



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

The Fight against Human Trafficking

Opinion of the National Council for Human Rights on Bill No. 27.14



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I. BACKGROUND AND REFERENCE

The National Council for Human Rights (CNDH)

Considering the request for an opinion made on 9 June 2016 by the President of the House of Councilors and received the same day;

Considering the Rules of Procedure of the House of Councilors, especially Article 282; Considering the Dahir No. 1-11-19 of 25 Rabii I , 1432 (1 March, 2011) establishing the National Council for Human Rights, in particular Article 16;

Considering the principles of Belgrade on the relationship between national institutions of human rights and parliaments, including the principles 22, 24, 25 and 28;

Considering the Memorandum of Understanding concluded on 10 December 2014 between the House of Councilors and the National Council for Human Rights, in particular Article 2;

Pursuant to the Constitution, including its preamble and Articles 19, 21, 22, 23, 24, 117, 118, 119, 120, 121, 123 and 126;

Considering Law No. 02.03 pertaining to entry and stay of foreigners into the Kingdom of Morocco, to emigration and illegal immigration, published in the Official Bulletin of 11 November , 2003 by Dahir No. 1-03-196 of 16 Ramadan 1424;

Considering the National Immigration and Asylum Strategy (SNIA) adopted by the Government Council on 18 December , 2014;

Considering the Moroccan Charter for Sustainable Tourism signed on 25 January , 2016 and in which the CNDH is involved;

Considering the Convention on Slavery (1926), signed 11 May 1959 by Morocco;

Considering the Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, to which Morocco has acceded 17 August 1973;

Considering the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), ratified by Morocco 21 June , 1993;

Considering the Convention Relating to the Status of refugees (1951), to which Morocco acceded by succession 7 November , 1956;

Considering the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), to which Morocco acceded on 21 June , 1993 in particular Article 6 as it was commented on by the Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 19;

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Considering the Convention on the Rights of the Child (1989), ratified by Morocco on 21 June , 1993 in particular Article 19 as it has been commented on by the Committee on the Rights of the Child in its General Comment No. 13, dated 18 April , 2011 and entitled «The right of the child to freedom from all forms of violence»;

Considering the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000), ratified by Morocco 2 October , 2001;

Considering the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000), ratified by Morocco 22 May , 2002;

Considering the Convention of the International Labor Organization (ILO) No. 29 on Forced Labor (1930), ratified by Morocco 20 May , 1957;

Considering the Convention of the International Labor Organization (ILO) No. 105 on the cancellation of forced labor (1957), ratified by Morocco on 1 December , 1966;

Considering the Convention of the International Labor Organization (ILO) No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (1999), ratified January 26, 2001;

6 Considering the United Nations Convention against Transnational Organized Crime, adopted by resolution 55/25 of the General Assembly on 15 November , 2000 and ratified by Morocco on 19 September , 2002;

Considering the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime, which Morocco has acceded 25 April , 2011;

Considering the UN General Assembly Resolution No. 64/293 of 12 August , 2010, entitled «the United Nations Global Plan of Action to Combat Trafficking in Persons»;

Considering the UN General Assembly Resolution No. 57/176 adopted on 18 December , 2002, entitled «Trafficking in Women and Girls»;

Considering the UN General Assembly Resolution No. 58/137 of 22 December , 2003, entitled «Strengthening International Cooperation Preventing and Combating Human Trafficking and Protecting Victims of Such Trafficking»;

Considering the UN General Assembly Resolution No. 59/156 of 20 December , 2004, entitled «Preventing, Combating and Punishing Trafficking in Human Organs»;

Considering the UN General Assembly Resolution No. 59/166 of 20 December , 2004, entitled «Trafficking in Women and Girls»;

Considering the UN General Assembly Resolution No. 61/144 of 19 December 2006, entitled «Trafficking in Women and Girls»;

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Considering the UN General Assembly Resolution No. 61/180 of 20 December , 2006, entitled «Improving the Coordination of Efforts against Trafficking in Persons»;

Recalling the relevant Concluding Observations in the fight against trafficking in persons addressed to our country by the Human Rights Committee on 1 December , 2004; by the Committee on the Elimination of Discrimination against Women on 23 January 2008; by the Committee against Torture on 21 December , 2011; by the Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families on 13 September , 2013; by the Committee on the Rights of the Child on 19 September , 2014 and the Committee on Economic, Social and Cultural Rights on 8 October , 2015;

In view of the guidance from the Working Group on Trafficking in Persons in the Vienna meeting on 27-29 January , 2010 on «Non-punishment and non-Prosecution of Victims of Trafficking: Administrative and Judicial Approaches to Offenses Committed in the Process of Such Trafficking»;

Recalling the relevant recommendations in the fight against trafficking in persons, addressed to our country in the framework of the Universal Periodic Review (2012);

In view of the report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children during her visit to Morocco in 2013;

In view of the Council of Europe Convention on Action against Trafficking in Persons, to which the National Council for Human Rights recommended to adhere;

In view of the jurisprudence of the European Court of Human Rights in the area of the fight against trafficking in persons;

Considering the model law against trafficking in persons developed by UNODC (Vienna, 2010);

The National Council for Human Rights presents its opinion on the law bill No. 27.14 on the fight against trafficking in persons.

Since the establishment in 2013 of a new migration policy based on a comprehensive, humanist and respectful of human rights, several reforms aiming to revise the legal framework for asylum, entry and stay of foreigners and the fight against trafficking in persons have been initiated. The bill subject of this opinion is part of the policy aiming to bring the aforementioned legislative system up into accordance with the 2011 constitution and the international commitments of Morocco. To this end, the National Council for Human Rights recommends that the following points are taken into consideration in the process of discussion and amendment of Bill 27. 14.

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The recommendations of the National Council for Human Rights have the following objectives:

- The effective implementation of the provisions of the Preamble of the Constitution relating to the prohibition and the fight against discrimination based on sex, as well as those of Articles 19, 21 and 22, 117, 118, 119, 120, 121, 123 and 126;
- The implementation of commitments arising under the Convention on the Elimination of All Forms of Discrimination against Women, in particular Articles 1 and 2;
- The implementation of the concluding observations and recommendations addressed to our country by institutions and international bodies in the area of the fight against trafficking in persons;
- Strengthening the provisions relating to the necessary definitions in the area of the fight against trafficking in persons;
- The accuracy of certain definitions and provisions of the bill in order to harmonize it with its object and purpose, namely the fight against trafficking in persons, especially women and children.

RECOMMENDATIONS OF THE COUNCIL

8 Recommendations pertaining to Article I of the bill

With regard to Article 448-I of the Criminal Code, the National Council for Human Rights welcomes the consideration of its recommendation pertaining to the definition of exploitation as formulated in the thematic report on Foreigners and Human Rights. The National Council for Human Rights notes in this regard that the definition given by Article 448-I of the Penal Code includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

The National Council for Human Rights also stresses the compatibility of the definition on trafficking adopted in the bill with the definition of trafficking emanating from Article 3 of the Additional Protocol to the UN Convention against Transnational Organized Crime. The CNDH also appreciates the inclusion of the criminalization of mediation in the process of trafficking.

The National Council for Human Rights notes, however, the non-inclusion in the bill of special terms relating to trafficking in particular. To this end, the Council recommends to the legislator to strengthen the provisions of this article, by introducing a new paragraph at the beginning of the article to define trafficking in persons as an exploitation of a position of vulnerability, slavery, similar practices and secondary victimization of the victim. The Council notes in this regard that the definition given by the Model Law UNODC against

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trafficking in persons to victimization is the situation in which one same person is victim of more than one crime during a given period of time. The «secondary victimization» means victimization that does not result directly from a criminal act but from the reaction of institutions and individuals to the victim.

Moreover, the CNDH recommends strengthening the first article of the bill with an additional paragraph stipulating the specific terms of the definition of trafficking in persons, including the definition of vulnerability in the context of the fight against trafficking. The CNDH proposes to transpose the definitions of these terms as provided for in Article 5 of the Model Law against Trafficking in Persons developed by UNODC.

The National Council for Human Rights recalls in this respect that Article 5 of the aforementioned Model Law provides that «for the purposes of this Law, the following definitions shall apply:

- a) “Abuse of a position of vulnerability” shall refer to any situation in which the person involved believes he or she has no real and acceptable alternative but to submit; or “Abuse of a position of vulnerability” shall mean taking advantage of the vulnerable position a person is placed in as a result of:
- (i) Having entered the country illegally or without proper documentation; or
 - (ii) Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance; or
 - [(iii) Reduced capacity to form judgements by virtue of being a child, illness, infirmity or a physical or mental disability; or
 - (iv) Promises or giving sums of money or other advantages to those having authority over a person; or
 - (v) Being in a precarious situation from the standpoint of social survival; or
 - (vi) Other relevant factors.”

Regarding the consent of the victim of human trafficking, the National Council for Human Rights has noted that Article 448-I states that the act of exploitation can only be achieved if it is the result of the negation of the will of the person by any means. Article 448-I4 provides for exemption from civil and criminal liability of victims of trafficking in persons for any act committed under threat, except in the case of a commission of an incriminating act voluntarily and without being subject to the threat.

It should be noted that the limited exemption of the victim of trafficking in persons from civil and criminal liability, which is conditioned by the refusal of the latter (the victim), could pose the problem of the burden of proof.

Conversely, the victim of human trafficking will become presumed guilty until proven innocent. For this reason, the CNDH proposes to introduce a provision in the fourth paragraph of Article 448-I of the Criminal Code under which the consent of the victim is irrelevant in the case of offenses constituting trafficking.

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Noting that the forced labor sentence no longer constitutes one of the penalties provided by the Penal Code, the CNDH proposes to repeal the reference made to it in Article 448-1 of the law that provides for the exclusion of the definition of «forced labor» from related work arising from a judicial decision.

Regarding Article 448-2 of the Criminal Code bill, the CNDH has noted that the wording of this article poses the problem of non-implementation of the principle of individualization of sentences depending on the nature of the offender (expert or ordinary person and according to the seriousness of the offense and the social unrest it can cause). This principle is provided by the Penal Code (Article 141-151). To this end, the Council recommends to rearticulate this article, strengthening its provisions by taking into consideration the personality of the offender and the consequences of the seriousness of the offense.

In view of the varying severity of the offenses relating to trafficking in persons, the non-distinction between various forms of trafficking offenses could result in the risk that some seemingly heavy penalties are not applied. To this end, the CNDH recommends to differentiate sanctions based on the seriousness of offenses.

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With regard to Article 448-5 of the Criminal Code bill, the CNDH advocates specifying the act committed by an «organized criminal group» which appears in Article 448-5, compared to that committed by two persons or more in their quality as authors or accomplices described in Article 448-2.

This distinction particularly affects the sentences and penalties prescribed under the bill. However, the National Council for Human Rights underlines that the provisions of the law bill on the fight against trafficking in persons should apply to all forms of trafficking, whether it is national or transnational and whether or not it is linked to organized crime, in accordance with Article 4 of the Model law.

The CNDH highlights in this context the recommendation of the Special Rapporteur on trafficking on persons in his report following his visit to Morocco in 2013, urging the government to « increase its efforts to prosecute traffickers whilst guaranteeing fair trial rights consistent with human rights based approach to criminal justice response and establish necessary legal framework and procedures in order to ensure that victims/ witnesses are protected.»

Given the fact that some witnesses to the crime of trafficking in human beings could be subjected to threats, as well as the spouse of the offender, ascendants, descendants or siblings, the CNDH recommends to eliminate the second paragraph of Article 448-7 of the Penal Code bill. In addition to the protection granted to the witness provided for

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under the current law, other provisions could be mobilized, such as the criminal provisions pertaining notably to the failure to assist persons in danger (Article 431 of the Penal Code).

The CNDH supports incentive measures for witnesses in order to report offenses related to trafficking, as incorporated in Article 448-12. It encourages the implementation of institutional measures for witnesses' protection and sheltering.

Regarding Article 448-14 of the Penal Code project, the CNDH recommends the elimination of the reference (made in the last sentence of the article) to any possible willingness or to the lack of a threat, all of which is likely to constitute grounds for criminal and civil liability of the victim of trafficking.

In light of this, the National Council for Human Rights points out that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant where one of the means set forth by the first paragraph of Article 448-1 have been used. It is logically and legally impossible, in the opinion of the CNDH, to "consent" when one of the means listed in the definition provided in the first paragraph of Article 448-1 have been used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will. This position is consistent with the recommendations of the Working Group on Trafficking in Persons (Vienna, 27-29 January 2010) on the non-liability of victims of trafficking for the illegal acts committed under duress or for offenses committed by the trafficked person, which are directly related to trafficking. Generally, victims of trafficking should be exempted from penalties for prostitution, for illegal immigration and other related offenses arising from trafficking.

Recommendations Relating to Article 2 and 3

The Council recommends introducing in Article 2 of the bill a provision in Article 82-5-1 of the Code of Criminal Procedure, under which the possibility of voluntary repatriation is guaranteed to victims regardless of their participation in any possible legal proceedings. The CNDH recommends introducing in Article 3 of the bill a provision in Article 82-7 of the Criminal Procedure Code in order to ensure the protection of witnesses, experts and whistleblowers with regard to offenses related to trafficking in persons.

Considering that the informal sector of traditional crafts can be a potential hotbed for trafficking, the Council recommends introducing in the 27.14 bill an article supplementing Dahir Number: 1.72.184 of July 27th, 1972 on social security in order to extend social protection to include workers in this sector.

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Furthermore, the Council reiterates its previous recommendations regarding the amendment of the provisions of the Family Code in order to prohibit the marriage of minors under 18 years old and to make into a criminal autonomous offense any act aimed at forcing an adult or a child under 18 years of age to enter into marriage, while enshrining civil liability of accomplices in the planning and / or execution of this marriage. In the same context, the Council reiterates its recommendation on the definition of the age of admission to domestic employment at 18 years old.

Regarding Article 82-5-1 of the Code of Criminal Procedure, the National Council for Human Rights recommends to introduce in the first paragraph a provision to the effect that guiding principles and an orientation guide will be elaborated through a regulatory text for the benefit of officers in charge of the application of the law in order to help them identify victims of trafficking and refer them to appropriate agencies to assist them. This proposal falls within the framework of the implementation of a recommendation of the UNODC Model Law against trafficking in persons which calls on States to «develop guidelines for law enforcement agencies to assist them in the identification of victims and their referral to appropriate assistance agencies. Such guidelines should include a list of indicators that could be reviewed and updated as needed at regular intervals.”

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The Council further recommends replacing the phrase «competent judicial authorities may, in appropriate cases, order that the presumed guilty or suspect should be prohibited from contacting or approaching the victims of trafficking ...» with the following wording: « the competent judicial authorities order the prohibition ... ». This recommendation is justified by the necessity to transform the possibility of issuing a protection order into a protection order to be granted automatically by law to victims of trafficking.

In the same spirit, the CNDH proposes to rearticulate the penultimate subparagraph of Article 82-5-1 stating «competent judicial authorities may allow foreign victims to remain in the country until the end of the judicial procedure» with «competent judicial authorities allow victims of trafficking ... » to ensure a better protection of victims of trafficking and to reinforce their rights.

The CNDH reiterates the importance of integrating measures adapted to the vulnerability of trafficked persons and to limit secondary victimization. This concept means a victimization that does not result directly from a criminal act but from the reaction of institutions and individuals to the victim of such act. As such, a person should be considered and treated as a victim of trafficking even before there is a strong suspicion as to the alleged perpetrator of the offense or before the status of victim is formally granted / recognized to the said person.

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In order to protect the rights of vulnerable people and to strengthen their defense guarantees, the CNDH underlines the importance of granting automatic assistance to minor victims of trafficking who wish to initiate civil proceedings and this is in light of the UN guidelines for action on children in the criminal justice system, which stress the necessity of a comprehensive child-centered juvenile justice process.

In order to ensure the rights of the defense to the vulnerable under the «principle of access to justice» under Article 13 of the Convention on the Rights of Persons with Disabilities, the National Council for Human Rights also stresses the importance for this category to benefit from the ex officio appointment of a public defense lawyer.

The National Council for Human Rights welcomes the fact that the competent judicial authorities have been given the possibility to allow foreigners in such cases to stay in the country until the end of the judicial proceedings or even thereafter, as stated by the current legislation.

However, the Council underlines the importance of adding to this current legislation an authorization pertaining to the administrative authorities responsible for issuing residence permits.

If a person is identified as a victim of trafficking, the National Council for Human Rights encourages competent authorities to issue a temporary residence permit to that person, regardless of whether or not she/he is cooperating with the competent authorities, with the possibility of renewal in accordance with Article 7 of the additional Protocol to the Convention against transnational organized crime ratified by Morocco April 25, 2011.

Finally, the CNDH reiterates its recommendation on the protection of data provided by victims of trafficking, which the Council expressed in its main memorandum on the initial draft bill of the code of criminal procedure. In addition to its aforementioned recommendation, the Council has proposed also in the aforementioned main memorandum to document all the obligations of social workers in the area of the protection of confidential data in their status currently underway, and to build on the International Declaration of Social Work Ethics adopted by the International Federation of Social Workers in 2004.

Recommendations Relating to Article 4

Regarding Article 4 of the draft bill, the National Council for Human Rights recommends clarifying the scope of government involvement in assisting the victims of trafficking in persons.

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The National Council for Human Rights recalls with this regard the recommendations of the Committee on the Rights of Migrant Workers in its concluding observations on Morocco's initial report (2013), which consisted of the establishment of effective mechanisms for the identification, protection and assistance to all victims of trafficking, in particular by providing them with shelters and by launching projects in order to help them rebuild their lives.

The CNDH recommends to clarify the responsibility of public authorities with regards the costs of protection and support of victims. In this regard, specific budgets should be mobilized and partnerships with civil society organizations can be considered.

The CNDH also recommends that Article 4 of the bill provides that victims of trafficking can benefit from free health care including the medical assistance system (RAMED).

Recommendations Relating to Article 5

The National Council for Human Rights welcomes the provisions included in Chapter 5 of the present bill supporting access to justice. In this regard, the CNDH stresses the importance of allowing victims of trafficking to gain effective access to justice through the right to appropriate legal assistance and the appointment of lawyers and competent interpreters. The CNDH recalls in this context that pursuant to subparagraph (a) of paragraph 2 of Article 6 of the Protocol on trafficking in persons, States parties are obliged to ensure that information on relevant court and administrative procedures are provided to victims.

Recommendations Relating to Articles 6 and 7

The National Council for Human Rights supports the establishment of a national body for the coordination of the fight against trafficking in persons. Such a body, which should include various stakeholders, could address the deficit in data on different phenomena related to trafficking, legal proceedings, and actually implemented measures in the area of victims and witnesses' protection. Such body shall also assume the role of a mechanism for monitoring and evaluating the policy on the fight against trafficking.

As highlighted by the Special Rapporteur on Trafficking in Persons following his visit in 2013, "given the absence of reliable data on trafficking in Morocco, there is a strong need to create a mechanism for the collection of data on cases of trafficking as well as forms, trends and manifestations of trafficking. This is highly instrumental in designing informed policy responses to address trafficking in persons.

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The terms and conditions of the institution and organization of such mechanism, established by a regulatory text, are yet to be defined. The creation of this commission is in line with paragraph 3 of Article 9 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. This paragraph requires States parties to implement exhaustive and coordinated public policies in the fight against trafficking in persons and to enhance cooperation with competent authorities, international organizations and national and international NGOs concerned with the issue of trafficking in people and its prevention.

The CNDH recommends to extend the Commission's remit to include the authority to ensure cooperation with the United Nations system and its specialized agencies in the field of trafficking, in particular the Special Rapporteur on trafficking in persons and UNODC.

Finally, the CNDH recommends to reintroduce, as stated in an earlier version of the initial draft bill, a provision enabling the Council to exercise the powers of the National Independent Rapporteur on the fight against trafficking in persons. To this end, the Council will not adhere to the National Commission but will work closely with the competent authorities and civil society organizations to collect information necessary for the preparation of its report.

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ANNEX

Accompanying measures

Articles 6 and 7 deal with the establishment of the National Commission for the fight against trafficking in persons and define its remit. For information purposes, the National Council for Human Rights suggests below a series of measures to strengthen the work of this Commission.

- Accession to the Convention of the Council of Europe on the fight against trafficking in persons, open to accession by non-member countries;
- Taking into account the recommendation of the Committee on the Rights of the Child in 2014, the National Council for Human Rights stresses the importance of awareness raising campaigns for the sector of tourism and the general public as an effective prevention tool against child sex tourism. The CNDH emphasizes the need for dissemination of the Moroccan Charter for Sustainable Tourism and the Global Code of Ethics for Tourism of the World Tourism Organization to travel agencies and the tourism sector. This Charter, to which the CNDH contributed, enshrines the commitment of the tourism operators to protect children from all forms of economic and sexual exploitation;
- The development of a concerted and participatory national plan for the fight against trafficking in persons;
- The establishment of a specific training program to strengthen the capacity of law enforcement officials active in the fight against trafficking (border patrol, national police, Royal Gendarmerie, justice, etc.) The CNDH recalls in this context that the National Immigration and Asylum Strategy (SNIA) provides for the specialization of certain operators in charge of the fight against trafficking in persons through the creation of a unit specializing in the fight against trafficking in persons, which is composed of law enforcement officers;
- Strengthening partnerships with associations active in the field of the fight against trafficking in persons and the protection of victims, including in the field of identifying potential victims of trafficking. The CNDH recalls in this respect that the National Immigration and Trafficking Strategy plans to set up a cell in collaboration with associations, specific methods of protection of witnesses and victims, and a system for reporting (toll free number);
- The CNDH recommends that governmental ministries (Justice, Interior, Foreign Affairs and Cooperation, in charge of Moroccans Living Abroad and Migration Affairs) incorporate the phenomenon of trafficking in their data gathering system;
- Finally, the CNDH recommends that the government launch a national survey on the phenomenon of trafficking in persons.

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