

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; 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 minority issues and the Special Rapporteur on freedom of religion or belief

REFERENCE:
OL AUT 2/2021

24 August 2021

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; 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 minority issues and Special Rapporteur on freedom of religion or belief, pursuant to Human Rights Council resolutions 40/16, 43/4, 41/12, 43/8 and 40/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the recently enacted **Anti-Terrorism Act (the "Act")**, which introduces **"religiously motivated extremist association" as a basis for criminalization and implements a new electronic surveillance system for individuals on conditional release – all in potential contravention of Austria's international and human rights law obligations**. We are particularly concerned that the legislation will result in the infringement of fundamental human rights, including the rights to freedom of thought, conscience, religion and belief, freedom of opinion and expression, freedom of association, privacy, liberty, movement, work, and education, all protected under the International Covenant on Civil and Political Rights ("ICCPR") and International Covenant on Economic, Social and Cultural Rights ("ICESCR") to which your Excellency's Government is a party. We note that these rights are also protected by the European Convention on Human Rights ("ECHR") to which your Excellency's Government is also a party.

We respectfully underline the importance of maintaining and upholding the fundamental guarantees of international and human rights law, particularly in relation to counter-terrorism efforts. We stress that respect for international human rights law treaties and norms is a complementary and mutually reinforcing objective in any effective counter-terrorism measure or effort at the national level. Consequently, we recommend review and reconsideration of certain aspects of the Act to ensure its compliance with Austria's international and regional legal obligations. We note that best international practice encourages States to independently review counter-terrorism and emergency law regularly so as to ensure that it remains necessary and compliant with international law.

According to the information received:

Overview of Applicable Human Rights Law Standards

We respectfully call your Excellency's Government's attention to the relevant provisions enshrined in the ICCPR, ICESCR, and ECHR. In particular, we

consider international human rights standards applicable under ICCPR articles 18 and 27, ICESCR article 15 and ECHR article 9, which protect the right to freedom of thought, conscience, religion and belief, the right to take part in cultural life and the right of persons belonging to minorities to practice their religion in community with others; ICCPR articles 19, 21 and 22 and ECHR articles 10 and 11, which guarantee the universally recognized right to freedom of opinion and expression and freedom of peaceful assembly and association; and ICCPR article 15 and ECHR article 7, which protect the principle of legality. We also refer to ICCPR article 17 and ECHR article 8, which protect against arbitrary or unlawful interference with a person's privacy, reputation and home; ICCPR article 12 and ECHR article 2, which protect freedom of movement; ICESCR article 13 and ECHR article 2, which protect the right to education; and ICESCR article 6, which protects the right to work.

We also respectfully call your Government's attention to the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (General Assembly Resolution A/RES/36/55), which provides in Article 2(1) that "[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other belief." Article 4(1) further states that "[a]ll States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms [.]". We also remind your Government of the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly Resolution 47/135), which refers to the obligation of States to protect the existence and the identity of religious or belief minorities within their territories and to adopt measures to that end (article 1), to ensure that they enjoy their own culture and profess and practice their own religion (article 2), as well as to adopt the required measures to ensure that persons belonging to minorities can exercise their human rights without discrimination (article 4).

Pursuant to ICCPR article 2, ICESCR article 2, and ECHR article 1, your Excellency's Government is under a duty to adopt laws that give domestic legal effect to these rights and to adopt laws as necessary to ensure that its domestic legal system is compatible with these treaties.

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 comply with all of their obligations under international law, particularly international human rights law, humanitarian law, and refugee law.

Context and Content of the Anti-Terrorism Act

The Anti-Terrorism Act was adopted by the National Council on 7 July 2021 and approved by the Federal Council on 15 July 2021. The Experts

understand that this is the first of several forthcoming legislative measures enacted to strengthen the State's measures to combat terrorism and prevent and counter violent extremism in light of the terrorist attack perpetrated in Vienna on 2 November 2020.

The Act undertakes to establish, through amendments to the Criminal Code, the Code of Criminal Procedure 1975, the Prison Act and the Court Organization Act to Combat Terrorism, the criminalization of "religiously motivated extremist association"; the addition of "religiously motivated extremist motives" as an aggravating factor in sentencing; and the electronic surveillance of individuals convicted of terrorism on conditional release, inter alia.

Specifically, according to Article 1 (9) of the Act, the Criminal Code will be amended to append the following provision as § 247b:¹

- (1) Anyone who founds or leads a religiously motivated extremist association may be punishable by imprisonment for up to two years, where he or another participant in the association has carried out or contributed to a serious illegal act in which the religiously motivated extreme orientation is clearly manifested.
- (2) Anyone who intentionally promotes, finances, or otherwise supports in a substantial manner the commission of religiously motivated extremist acts may be punishable by imprisonment of up to one year or a fine of up to 720 daily rates.
- (3) A religiously motivated extremist association is one that continually attempts to replace, in an unlawful manner, the essential elements of the democratic constitutional order of the Republic with a social and state order based exclusively on religion, by preventing the enforcement of laws, ordinances or other state decisions or by arrogating to itself sovereign rights based on religion or attempting to enforce such rights.

Further, article 1 (3) of the Act amends Section 33 (1) of the Criminal Code to include the addition of "religiously motivated extremist motives" as a new general aggravating factor for sentencing.

In addition, article 1 (6) of the Act amends § 52 b of the Criminal Code to provide for the electronic monitoring by ankle bracelet of individuals convicted of terrorism-related offenses, sentenced to at least 18 months of imprisonment, and on conditional release. The Act stipulates such surveillance where deemed "absolutely necessary" to monitor compliance with the conditions of release and where the individual has given consent. The absolute necessity of surveillance must be subject to judicial review at least once a year, and the underlying data collected may only be used, "[w]ithout prejudice to Section 76 (2) of the Code of Criminal Procedure," if necessary, "1. to establish a violation of an instruction or prohibition on local residence" or "2. to take action related to a violation of instructions." Unless used for these purposes, the data must be deleted no later than two weeks after collection.

¹ This is an informal translation of the bill.

The Act also provides that “[e]ach time the data is retrieved, at least the time, the retrieved data and the processor must be logged. The monitored person must be informed of any access to their data. The log data may only be used to check the admissibility of the retrievals and must be deleted after twelve months.” Lastly, the Act stipulates that the Federal Minister of Justice may issue guidelines on the type and implementation of electronic surveillance by ordinance.²

Religiously Motivated Extremist Association

We understand that radicalization and its violent manifestations pose concrete and significant challenges for many countries. However, any regulatory response designed to prevent and counter violent extremism must be international and human rights law compliant, as well as being nuanced, legally based, and empirically sound. We would like to stress that counter-terrorism legislation with penal sanctions should not be misused against individuals peacefully exercising their human rights and fundamental freedoms.

We consider that Austria’s newfound criminalization of “religiously motivated extremist association” and creation of the aggravating factor of “religiously motivated extremist motives” poses a number of concerns with regard to the potential infringement of the international human rights of freedom of thought, conscience and religion, freedom of opinion and expression, and freedom of peaceful assembly and association.

First and foremost, we are concerned by the Act’s general linkage between religious ideology and violent extremism, and the consequent potential impact on the rights to freedom of religion, opinion, expression, and association. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has found no empirical data supporting the assumption that religious ideology in general supports terrorism.³ Moreover, after conducting an extensive review of national plans and policies on the prevention and countering of violent extremism in 2020, she found that religious ideology is often prioritized at the expense of other factors empirically proven to be determinative of vulnerability to violent extremism, such as local political grievances and the experience or perception of abuse by governmental authorities.⁴ Indeed, as the Special Rapporteur on freedom of religion or belief contends, strategies to prevent and counter violent extremism “have tended to alienate a range of religious or belief communities... defeating the ultimate objectives of enhancing public safety”.⁵ Consequently, we emphasize the importance of fully recognizing the push-pull factors of violent radicalization and, in particular, comprehensively addressing the underlying social, economic, and cultural conditions that drive individuals to join violent extremist groups or act violently with extremist motive. In this respect, we underline the importance of a comprehensive, balanced, and human rights-centred approach to preventing and countering violent extremism, beyond the criminalization of extremist offenses and in line with Austria’s obligations under international and regional law.

² Anti-Terrorism Act, art. 1(9).

³ A/HRC/43/46, para. 18.

⁴ A/HRC/43/46, paras. 18, 20.

⁵ A/73/362, para. 10.

With regard to article 1 (9) of the Act, which invokes the concept of “religiously motivated extremism” as a basis for criminalization, we are concerned by the potential conflation of violent extremism with the genuine and protected exercise of the rights to freedom of religion, opinion, expression and association, and the seeming lack of safeguards to prevent such conflation. We underline that any measure limiting the exercise of these rights and freedoms on counter-terrorism grounds must comply with the objective criteria of legality, proportionality, necessity, and non-discrimination under international law, including by being non-discriminatory in intent and effect and the least restrictive measure to meet the legitimate aim of protecting national security.⁶

We are concerned that the Act’s vague definitional framework may be expansively and arbitrarily applied to hinder or penalize individuals and organizations from undertaking legitimate manifestations of religion or belief, expression, and association. Religious expression is one of the most profound and meaningful acts of personal choice and commitment exercised by many individuals, essential to the definition of personhood for many and linked to the dignity inherent found in each person. Article 1 (9) of the Act defines “religiously motivated extremist association” as an association that aims to “replace, in an unlawful manner, the essential elements of the democratic constitutional order of the Republic with a social and state order based exclusively on religion,” by means of “preventing the enforcement of laws, ordinances or other state decisions or by arrogating to itself sovereign rights based on religion or attempting to enforce such rights.” The Act does not specify, and is thus completely vague on, what conduct would constitute such a prohibited act of prevention or arrogation, nor what linkage is needed between such an act and the purported aim of replacing the existing democratic constitutional order in an “unlawful manner.” Nor does the Act define what the requisite manifestation of a “religiously motivated extremist orientation” entails. The Act also fails to define “religiously motivated extremist motives”, despite its inclusion as an aggravating factor. Lastly, further legal uncertainty stems from the requirement of a “serious illegal act” in the criminalization of founders or leaders of a “religiously motivated extremist association,” as compared to the requirement of “religiously motivated extremist acts” in the stipulation of secondary liability.

We are concerned that this vague terminology contravenes the requirement of legality as required by the ICCPR, as well as the guarantee of *nullum crimen sine lege* under international law and is vulnerable to abuse without further precision. In this context, we observe how globally the lack of semantic and conceptual clarity surrounding the term “extremism” risks hindering the effective implementation of human rights-compliant strategies and policies to prevent and counter violent extremism and terrorism.⁷ As the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism has concluded, “the term ‘extremism’ has no purchase in binding international legal standards and, when operative as a criminal legal category, is irreconcilable with the principle of legal certainty; it is therefore per se incompatible with the exercise of certain fundamental human rights.”⁸ Similarly, phrases such as “extremist orientation” have no fixed meaning in law or social science, leading to enormous potential for arbitrary and discriminatory application. The terminology of “religiously motivated” extremism further exacerbates these risks of human rights abuse, with the particular risk of

⁶ ICCPR, arts. 9, 18(3), 19(3), 22(2); HRC General Comments Nos. 27, 34; ECHR arts. 7, 9, 10.

⁷ A/HRC/43/46, para. 12-14.

⁸ A/HRC/43/46, para. 14.

perpetuating and even inciting discrimination and violence against persons belonging to religious minorities in the country.

We caution that the vague and ill-defined provisions of the Act may be used as a tool to silence legitimate religious actors and to discriminately target adherents of a particular faith on the basis that they are predisposed to violent extremism.⁹ As a result, we are highly concerned that the application of the Act would have a chilling effect on the formation and peaceful exercise of religious communities and associations, in violation of the right to freedom of religion or belief, as well as the rights to take part in cultural life, freedom of opinion and expression and freedom of association and peaceful assembly. Specifically, we note that the criminalization of any founder or leader of an association whose members commit a serious illegal act motivated by religious extremism risks penalizing any founder or leader without any consideration of imputability or the problematic practice of attribution solely by associational status.¹⁰ Not only may this provision contravene the legal requirements of proportionality and necessity, but it may deter individuals from founding or leading religious associations and religious communities from practicing their faith altogether, with negative, disproportionate impacts on minority religious faith and practices. The criminalization of any individual “promot[ing], financ[ing], or otherwise support[ing] in a substantial manner” the commission of a “religiously motivated extremist act” may further deter individuals from supporting religious associations or taking part in religious activities out of fear that even the legitimate activities of such associations will be construed by officials as “religiously motivated extremist acts.” Such deterrence may also extend to the ability to fundraise for organizations peacefully exercising the rights to freedom of religion, opinion, expression, and association.

We would like to stress that the rights to freedom of religion or belief, association, opinion and expression and to take part in cultural life are protected under international law, and the non-violent exercise of these rights is not a criminal offence. We remind the Government that the right to freedom of thought, conscience, religion or belief includes the freedom “either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”¹¹ According to the authoritative interpretation of the Human Rights Committee, “[t]he freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts [including] ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts.”¹² We caution your Excellency’s Government that stigmatizing certain minority religious groups and creating substantial barriers to religious faith and practice contravenes binding human rights law obligations and is toxic to democracy. We echo the observation of the Special Rapporteur on minority issues that “[r]eligious minorities often find themselves in conditions of structural vulnerability which can lead to a vicious circle that perpetuates discrimination, hostility, insecurity and violence.”¹³

We would also like to remind your Government that the right to assemble peacefully and associate freely extends to “persons espousing minority or dissenting views or belief” and that Austria is obliged to “take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly

⁹ See A/73/362, para. 3.

¹⁰ See *Refah Partisi (the Welfare Party) et al. v. Turkey*, ECtHR, para. 128.

¹¹ ICCPR, art. 18.

¹² General Comment No. 22, CCPR/C/21/Rev.1/Add.4, para. 4.

¹³ A/67/268, para. 82.

and of association are in accordance with their obligations under international human rights law.”¹⁴ We underscore that the legitimate interest in protecting national security should not be used to silence or deter diverse or critical voices.

Electronic Surveillance by Ankle Bracelets

We are also concerned that article 1 (6) of the Act providing for electronic surveillance may lead to the disproportionate and undue infringement on the rights to privacy, liberty, and movement. We positively note the safeguards that the Government has instituted in order to limit such potential infringement. These include: the requirement that a court determine that electronic monitoring is “absolutely necessary,” with the judicial determination put under review at least once a year; the limitation on the use of data for specific enumerated purposes; the deletion of data within two weeks unless they are being used for the foregoing purposes; notification of the monitored person of any data retrieval; and a ten-year time limit on such electronic monitoring. However, we fear that these safeguards may prove insufficient.

Principally, we fear that the use of electronic ankle bracelets may risk serious interference with the privacy, reputation, liberty, and movement of individuals, as protected under the ICCPR and ECHR. We share the observation of the Special Rapporteur on the human rights of migrants that “the stigmatizing and negative psychological effects of [...] electronic monitoring are likely to be disproportionate to the benefits of such monitoring.”¹⁵ Further, where electronic monitoring requirements are paired with restrictions to remain at one’s place of residence for most of the day, such restrictions risk amounting to house arrest, in violation of the right to freedom of movement. These requirements may cause humiliation, hardship, and stigmatization, with negative impacts on fundamental social and economic rights, including limitations on the capacity of monitored persons to take up employment, pursue education and access public goods and services, in contravention of the ICESCR and human rights law. In addition, if the system requires the monitored person to have a permanent residence, then individuals without such place of residence may find themselves back in detention.¹⁶ We emphasize that this may also make such measures discriminatory in effect.

We also observe that the Act stipulates that the data from the electronic ankle bracelets may only be used to establish or take action related to a violation of location-based restrictions – “[w]ithout prejudice to Section 76(2) of the Code of Criminal Procedure.” We are concerned that this carve-out, which provides for the use of data upon request by criminal investigation authorities, prosecutors, and courts, exceeds the narrow—and purportedly necessary—use of the electronic bracelet technology to ensure compliance with location-based restrictions. We note that typically electronic monitoring devices collect data on the monitored person’s movement at all times, thus leaving such immensely personal data vulnerable to abuse. While the Act stipulates that most data will be automatically deleted every two weeks, it also creates an exception for data retained for the uses permissible by law, leaving it unclear whether such data can in those circumstances be retained indefinitely. Moreover, while the requirements that retrieval of the data be logged and the monitored person be informed accordingly offer important safeguards of data

¹⁴ A/HRC/24/5, para. 2.

¹⁵ A/HRC/20/24, para. 63.

¹⁶ See A/HRC/20/24, paras. 63-64.

privacy, the Act does not make clear whether this applies to the Section 76 (2) carve-out.

In this context, we highlight that the “United Nations Standard Minimum Rules for Non-custodial Measures”, also known as the Tokyo Rules, was approved by the UN General Assembly in Resolution 45/110 and stipulates that “[n]on-custodial measures should be used in accordance with the principle of minimum intervention”. We also note that the interference with an individual’s right to privacy is only permissible if it is neither unlawful nor arbitrary.¹⁷ We therefore underline the need for a careful, comprehensive, and case-specific assessment of the extent to which the electronic ankle bracelet restricts the human rights of the monitored person. All individuals subject to the electronic surveillance program must be treated with dignity, humanity and respect for their human rights, and any limitation on rights caused by the Act’s proposed electronic surveillance system must meet the requirements of necessity, proportionality, legality, and non-discrimination.

Lastly, we note the Act’s stipulation that the Federal Minister of Justice may issue guidelines on the implementation of electronic surveillance by ordinance. We underscore the importance of having clear, comprehensive, and human rights- and rule of law-informed guidance regarding the implementation of the monitoring system—including at every stage of data usage, throughout collection, management, sharing, use, and retention, as well as the underlying process for determining the “absolute necessity” of such surveillance. We also emphasize the need for effective independent oversight, including by establishing or expanding existing oversight bodies, to supervise the implementation of these measures.¹⁸

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 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.
2. Please provide information in detail on how the counter-terrorism and preventing and countering violent extremism efforts of your Excellency’s Government comply with 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 and 72/180, in particular with international human rights law.
3. Please provide information for the newly adopted “religiously motivated extremist association” basis for criminalization, including any underlying empirical data on the linkage between religious ideology and violent extremism; how your Excellency’s Government considers that such criminalization respects the principles of necessity, legality, proportionality, and non-discrimination, and safeguards the

¹⁷ ICCPR art. 17(1); HRC General Comment No. 16, para. 3.

¹⁸ See Krisztina Huszti- Orbán & Fionnuala Ni Aoláin, *Use of Biometric Data to Identify Terrorists: Best Practice or Risky Business?* (2020), at 16; A/HRC/14/46, para. 34.

rights to freedom of religion, expression, and association; and how the Act guarantees to not resort to religious profiling and to ensure that religious associations, including minority religious faiths, performing legitimate, peaceful activities will not be targeted and hindered by the application of this Act.

4. Please provide information on the lack of definitional clarity on the terms “religiously motivated extremist association”, “religiously motivated extreme orientation”, “religiously motivated extremist motives” and “religiously motivated extremist acts,” and how your Excellency’s Government plans to address these definitional gaps in practice.
5. Please provide information on how the process of implementation of the electronic surveillance system is compatible with the principles of necessity, legality, proportionality, and non-discrimination and safeguards the rights to privacy, liberty and freedom of movement; whether the Federal Minister of Justice has issued any guidance on the implementation of electronic surveillance by ordinance; and what capacity-building and training measures have been taken in this respect, in particular with respect to a human rights-centered approach.
6. Please provide any information pertaining to the independent oversight of counter-terrorism measures required by your Excellency’s Government.

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](#) after 48 hours. They will 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

Irene Khan

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

Fernand de Varennes

Special Rapporteur on minority issues

Ahmed Shaheed

Special Rapporteur on freedom of religion or belief