

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on minority issues; the Special Rapporteur on the right to privacy; and the Special Rapporteur on freedom of religion or belief

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on minority issues; Special Rapporteur on the right to privacy and Special Rapporteur on freedom of religion or belief, pursuant to Human Rights Council resolutions 40/16, 42/22, 34/18, 41/12, 42/10, 35/11, 34/6, 37/2 and 40/10.

In this connection, we offer the following comments directed to the Unlawful Activities (Prevention) Amendment Act 2019 (the amended Act) and to the current counter-terrorism legislation, the 1967 Unlawful Activities Prevention Act (the Act). We are raising concerns in relation to their compatibility with India's obligations under international human rights law and in relation to pertinent international standards of counter-terrorism legislation. In particular, we note that as enacted, the amendment raises serious concerns regarding the designation of individuals as "terrorists" in the context of ongoing discrimination directed at religious and other minorities, human rights defenders and political dissidents, against whom the law has been used. Compliance with human rights treaties and standards are complementary and mutually reinforcing goals with effective counter-terrorism measures.¹ We, therefore, encourage an ongoing review and reconsideration of certain key aspects of the amended Act to ensure that it is in compliance with your Excellency's Government's international human rights obligations.

Overview of international human rights law standards applicable

We respectfully call your Excellency's Government's attention to the relevant provisions enshrined in the International Covenant on Civil and Political Rights (ICCPR), acceded to by India on the 10 April 1979, and the Universal Declaration of Human Rights (UDHR). In particular, we consider international human rights standards applicable under article 15(1) ICCPR and article 11 UDHR, which provide for the principle of legality;

¹ A/HRC/16/51 para. 8.

articles 19, 21 and 22 ICCPR and articles 19 and 20 UDHR, which guarantee the universally-recognized right to freedom of opinion and expression and freedom of peaceful assembly and association; article 26 ICCPR which recognizes the right to equality and the prohibition of discrimination, in this case because of the targeting of human rights defenders and persons belonging to certain minorities; and article 14(2) ICCPR and article 11(1) UDHR, by which any reversal of burden of proof by the State and undue delay in pre-trial detention is inconsistent with international legal standards. In particular, we refer to article 17 ICCPR and article 12 UDHR, which protect against arbitrary or unlawful interference with a person's privacy, reputation and home. We also consider article 2 ICCPR, whereby the State is under a duty to adopt laws that give domestic legal effect to the rights and adopt laws as necessary to ensure that the domestic legal system is compatible with the Covenant.²

We further refer to the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180. These resolutions require that States must ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law.

Concerns relating to the compatibility of the Law with international human rights law

Introduction

The Unlawful Activities (Prevention) Amendment Bill, 2019 (the Bill) was introduced by the Minister of Home Affairs, Amit Shah, in the Lok Sabha (Parliament, Lower chamber) on 8 July 2019.³ The Bill was passed on 24 July 2019 in the Lok Sabha and on the 2 August 2019 in the Rajya Sabha (Higher Chamber) and received presidential approval on 8 August 2019⁴. The new law amends the 1967 Unlawful Activities (Prevention) Act (the Act), which provides specific procedures to deal with terrorist activities. It follows amendments of the Act in 2004, 2008 and 2013 in order to incorporate new provisions concerning different aspects of terrorism.

We are aware of the previous concerns articulated about the effects of the Act which include its wide application to encompass activities falling short of acts of terrorism in the absence of a clear definition of terrorism in the law. While we welcome that the new law aggregates the International Convention for Suppression of Acts of Nuclear Terrorism (2005) to the treaties listed in a schedule list of applicable Conventions enshrined in the Act pursuant to section 11 (b), we are concerned that the

² See *Leyla Şahin v. Turkey* [GC], No. 44774/98 at para. 136, ECHR 2005.

³ The Unlawful Activities (Prevention) Amendment Bill, 2019, PRS *Legislative Research* available at <https://www.prsindia.org/billtrack/unlawful-activities-prevention-amendment-bill-2019>.

⁴ The Unlawful Activities (Prevention) Amendment Act, 2019, available at <http://egazette.nic.in/WriteReadData/2019/210355.pdf>.

changes to the aforementioned 1967 Unlawful Activities (Prevention) Act aggravate the previously identified human rights deficits of this law⁵.

We encourage a process of independent review not only to engage international best practice in relation to the use of counter-terrorism law but also because review offers the government an important opportunity to ensure that the law is human rights compliant. It would enable the Government to tighten and ensure that the definition of terrorism contained in national law is appropriately precise, narrow and tailored, and that use of counter-terrorism law and practice are in conformity with international human rights standards, and strictly contained to those specifically violent acts that constitute terrorism under international law.

We note and positively acknowledge previous decisions of the Indian Supreme Court in two cases *Indra Dass v. State of Assam* (2011) and *State of Kerala v. Raneef* which provide reasoned interpretation of the 1967 Act which appear in consistency with the State's international law obligations. These decisions offer a positive domestic benchmark on how to address some of the human rights deficits of the amended law. We remind the Government of the obligations contained in article 2(2) of the ICCPR, stipulating that States parties must take all necessary steps to adopt laws to give effect to the rights enshrined in the Covenant.⁶ We note that in relation to the amendments to Counter-Terrorism legislation, the legislature shall review and ensure that any law approved by it conforms to the norms of international human rights that are binding upon the State.⁷ In particular, we refer to Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights.

Definition and Commission of Terrorism

We note that while originally only organisations could be designated “terrorist organisations” falling under the scope of the Act pursuant to Chapter I, 2 (e)(i), the amended Act expands this definition to individuals. It empowers the National Investigation Agency (NIA) to apply the Counter-Terrorism legislation to individuals designated in the legislation according to sections 5 (ii) and (iii) and section 6 (i) and (v) with relevance also for designation and regulation of organisations (and the rights of individuals associated thereto) in the sections 35 and 36 of Chapter IV of the Act (“terrorist organizations”).⁸ The legislation sets out that if an individual commits or participates in acts of terrorism, prepares for terrorism or promotes terrorism, this individual shall be designated a terrorist.⁹ We caution that the expansion of the

⁵ Jayanth K. Krishnan, *India's Patriot Act: POTA and the Impact on Civil Liberties in the World's Largest Democracy* 22(4) *Law & Inequality: A Journal of Theory and Practice* 265 (2004);

⁶ General Comment 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2014) UN Doc CCPR/C/21/Rev.1/Add.13.

⁷ A/HRC/16/51 para. 14 (2).

⁸ The Unlawful Activities (Prevention) Amendment Bill, 2019, *PRS Legislative Research*, (n 3).

⁹ How amendments to UAPA will give more teeth to anti-terror law, *Times of India*, 24 July 2019, (n 4).

designation of individuals as “terrorist” as enshrined in the legislation is problematic, because the Act fails to define a “terrorist threat” clearly and introduces broad discretion for the relevant authorities to label a person as a terrorist threat based on imprecise criteria. In this context, we remind your Excellency’s Government that a vague and broad scope of anti-terrorism legislation containing criminal provisions contravenes the principle of legality, among others.¹⁰

We are concerned that the definition of a ‘terrorist act’ in the Act differs substantially from the definition advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.¹¹ We underscore that the definition of terrorism and related offences must be “accessible, formulated with precision, non-discriminatory and non-retroactive.”¹² We note that Chapter 1 of the Act sets out a number of definitions that frame the legislation and its amendment. According to Chapter I, 2 (k) “terrorist act” has the meaning assigned to it in section 15, and the expressions “terrorism” and “terrorist” shall be construed accordingly. Section 15 (Chapter IV, section 15 of the Act) defines a “terrorist act” as “whoever does any act with intent to threaten or likely to threaten the unity, integrity, security [economic security] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,” by means of using lethal weapons to cause death, destruction of property, particularly property used for the defence of India, by means of causing or attempting to cause death of a public functionary or by detention, kidnapping or abduction of individuals.

We note that to categorise an offense as a ‘terrorist act’ consistent with good practice in international law implies three elements that must be cumulatively present: a) the means used must be deadly; b) the intent behind the act must be to cause fear among population or to compel a government or international organization to do or refrain from doing something; and c) the aim must be to further an ideological goal. In contrast, the Act offers an overbroad and ambiguous definition of a ‘terrorist act’ which includes the death of, or injuries to any person, damage to any property, an attempt to overawe any public functionary by means of criminal force and any act to compel the government or any person to do or abstain from doing any act.

In this regard, we recall that the definition of terrorism and terrorism offences must be confined to acts that are ‘genuinely’ terrorist in nature in accordance to the elements identified by the Security Council in its resolution 1566 (2004). Criminal offences must thus be set out in “precise and unambiguous language that narrowly defines the punishable offence.¹³” Therefore, we urge the Government to maintain a definition of terrorism consistent with the core legal meanings adopted by the Security Council and by State Parties who have signed relevant multilateral terrorism conventions and commends the definition of terrorism developed by this mandate for your

¹⁰ [CCPR/C/GC/34](#), paragraph 50.

¹¹ [A/HRC/16/51](#)

¹² [A/HRC/16/51](#), paragraph 27 (citing International Covenant on Civil and Political Rights, art. 15, General Assembly resolution 63/185, para. 18, and E/CN.4/2006/98, para. 49).

¹³ Inter-American Court of Human Rights, *Castillo Petruzzi et al. v Peru*, para. 128

consideration¹⁴, as well as compliant with the narrow and precise definition set out by the Security Council. We also underline that the definition of terrorism in national legislation should be guided by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly.¹⁵

We draw your Excellency's Government attention to the "principle of legal certainty" under international law, enshrined in article 15(1) ICCPR and article 11 UDHR. This principle requires that criminal laws must be sufficiently precise so it is clear what types of behaviour and conduct constitute a criminal offence and what would be the consequence of committing such an offence. This principle recognizes that ill-defined and/or overly broad laws are open to arbitrary application and abuse. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has highlighted the dangers of overly broad definitions of terrorism in domestic law that fall short of international treaty obligations.¹⁶

We note that the new legislation fails to specify other imprecise and unclear formulations enshrined in the Act. According to the Act, Chapter I, 2 (m), a "terrorist organisation" means an organisation listed in the Schedule of the Act or an organisation operating under the same name as an organisation so listed. According to Chapter VI, section 35, an organisation is designated as "terrorist organisation" if it a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise involved in terrorism. Chapter IV, section 38 sets out that "a person, who associates himself, or professes to be associated, with a terrorist organisation commits an offence relating to membership of a terrorist organisation." An "unlawful association" means any association, that has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity pursuant to Chapter 1, 2 (p) of the Act. Any police officer "may search any person entering, or seeking to enter, or being on or in," a premise that "is used for the purpose of unlawful association" and "may detain any such person for the purpose of searching him," pursuant to Chapter II, section 8 (6) of the Act. We note that particularly in situations when definitions of terrorism offenses are linked to the listing of proscribed organisations (either in conjunction with the Consolidated List of the United Nations or where the State advances its own list of proscribed organizations domestically), powers of arrest, questioning and investigation, alterations in the rules concerning detention and trial, and administrative measures, such as the forfeiture of property, the adoption of overly broad definitions of terrorism carries the potential for the abuse of applicable rights along a deliberate misuse of the term.¹⁷

We recall that the failure to use precise and unambiguous language in relation to terrorism offences fundamentally affects the protection of a range of fundamental human

¹⁴ A/HRC/16/51

¹⁵ See General Assembly resolutions 49/60 and 51/210, which have been continuously recalled by the Assembly in its resolutions on measures to eliminate international terrorism, most recently in its resolution 72/123.

¹⁶ A/70/371, para. 46(c); A/73/361, para. 34.

¹⁷ See E/CN.4/2006/98 (2005), para. 27, and E/CN.4/2006/78, para. 44.

rights. “Unlawful activity”, in relation to an individual or association, means any action taken by such individual or association whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise that a) may incite the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, b) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India or c) which causes or is intended to cause disaffection against India pursuant to the Act, Chapter I, 2 (o). We note that it is not sufficient as a matter of compliance to international human rights law to merely state that a person has violated a particular law or that he or she has breached State security.¹⁸ The person must be given an explanation on what constitutes “terrorist” acts, to enable an adequate defence of her actions. In this regard, we note that non-violent criticism of State policies or institutions, including criticism of the judiciary, should not be made a criminal offence under counter-terrorism measures in a society governed by rule of law and abiding by human rights principles and obligations.¹⁹ The adoption of overly broad definitions of terrorism therefore carries the potential for deliberate misuse of the term and pose the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction on human rights.²⁰

Transfer of Broad Powers to the Executive

We are concerned with the transfer of broad and increased powers to governmental authorities to investigate, seize property and designate individuals responsible for acts that are ‘likely to threaten’ or ‘likely to strike terror in people’ due to the changes introduced by the Bill. The notion of potential/likely terrorism brings the law’s application squarely into “pre” crime-based regulation, a matter that deeply concerns us for its effects on the rule of law and the proportionate approach to sanction. The Act initially required an investigating officer to obtain prior approval of the Director-General of the Police to seize properties suspected to be linked with terrorism pursuant to section 25 of the Act (“Powers of investigating officer and Designated Authority and appeal against order of Designated Authority”). The 2019 amendment adds that if an officer of the National Investigation Agency (NIA) conducts the investigation, the approval of Director General of NIA, instead of the Director General of Police, would be required pursuant to section 3 of the Bill. Under the Act, the investigation may be conducted by officers only of the rank of Deputy Superintendent or Assistant Commissioner of Police or above pursuant to Chapter VII, section 43. However, the amendment additionally allows “officers of the National Investigation Agency, below the rank of Inspector” to investigate cases pursuant to section 8 of the Bill.²¹ In this regard, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted a growing number of complaints that

¹⁸ Communication No. 414/1990, *Mika Miha v Equatorial Guinea*, Views adopted by the Human Rights Committee on 8 July 1994, para. 6.5.

¹⁹ A/HRC/37/52, para. 47.

²⁰ A/HRC/16/51, para. 26.

²¹ The Unlawful Activities (Prevention) Amendment Bill, 2019, PRS *Legislative Research* (n 3).

legislation introduced to combat terrorism restricts rights by according broad powers to the executive, to the exclusion of judicial oversight and control.²²

Given the aforementioned broad and imprecise definition of terrorist organisation and the participation in it, we caution that broad powers conferred to the executive by the amendment may contribute to the arbitrary and unreasonable use of those powers. The Act's vague definition of "unlawful activities" and "membership" of terrorist organisations confers discretionary powers upon state agencies and weakens judicial oversight, thereby diminishing civil liberties in the process. In this context, we recall that where the law relating to terrorism confers discretionary powers upon public agencies, adequate safeguards, including judicial review, must exist for the purpose of ensuring that discretionary powers are not exercised arbitrarily or unreasonably. Counter-terrorism measures should, to the broadest possible extent, be entrusted to civilian authorities whose functions relate to combating crime and whose performance of counter-terrorism functions is pursuant to ordinary powers.²³ We would like to recall that the exercise of functions and powers shall be based on clear provisions of law that exhaustively enumerate the powers in question recognized by the mandate as best practice.²⁴

Threats to Human Rights Defenders or Religious and other Minorities as well as Restrictions on Freedom of Expression

In relation to the Act and its 2019 amendment, we are concerned about the use of counter-terrorism legislation as a way to conflate human rights and civil society activities with terrorist activities. In some instances, national security and counter-terrorism legislation and other measures, such as laws regulating civil society organisations, have been misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law.²⁵ Laws that criminalise freedom of expression or views that appear to praise, glorify, support, defend, apologise for or that seek to justify acts defined as "terrorism" under domestic law implicate both serious concerns of legality and limitations on freedom of thought and expression. The application of such provisions has been targeted at, inter alia, the legitimate activities of political opposition, critics, dissidents, civil society, religious and other minorities as well as human rights defenders, lawyers, religious clerics, bloggers, artists, musicians and others.²⁶ We would like to remind your Excellency's Government that, in its resolutions, the Human Rights Council noted its grave concern that "in some instances, national security and counter-terrorism legislation and other measures, such as laws regulating civil society organizations, have been misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law."²⁷

²² A/63/223, para. 13; See, also, report of the Special Rapporteur on the independence of judges and lawyers,

A/HRC/4/25, para. 32.

²³ A/HRC/16/51, Annex, Practice 3(1).

²⁴ A/HRC/16/51, para. 15.

²⁵ A/HRC/RES/34/5, para. 12.

²⁶ A/HRC/37/52, para. 47; See also IND 21/2018 and IND 17/2019

²⁷ [A/HRC/RES/25/18](#), [A/HRC/RES/27/31](#), [A/HRC/RES/32/31](#) and [A/HRC/RES/34/5](#).

We caution that the proposed expansion of the legal scope of the Act to individuals as outlined in the Bill will broaden potential discrimination against religious and other minorities as well as human rights defenders and is being used to target certain civil society actors on political, religious or other unjustified grounds.²⁸ In this regard, we would like to draw the attention of your Excellency's Government to article 19 of UDHR and article 19 of the ICCPR, which provide for the right to freedom of expression, as well as to Human Rights Council resolution 12/16, calling on States to recognise the exercise of the right to freedom of opinion and expression as one of the essential foundations of a democratic society. Further, article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities indicates that "States shall take measures, where required, to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law". This principle is also reflected in articles 21 and 22 of the ICCPR and article 20 UDHR on freedom of peaceful assembly and association and the principles enunciated by Human Rights Council resolution 24/5, and in particular operative paragraph 2, which "reminds States of their obligation to respect and fully protect the [right] of all individuals to... associate freely, online as well as offline ... seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the [right] to freedom of... association are in accordance with their obligations under international human rights law."²⁹ Furthermore, Article 26 of the ICCPR stresses that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] religion [...]."

In this regard, we wish to emphasize that the exercise of all functions under the law relating to terrorism may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right.³⁰ We recall that any restriction of rights, where they are temporally derogable, derogation measures shall not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.³¹ We further refer to the Human Rights Committee General Comment No. 34 (2011), on the right to freedom of opinion and expression. Accordingly, "All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion." In this regard, we caution against the misuse of counter terrorism legislation with penal sanctions against individuals peacefully exercising their rights to freedom of expression, as well as freedom of religion or belief and freedom of peaceful association and assembly.³²

²⁸ A/70/371, para. 46(c).

²⁹ See also, UN Declaration on Human Rights Defenders, article 5 (a) and article 6 (b) and c).

³⁰ A/HRC/16/51, para. 14, Practice 2 (2).

³¹ General comment No. 29, op.cit., paras. 8 and 13(c); and *A and others v Secretary of State for the Home Department*, 2004, UKHL 56, para. 68.

³² In its resolutions, HRC noted its grave concern that "in some instances, national security and counter-terrorism legislation and other measures, such as laws regulating civil society organizations, have been

Furthermore, we would like to refer to the fundamental principles set forth in 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, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. Article 12(2) in fact requires the State to take all necessary measures to ensure the protection by the competent authorities of everyone against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.

Fair Trial Rights and Due Process

The Act raises important issues regarding the right to be presumed innocent, as it reverses the burden of proof on the accused. According to the Act, if the government, while undertaking recovery of arms or finds fingerprints of the accused on materials associated with a terrorist act, it may presume the guilt of a suspect. Chapter VII, section 43 E stipulates that for an offense under section 15 (“terrorist act”), the “Court shall presume, unless the contrary is shown, that the accused has committed such offence” if any weapons or other material used in this act were (a) recovered from the possession of the accused or if (b) fingerprints or any other definitive evidence suggesting the involvement of the accused in the offence were found at the site of the offence. It, therefore, creates a presumption of guilt for terrorism offences based on the seizure of evidence.

We remind the government that the reversal of the burden of proof violates the right of presumption of innocence as set out in article 14(2) ICCPR and article 11(1) UDHR indicating that every person charged with a criminal offence is entitled to be presumed innocent until proven guilty according to law. This means that it is the prosecution who bears the burden of proof to show guilt beyond a reasonable doubt; that the accused person is entitled to the benefit of the doubt; and that an accused person must be treated in accordance with the presumption of innocence.³³ Statutory presumptions that reverse the burden of proof with regard to elements of an offence will violate the presumption of innocence.³⁴ We recall that any individual or entity considered to be linked to terrorism has a right to court review of the decision with due process rights applying to such review, including disclosure of the case against him, her or it, and such

misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law” ([A/HRC/RES/25/18](#), [A/HRC/RES/27/31](#), [A/HRC/RES/32/31](#) and [A/HRC/RES/34/5](#)).

³³ Human Rights Committee, general comment No. 32, para. 30. [L] [SEP]

³⁴ See Human Rights Committee, concluding observations: Australia, CCPR/C/AUS/CO/5, para. 11. [L] [SEP]

rules concerning the burden of proof that are commensurate with the severity of the sanctions.³⁵

The ICCPR allows pre-trial detention to be used as a last resort and only when it is necessary, reasonable and proportionate to the objective sought by the prosecution. Under the Act, the police are allowed a time of 180 days for investigating a case as opposed to the usual 60 to 90 days under India's criminal law.³⁶ This is a considerable expansion of the time in which a person will be held in custody 'without charge'. This further allows the police to detain an accused for 6 months without producing evidence against him or her justifying such custody. We are very concerned that the only information which may be available to a detained person in this period is the *First Information Report* and the specific section of the legislation upon which their detention is based. The first information report is only the first data point of a cognizable offence and will, in most cases, contain no information which will give an arrestee any indication of what the allegations against her may contain. It is only when the charge sheet is filed, under the amended legislation at 180 days that the detainee will have any concrete information as to the substantive basis of their arrest. During this six-month period the detainee has no entitlement to bail unless there are no "reasonable grounds for believing that the accusation against the person is prime facie true" (section 43D (5), proviso). This makes the provision of bail highly unlikely.

We are concerned that this provision constitutes a serious encroachment on the right to the presumption of innocence, and the right against self-incrimination because the arrestee will have to show the absence of "reasonable grounds" notwithstanding that they will not know the grounds for arrest proffered by the state. It also allows the accused to be held in police custody for 30 days instead of 15 days. The Act thus allows for persons to be detained arbitrarily for prolonged periods, who may ultimately be found to be innocent. We also note that in this regard the amendment fails to adjust the counter-terrorism legislation to international human rights standards. Under international law, a person charged with a criminal offence has the right to be tried without undue delay according to article 14(3)(c) ICCPR.³⁷ If this does not happen, they must be released.³⁸ In this regard, we are concerned that the Bill fails to remedy the existing inconsistencies of the Act with international human rights standards.

As good practice, it is suggested that when States utilise proscription as a method of regulation, they clearly set out in their counter-terrorism legislation the lists of terrorist organizations and individuals. The grounds and procedures for inclusion of such lists should be clearly defined in domestic law and accessible. Relevant decisions must be based on an individual assessment with full respect for due process standards and must comply with the principles of necessity, proportionality and non-discrimination. Proscription should never be based on racial, ethnic, national or religious affiliation and

³⁵ A/HRC/16/51, para. 35, Practice 9 (3).

³⁶ Code of Criminal procedure, section 167

³⁷ The UDHR does not include any specific reference to this right, but refers to a person enjoying "all the guarantees necessary for his defence" in his/her trial (art. 11(1)).

³⁸ ICCPR, art. 9(3).

must not result in the repression of free expression.³⁹ Authorities must make reasonable and proactive efforts to inform those affected of the proscription, its factual and legal basis as well as its consequences. Effective and accessible review and oversight mechanisms should be established allowing claims of mistaken identity to be dealt with speedily and making effective remedy, including compensation available for persons wrongly affected.⁴⁰ Moreover, regular periodic review of proscriptions and resulting sanctions is an essential tool in ensuring that such measures continue to be both necessary and proportionate. Given that the amendment expands the actors of terrorist offenses to individuals, we are particularly concerned with the current absence of such mechanism in the amended Act.

The Right to Privacy

The amended Act appears to interfere with the privacy, reputation and liberty of individuals contravening article 17 ICCPR and article 12 UDHR, which protects against arbitrary or unlawful interference with a person's privacy and home. Interference with an individual's right to privacy is only permissible if it is neither unlawful nor arbitrary.⁴¹ We note that the Amended Act allows for searches, seizures and arrests based on the 'personal knowledge' of the police officers without a written validation from a superior judicial authority. Pursuant to Chapter II, section 7 of the Act, an officer may enter in any premises of a person who is part of an "unlawful association" and who received a prohibitory order to use funds for such association. The officer has the power to examine the books of that person, search for moneys, securities or credits, and make inquiries from such person or any officer, agent or servant of such person, touching the origin of any dealings in any moneys, securities or credits which the investigating officer may suspect are being used or are intended to be used for the purpose of the unlawful association. We also note the powers relating to the interception of communications and that these appear to lack any independent prior approval or monitoring. Given the imprecise definition of "unlawful association," we caution that the amended Act fails to remediate potential undue and excessive interferences with a person's privacy and home or to attacks upon honour and reputation.

In this regard, we remind your Excellency's Government that the Human Rights Council has found that right to privacy is a human right that supports other human rights and forms the basis of any democratic society.⁴² Countering terrorism does not give States a carte blanche, which automatically legitimates any interference with the right to privacy.⁴³ Limitations to the right to privacy or other dimensions of article 17 are subject to a permissible limitations test, which holds that restrictions that are not prescribed by law are "unlawful" in the meaning of article 17, and those that fall short of being

³⁹ Freedom of Expression also protects speech that offends, shocks and disturbs, as long as it does not amount to advocacy of hatred that constitutes incitement to discrimination, hostility or violence, etc. See General Comment No. 34, para. 11

⁴⁰ A/HRC/16/51, para. 34. Australia, Charter of the United Nations Act, 1945, sect. 25; Belgium, arrêté royal du 28 décembre 2006; Canada, Criminal Code 1985, sects. 83.05 and 83.07.

⁴¹ ICCPR art. 17(1); Human Rights Committee, general comment No. 16, para. 3.

⁴² A/HRC/13/37, para. 11.

⁴³ A/HRC/13/37, para. 13.

necessary or do not serve a legitimate aim constitute “arbitrary” interference with the rights provided under article 17, as set forth by the Human Rights Committee in its general comment No. 27 (1999). We also recall that where the exercise of functions and powers relating to counter-terrorism legislation involves a restriction upon a human right that is capable of limitation, any such restriction should be to the least intrusive means possible and shall (a) be necessary in a democratic society to pursue a defined legitimate aim, as permitted by international law; and (b) be proportionate to the benefit obtained in achieving the legitimate aim in question.⁴⁴

The Act’s Preamble refers to United Nations Security Council Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1735 (2006) and 1822 (2008) as guiding frameworks for the legislation based on the position that all States are required to take measures to combat international terrorism. Noting also that the UN Charter which frames the functioning of the Security Council makes substantial references to human rights protection, this affirms the requirement to promote and respect human rights norms including when addressing terrorism domestically. The Security Council now consistently includes language on the need for States to ensure that “any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law” in chapter VI and chapter VII resolutions addressing terrorism.⁴⁵ We remind your Excellency’s Government that the compliance with all human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium- and long-term strategy to combat terrorism.⁴⁶ It is recommended as best practice that in the case that the proposed amendment may be inconsistent with applicable human rights standards and legislation, the State shall declare that the inconsistent law is to be of no force or effect.⁴⁷

We reiterate our grave concern over the potential restrictions of the rights that are implicated by the Law and its amendments and the concern that the counter-terrorism legislation falls short of meeting India’s human rights obligations. Of particular concern is that the amended Act fails to specify the aforementioned imprecise definitions of “unlawful organisation” and “terrorist”. We recommend your Excellency’s Government to evaluate, and in case necessary review and or refer it back to the parliament for reconsideration, in order to ensure its consistency with international human rights

⁴⁴ A/HRC/16/51, para. 14, Practice 2 (3).

⁴⁵ See Security Council resolution [1535 \(2004\)](#). See also Security Council resolutions [1456 \(2003\)](#), paragraph 6 (“States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law . . .”), and [1624 \(2005\)](#), paragraph 4 (“States must ensure that any measures . . . comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law . . .”).

⁴⁶ A/HRC/16/51, para. 12; See A/60/825, para. 5; A/HRC/8/13; Statement by the President of the Security Council of 27 September 2010, op.cit. , eighth paragraph; the Internal Security Programme and National Counter- Terrorism Strategy of Finland; Switzerland questionnaire response; and the Human Security Act 2007 of the Philippines, sect. 2.

⁴⁷ A/HRC/16/51, para. 14 Practice 1 (3).

standards In parallel, as regards the use of police and prosecutorial powers outlined in this communication, your Excellency's Government, through relevant line Ministries, may wish to consider issuing appropriate guidance to the police and other relevant security forces, with a view to ensuring a more human rights compliant application of the law. In this context, we suggest to your Excellency's Government the appointment by the Executive of a person or body to act as independent reviewer of the application and operation of the law relating to terrorism as a recommended best practice by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁴⁸ We remain open and willing to provide technical advice and assistance to the establishment and operation of such a body.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned assessment of the amended Act.

2. Please explain how the amended Act is compatible with your Excellency's Government's obligations under articles 2, 14, 15, 17, 19, 20, 21 and 26 ICCPR and articles 11, 12, 19 and 20 UDHR and how it may remediate the aforementioned inconsistencies with international human rights standards enshrined in the Act.

3. Please provide information in detail of how your Excellency's Government's counter-terrorism efforts comply with the United Nations Security Council resolutions [1373 \(2001\)](#), [1456\(2003\)](#), [1566 \(2004\)](#), [1624 \(2005\)](#), [2178 \(2014\)](#), [2341 \(2017\)](#), [2354 \(2017\)](#), [2368 \(2017\)](#), [2370 \(2017\)](#), [2395 \(2017\)](#) and [2396 \(2017\)](#); as well as Human Rights Council resolution [35/34](#) and General Assembly resolutions [49/60](#), [51/210](#), [72/123](#), [72/180](#) and [73/174](#) in particular with international human rights law, refugee law, and humanitarian law contained therein.

4. Please identify the positive measures and oversight provided by your Excellency's government on the excise of the powers now enumerated in the amended Act.

5. Please indicate what specific legal and administrative measures have been taken to ensure that human rights defenders as well as members of religious and other minorities in India are able to carry out their legitimate work and activities, including through the exercise of their right to freedom of opinion and expression and their rights to freedom of association, in a safe and enabling environment without fear of being designated "terrorist".

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will

⁴⁸ A/HRC/16/51, para. 14, Practice 4 (2).

also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Leigh Toomey
Vice-Chair of the Working Group on Arbitrary Detention

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Mary Lawlor
Special Rapporteur on the situation of human rights defenders
Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Fernand de Varennes
Special Rapporteur on minority issues

Joseph Cannataci
Special Rapporteur on the right to privacy

Ahmed Shaheed
Special Rapporteur on freedom of religion or belief