratified this Convention on 8 January 2002
- 9-** Morocco ratified this Protocol on 8 January 2002
- 10-** Morocco ratified this Convention on 9 May 2007
- 11-** Morocco ratified this Convention on 8 January 2002
- 12-** Morocco ratified this Convention on 19 September 2002
- 13-** Morocco ratified this Convention on 31 March 2010
- 14-** Council of Europe's Committee of Experts on Terrorism (CODEXTER), Profiles on Counter-Terrorist Capacity (United Kingdom), April 2007
- 15-** CODEXTER, Profiles on Counter-Terrorist Capacity (Netherlands), November 2008
- 16-** CODEXTER, Profiles on Counter-Terrorist Capacity (Germany), November 2011
- 17-** Article 113-13 of the Penal Code: "French criminal law applies to felonies and misdemeanors defined as acts of terrorism and punishable under Title II of Book IV committed abroad by a French national or a person habitually resident on the French territory".
- 18-** CODEXTER, Profiles on Counter-Terrorist Capacity (France), September 2013
- 19-** Published in the Moniteur Belge on 7 March 2012
- 20-** Published in the Moniteur Belge on 4 March 2013
- 21-** Article 140d: "Without prejudice to the application of Article 140, anyone who, in Belgium or any other country, receives the instruction or training referred to in Article 140c for the purpose of committing one of the offences listed in Article 137, with the exception of the offence referred to in Article 137, § 3, 6°, shall be punished with a prison sentence of five to ten years and a fine of one hundred to five thousand euros".
- 22-** CODEXTER, Profiles on Counter-Terrorist Capacity (Belgium), February 2014
- 23-** CODEXTER, Profiles on Counter-Terrorist Capacity (Austria), August 2012.
- 24-** Committee against Torture, Forty-seventh session, 31 October–25 November 2011, Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture, Morocco, CAT/C/MAR/CO/4, 21 December 2011 (§8).
- 25-** A/HRC/27/48, 4 August 2014, Report of the Working Group on Arbitrary Detention, Mission to Morocco, (§83, point c).

26- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53/Add.2, 30 April 2013: "Amend the Anti-Terrorism Act (No. 03-03) to reduce the period of police custody from 96 hours (renewable twice)".

27- "16. The Committee recommends that the State party undertake a comprehensive review of its legislation in order to bring it into compliance with the principles and provisions of the Optional Protocol, and in particular that the State party:

(a) Explicitly prohibit and criminalize the recruitment and use of children under 18 years of age in hostilities by armed forces, non-State armed groups and security companies;" CRC/C/OPAC/MAR/CO/1, 13 November 2014, Committee on the Rights of the Child, Concluding observations on the report submitted by Morocco under article 8, paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

28- "18. The Committee recommends that the State party establish extraterritorial jurisdiction over acts prohibited under the Optional Protocol, including the conscription or enlistment of children into the armed forces or armed groups, or their use to participate actively in hostilities, if such crimes are committed by or against a Moroccan national or a person who otherwise has a close link with the State party". CRC/C/OPAC/MAR/CO/1, 13 November 2014, Committee on the Rights of the Child, Concluding observations on the report submitted by Morocco under article 8, paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

29- E/CN.4/2006/98, 28 December 2005, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (§72).

30- S/RES/1566 (2004), adopted by the Security Council at its 5053rd session on 8 October 2004 (§3).

31- Adopted by the Committee of Ministers on 19 September 2001.

32- This definition is provided for in Article 7 of the Council of Europe Convention on the Prevention of Terrorism.

33- Article 218-1 (§1) of the current Penal Code: "The following offenses shall constitute acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking aimed at gravely affecting law and order by intimidation, terror or violence: ..."

34- Human Rights Committee : CCPR/CO/82/MAR; 1 December 2004, Concluding observations of the Human Rights Committee - Morocco



المجلس الوطني لحقوق الإنسان
 Conseil national des droits de l'Homme

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