

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 Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on minority issues; the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
OL LKA 3/2021

9 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; Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on minority issues; Special Rapporteur on freedom of religion or belief; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 40/16, 42/22, 45/3, 43/4, 43/8, 40/10 and 43/20.

In this connection, we would like to raise our concerns about the adoption and implementation of a recent regulation, titled ‘Prevention of Terrorism (Deradicalization from holding violent extremist religious ideology) Regulations No. 01 of 2021’ [hereinafter ‘Regulation’] under section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended by Act No. 10 of 1982 [hereinafter ‘PTA’] published in the *Gazette Extraordinary* No. 2218/68 on 12 March 2021. In this regard, we wish to express our serious concern and to encourage the rescission of the Regulation because its provisions are contrary to Sri Lanka’s international legal obligations.

This new Regulation expands upon provisions of concern found in the PTA. The human rights challenges of the PTA and the International Covenant on Civil and Political Rights Act of 2007 [hereinafter ‘2007 ICCPR’] were the subject of previous communications sent to your Excellency’s Government on 26 October 2018 (LKA 5/2018) and on 26 February 2019 (LKA 1/2019). We regret that, to date, we have not received responses regarding those communications. Moreover, despite our observations on the legislative proposals being advanced by your Excellency’s Government and on some provisions of the new draft Counter Terrorism Act [hereinafter ‘CTA’], published in the *Gazette Extraordinary* dated 17 September 2018, it appears that the advice on human rights compliance has not been addressed in the new Regulation. Following their visits to Sri Lanka, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances made several recommendations to your Excellency’s Government with regard to corrective or remedial measures that they deemed ought to be taken in relation to the PTA.¹ We regret that these remedial measures have not been adopted, and rather that an additional set of rights-denying measures are being advanced by this Regulation, further undermining the protection of human rights in Sri Lanka.

¹ See [A/HRC/39/45/Add.2](#), [A/HRC/40/52 Add.3](#), [A/HRC/33/51/Add.2](#) and [A/HRC/42/40/Add.1](#)

We respectfully remind your Excellency's Government, that although there is no agreement on a multilateral treaty on terrorism which *inter alia* defines terrorism, States should ensure that counterterrorism legislation is limited to criminalizing conduct which is properly and precisely defined on the basis of the provisions of international counterterrorism instruments and is strictly guided by the principles of legality, necessity, and proportionality.² The definition of terrorism in national legislation should be guided by the definition found in Security Council resolution 1566 (2004) and also 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.³ Counterterrorism legislation should be in compliance with human rights obligations, protection of due process, and in line with the international prohibition against arbitrary detention.

We wish to convey that the measures adopted under this new Regulation may contradict your Excellency's Government's international obligations, in particular the Universal Declaration of Human Rights ('UDHR'), the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the International Convention for the Protection of All Persons from Enforced Disappearances ('ICPPED') as well as the 1992 Declaration on the Protection of all Persons from Enforced Disappearance, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which reflect, codify and consolidate the customary international law that is legally binding on all States⁴ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN 'CAT'). Enforcement of this Regulation may result in significant and detrimental impacts on the promotion and protection of several fundamental freedoms. In particular, we are concerned that the law lacks precision in key aspects creating opportunities for misuse due to broadly worded and vague provisions. Section 2 of the Regulation introduces several broad terms that are not defined and lack precision. Such legal uncertainty may facilitate arbitrary detentions, undermine due process, and limit the exercise of fundamental rights including freedom of opinion and expression and religion or belief under domestic law. Section 3 of the Regulations allows non-law enforcement entities to detain individuals for up to 24 hours without a legal warrant or an investigation, raising the risk for enforced disappearances and torture, inhuman and degrading treatment. Moreover, the inclusion of several provisions in the Regulation creating the capacity to formally deprive persons of their liberty without judicial process, described as 'rehabilitation', may constitute arbitrary detention under international law, and is of profound concern to the Experts. We recommend reconsideration or rescission of this Regulation to ensure that laws are in compliance with Sri Lanka's international human rights obligations.

The Regulation lacks precision and legal certainty, impacting freedom of expression, opinion, and religious belief

Lack of legal certainty

² CCPR/C/GC/34.

³ S/RES/1566; A/RES/51/210.

⁴ A/HRC/33/51/Add.3, para. 3

We bring your attention to the ‘principal of legal certainty’ under international law⁵ which requires that criminal laws are 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 susceptible 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 obligations.⁶ Her report also underscores that the use of counter-terrorism law to quell legitimate activities protected by international law is inconsistent with the State’s obligations.

Article 9 (1) ICCPR affirms the principle of legal certainty under international law and requires that any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. Consequently, criminal laws must be sufficiently precise so that it is clear what types of behaviour and conduct constitute a criminal offence, and what would be the consequence of committing such an offence. We underscore that legal frameworks must be formulated with sufficient precision so that any individual can regulate his or her conduct accordingly⁷ and to prevent ill-defined and/or overly broad laws which are open to arbitrary application and abuse and may lead to arbitrary deprivation of liberty. Precision is essential in the use of exceptional counterterrorism powers, and ambiguity must be remedied to ensure adherence to international human rights obligations.

We note with serious concern that there appears to be insufficient consideration given to formulating precise terms and conditions that govern who is subject to ‘de-radicalization from holding violent extremist religious ideology’. Despite the word ‘de-radicalization’ appearing in the title of the Regulation, it is not defined nor mentioned again. The word ‘radicalize’ is also not defined or mentioned in the body of the Regulation. The terms ‘de-radicalize’ or ‘radicalize’ are not defined in or appear in the PTA. The Special Rapporteur on the promotion and protection of human rights while countering terrorism has expressed concerns that the definition of ‘violent extremism’ remains opaque and deeply contested.⁸ She has noted that the term lends itself to illegitimate judgments about what extremism is, highlighting that this can lead to the inclusion of non-violent groups on executive lists of ‘extremist’ entities.⁹ The Special Rapporteur takes the view that 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 (A/HRC/43/46, paras 12, 13 and 14). It is unclear from the Regulation when precisely the espousal of a particular view would be considered ‘radical’ or what views precisely fall into this opaque category, and what thresholds or acts would be met to be considered as engaged in ‘violent extremism’. Despite the title of the Regulation, these concepts are neither explained nor defined.

⁵ ICCPR article 15(1).

⁶ [A/73/361](#), para.34.

⁷ [E/CN.4/2006/98](#), para 46.

⁸ [A/HRC/43/46](#), para. 12.

⁹ [A/HRC/43/46](#), para. 13.

Limitations on freedom of speech

Section 2 of the Regulation states:

The objective of these regulations shall be to ensure, that any person who surrenders or is taken into custody on suspicion of being a person who by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups after the coming into operation of these regulations is dealt with in accordance with the provisions of the Act, and that persons who have surrendered or have been taken into custody in terms of any emergency regulation which was in force at any time prior to coming into operation of these regulations, continue in terms of these regulations, to enjoy the same care and protection which they were previously enjoying.

The principle of legality in article 19 (3) of the ICCPR requires that any restriction on fundamental freedoms be ‘formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.’ Under section 2 of the Regulation, individuals can be prosecuted criminally or sent to rehabilitation if they surrender or are taken into custody on suspicion of causing or intending to cause ‘acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups’ by ‘words either spoken or intended to be read or by signs or by visible representations or otherwise.’ The Regulation retains this broadly worded language from the PTA and enables the deprivation of liberty on the basis of suspicion and without judicial process. There are no objective criteria which have been clearly set out for any of the evaluations/decisions to be taken as to the constitutive components of this offence.¹⁰

The Regulation does not precisely define what speech is prohibited consistent with the requirements of article 19 (3) and is likely to constitute an unlawful interference with the freedom of expression and opinion, including expression through artistic and symbolic means, also protected under article 15 of the ICESCR. Specifically, the provisions could function to restrict journalists, human rights defenders, civil society actors, and others from reporting or expressing views on anti-terrorist operations.¹¹ While the prevention of terrorism may be a legitimate ground for restricting freedom of expression, extreme care must be taken to ensure the legislation is ‘crafted and applied in a manner that conforms to the strict requirements of paragraph 3 [of article 19 of the ICCPR].’ As previously indicated, the Experts wish to emphasize that the right to freedom of expression extends not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population.

The broad scope of the Regulation may result in misuse or misapplication, directly or indirectly leading to the silencing of dissent and criticism of the government. We express concern that this law may be used against civil society and humanitarian actors. The Human Rights Council has noted with grave concern that ‘in some instances, national security and counterterrorism legislation and other measures, such as laws regulating civil society organisations, have been misused to target human

¹⁰ [A/HRC/43/46](#), para. 13.

¹¹ [A/HRC/37/52](#), para. 47.

rights defenders or have hindered their work and endangered their safety in a manner contrary to international law.’¹² Without precision, any speech or expression may be deemed to have caused ‘feelings of ill will’ or ‘communal disharmony’ thus limiting freedom of speech and expression.

Inchoate crimes of ‘intent’ should be carefully formulated

The Regulation further raises concern regarding the arrest and detention of individuals based on charges of ‘intending’ to cause ‘acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups’ through ‘words either spoken or intended to be read or by signs or by visible representations or otherwise’. The intent described is akin to an inchoate legal offence, which appears to suffer from a deficit in clarity as drafted in the Regulation. The phrasing of the Regulation seems to harken to incitement as it covers statements or expressions that *could* lead to disharmony or ill will between communities or groups. Article 20 (2) of the ICCPR states that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Incitement is defined as statements about national, racial, or religious groups, which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups. We accept that there are genuine cases in which exhortation to terrorism must be constrained. A lack of objective understanding about ‘intent to cause disharmony’ can capture a broad and indiscriminate range of expression and actors may place undue restriction on the freedom of expression and opinion as protected by international human rights law. We recommend that your Excellency’s Government be guided by the standards found in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, in particular the six-part threshold test set out therein.¹³ Under this standard, the threshold for those inchoate crimes should be the reasonable probability that the expression in question would succeed in inciting a terrorist act, thereby establishing a causal link or actual risk of the proscribed result occurring.¹⁴

Limitations on freedom of religion or belief

The prohibition on causing or intending to cause ‘violence or racial, religious or communal disharmony’ by ‘words either spoken or intended to be read or signs or visible representations or otherwise’, may jeopardize the right to freedom of thought, conscience, and religion. The inclusion of the word ‘otherwise’ may also impinge on the freedom of belief and on the right to take part in cultural life. Such a vague disposition can be used to compromise the expression and manifestation of one’s religion or beliefs. Article 18 of the ICCPR protects everyone’s right to freedom of thought, conscience, and religion or belief. The Human Rights Committee in its General Comment 22 paragraph 4 advises that the freedom to manifest religion or belief may be exercised ‘either individually or in community with others and in public or private.’ The comment further elaborates that the freedom to manifest religion or belief in worship, observance, practice, and teaching encompasses a broad range of acts. While the manifestation of religion or belief may be restricted as per article 18 (3) of the ICCPR, to protect public safety, order, health, morals and the fundamental rights and freedoms of others, any such limitation must fulfil a number of obligatory

¹² [A/HRC/RES/25/18](#), [A/HRC/RES/27/31](#), [A/HRC/RES/32/31](#) and [A/HRC/RES/34/5](#).

¹³ [A/HRC/22/17/Add.4](#), annex, appendix, para. 29.

¹⁴ [A/HRC/43/46](#), para. 27.

criteria including being non-discriminatory in intent or effect and constituting the least restrictive measure. Even in the face of overwhelming public necessity that falls on one or more of the five grounds for permissible limitations noted in article 18 (3), if there is a less restrictive measure, a greater interference with the right to manifest one's beliefs will not be permissible. Additionally, we wish to underscore that the right to freedom of thought, conscience, religion, or belief cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of the Covenant. These principles are far-reaching and profound, encompassing freedom of thought and expression, personal conviction and the commitment to religion or belief.¹⁵ The provision concerning religious disharmony is frequently invoked against religious minorities rather than against the religious majority (see LKA 04/2020) violating this protection of expression and the principle of non-discrimination.

The Special Rapporteur has previously expressed concern that religious beliefs and practices can be used as a placeholder in the classification of radicalization.¹⁶ As a detainee cannot materially rebut the assigned classification or challenge the criteria used to define radicalization, due to lack of definition or objective criteria, this may amount to both direct and indirect discrimination on the grounds of religious belief disproportionately used to target persons belonging to religious minorities.

This overly broad provision appears in the PTA and reappears in further modified and right-negating form in this Regulation. It has been the subject of ongoing concern due to its lack of precision and misuse. In particular, during his visit to Sri Lanka in 2019, the Special Rapporteur on freedom of religion or belief had expressed concerns with regard to the overly broad and ambiguous provisions of the PTA, its reported use to target minorities and to suppress dissenting views, and he called for its abrogation.¹⁷ This Regulation runs the risk of continuing to broadly proscribe expressions, opinions and religious beliefs that should be firmly protected under human rights law.

The Regulation violates the prohibition against arbitrary arrest and detention

We also draw your attention to Section 3 of the Regulation which states:

Any person who, in connection with any offence under the provisions of

- (a) the Act, or the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 published in the Gazette Extraordinary No. 2123/3 of May 13, 2019, surrenders, or has surrendered to, or is taken or has been taken into custody by; or
- (b) the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2019 published in the Gazette Extraordinary No. 2120/5 of 22 April 2019, has surrendered to or has been taken into custody by, any police officer, or any member of the armed forces, or to any public officer or any other person or body of persons authorized by the President by Order, may be referred to a rehabilitation programme in terms of the provisions of these regulations.

¹⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para.1.

¹⁶ [A/HRC/43/46/Add.1](#)

¹⁷ [A/HRC/43/48/Add.2, para. 74](#)

This provision allows the powers of arrest to be exercised by a wide array of individuals who may not be trained or have relevant, sufficient legal expertise to be authorized to undertake deprivations of liberty. The Regulation expands the arresting power found under the PTA. The PTA gave arresting authority to ‘any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf.’

Article 9 (1) of the ICCPR affirms that ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’. With regard to the meaning of the words ‘arbitrary arrest’ in article 9 (1), the Human Rights Committee has held that ‘arbitrariness’ is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law. ... [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances.¹⁸ Principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment clearly states that ‘Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.’ The Regulation does not make it clear which ‘persons or body of persons’ may be authorized by the President to wield arresting power, nor does the Regulation prohibit retroactive authorization of ‘persons or body of persons’ who might make an arrest under the provisions of the Regulation. Thus, it appears that an individual may be detained by anyone and such arrest could be sanctioned retroactively. The concerns about fairness, due process, coercion, and arbitrariness raised by this provision are of profound concern to the Experts.

Moreover, Section 5 of the Regulation states:

1. Any person other than a police officer to whom a person surrenders or who takes a person into custody in terms of regulation 3 shall hand over such surrendee or person taken into custody, to the Officer in Charge of the nearest police station within twenty-four hours of such surrender or taking into custody.
2. Notwithstanding the provisions of regulation 3, where there is reasonable cause to suspect that a surrendee or detainee has committed an offence specified in regulation 3, the Officer in Charge of the police station in which such surrendee or detainee is held in custody shall submit a report to the Minister for consideration whether such surrendee or detainee shall be detained in terms of section 9 of the Act, for the purpose of conducting an investigation.

Section 5 (1) allows anyone under Section 3 to be detained for 24 hours before being handed over to law enforcement. Such detention raises serious unease beginning with the concerns noted above about the potential arbitrariness of the arrest. First, it is troubling that there are no standards or criteria set out to ensure that the person has not been detained for more than 24 hours before being handed over to the police station. Without any arrest receipt provided to the arrestee, or his or her family or any communication with another regulating body, there is no record maintained of

¹⁸ A/49/40 (Vol.II) at p.181, para 9.8.

which individuals are being taken into custody. Article 17 (2) (c) of the ICPPED requires States to ‘Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty.’ Additionally, article 17 (2) (d) guarantees the right of persons deprived of liberty to communicate with, and be visited by, family and others, article 17 (2) (e) guarantees access by the competent and legally authorized authorities and institution to places of deprivation of liberty and article 17 (2) (f) guarantees that persons deprived of their liberty or others with a legitimate interest can take proceedings before a court which may decide without delay on the lawfulness of the deprivation of liberty. Article 18 also guarantees that a minimum level of information must be provided to any person with a legitimate interest, including relatives of individuals deprived of their liberty, including the date, time, and place where the person was deprived of liberty and their whereabouts. We further refer to articles 9 and 10 of the 1992 Declaration, which, inter alia, also require that persons deprived of their liberty be held in recognized places of detention and that accurate information on their place of detention is made promptly available to their family members and others with a legitimate interest. Both the 1992 Declaration (in article 6) and the ICPPED (in article 23) also require the training of law enforcement personnel involved in custody or treatment of any person deprived of liberty, including on the prohibition of enforced disappearances. The Regulation is not in compliance with these international standards.

Similarly, article 11 of the Convention against Torture requires ‘Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.’ Because persons can be held by individuals without such training, review protocols or oversight, this increases the risk that detainees will be subjected to torture, inhuman, or degrading treatment. Second, there are no standards or criteria established for the conditions or locations for where an individual may be detained. As a result, this provision does not comply with the standards of accommodation established by the Standard Minimum Rules for the Treatment of Prisoners.¹⁹

Section 5 (2) elicits further worry. The Regulation defines a detainee as one who ‘is taken or has been taken into custody under regulation 3’ and a surrendee is defined as ‘any person who surrenders or has surrendered under regulation 3.’ A ‘surrendee’ is defined under ER 2005 (regulation 22, as amended by Regulation No. 1462/8, 12 September 2006) as any person who surrenders to the authorities in connection with a wide range of offences, including firearms and explosives offences, offences under the PTA, certain offences under the Penal Code, or ‘under any emergency regulation’. In 2011, *Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No.5* was implemented. The 2011 regulations contained provisions which required the person who surrendered to the authorities to sign a statement attesting to the voluntariness of the surrender. However, during a country visit, the Special Rapporteur reported instances of surrendees being allegedly coerced into surrendering to avoid “severe consequences”.²⁰ Past questions about the genuine voluntariness of ‘surrendees’ coupled with the possibility of coercion, torture, or the of the risk of enforced disappearance during the 24-hour unsupervised detention

¹⁹ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>

²⁰ A/HRC/40/52/Add.3, FN 33.

period, gives rise to considerable concerns.

Language in Section 5 (2) further underscores the potential for arbitrariness of arrests and detention in contravention of international laws. Section 5 (2) states:

the Officer in Charge ('OIC') of the police station in which such surrendee or detainee is held in custody shall submit a report to the Minister for consideration whether such surrendee or detainee shall be detained in terms of section 9 of the Act [PTA], for the purpose of conducting an investigation.

Section 5 (2) references detention under section 9 of the PTA which limits maximum detention time to 18 months. The Regulation states that this detention occurs 'for the purpose of conducting an investigation.' While the phrase 'reasonable cause for suspecting an offence has been committed' is used, the presumption that detention occurs before the commencement of an investigation can implicate further arbitrariness concerns.

Rehabilitation as a criminal penalty without trial violates the right to fair trial and due process

The concepts of rehabilitation and de-radicalization are complex, and their activation constitute highly challenging activities. As the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism has noted in previous reports, rehabilitation generally requires highly skilled professional intervention, must be soundly legally based, and cannot be used as a substitute for criminal charges, or as a means to simply take persons out of their public and private lives and into the custody of the state.²¹

Section 5 (4) of the Regulation states:

Where the Attorney-General is of the opinion that according to the nature of the offence committed a surrendee or detainee shall be rehabilitated at a [Reintegration] Centre²² in lieu of instituting criminal proceedings against him, such surrendee or detainee shall be produced before a Magistrate with the written approval of the Attorney-General. The Magistrate may make order, having taking into consideration whether such surrendee or detainee has committed any other offence other than offences specified in regulation 3, referring him for rehabilitation for a period not exceeding one year at a [Reintegration] Centre.

Under this provision, there is no opportunity for a fair trial, as the detainee or surrendee are not given the opportunity to hear the case against them or the result of any investigation concerning their alleged activities. The OIC, the Attorney-General and the Magistrate are empowered to decide to either send an individual to rehabilitation or institute a criminal case. Furthermore, the Regulation does not explicitly provide the Magistrate with the power to release or bail the person during the period of 'rehabilitation'. According to Section 5 (4), the Magistrate seems to intervene in the procedure only to decide to either send the accused to the

²¹ [A/HRC/43/46](#).

²² Section 4 of the Regulation: The Secretary to the Ministry of the Minister shall, from time to time approve Centres to be known as "Reintegration Centres" (hereinafter referred to as the "Centre") for the purpose of rehabilitating the surrendees and detainees. Upon such approval the Commissioner - General of Rehabilitation shall by order published in the Gazette specify the category and the place of the Centres approved by the Secretary

Reintegration Centre or instituting a criminal case against him because such surrendee or detainee shall be produced before a Magistrate with the written approval of the Attorney-General without a chance to hear the accused once. Based on the nature of the alleged offence committed, the Attorney-General can decide whether a detainee or a surrendee can be rehabilitated at a Reintegration Centre in lieu of instituting criminal proceedings against him. The deprivation of liberty through this process of allocation to ‘rehabilitation’ is fundamentally inconsistent with the most essential due process obligations protected by the ICCPR and UDHR.

After the twelve-month period expires, under Section 7 (1) of the Regulation, the Minister is empowered to extend the period of rehabilitation based upon the recommendation of the Commissioner-General of Rehabilitation, or to order the release of the detainee. Section 7 (2) (b) allows for extensions to this one-year limit in six month increments up to one additional year. This expands the ‘rehabilitation’ referral to a period of up to two years. This is deeply concerning for several reasons. The rehabilitation process does not presume the innocence of the individual, nor does it give the individual an opportunity for a fair trial with access to legal counsel, independent judicial oversight, and the opportunity to appeal the basis for the conviction/deprivation of liberty which are basic international human rights guarantees. In effect, the Regulation can restrict the liberty of persons and penalize the individual without any access to due process guarantees, without charge or trial. Additionally, no criminal acts need to actually be committed before referral to rehabilitation occurs. It appears sufficient for there to be ‘intent’ to cause disharmony or ill will through words or expressions. The decision to continue rehabilitation is made without any oversight or other mechanism, thus risking extending an arbitrary detention for even longer periods. This practice may allow systematic detention without trial in Sri Lanka inconsistent with your Excellency’s Government’s international legal obligations.

While the rehabilitation programme has been presented as an ‘amnesty’ in lieu of prosecution, in certain cases, it was neither, as some individuals went from administrative detention under the PTA, to rehabilitation and back, through ‘revolving doors’ that could keep individuals in detention without any judicial involvement for years on end.²³ We would remind your Excellency’s Government that the provision of Amnesty under international law is primarily enabled through the application of article 6 (5) of Protocol II Additional to the Geneva Convention of 1977, and comes in the context of the application of penal provisions related to the commission of breaches of international humanitarian law, as well as significant procedural guarantees implicated in the application of international humanitarian law.

The ‘judicial involvement’ consisting of a decision made by the Attorney General, confirmed but not fully reviewed by a judge,²⁴ does not amount to a proper judicial process, which is required in any restriction imposed on the right to liberty.²⁵ In the ‘Report of the Working Group on Arbitrary Detention on its visit to Sri Lanka’, the Working Group found that individuals sent for rehabilitation were detained arbitrarily. Their deprivation of liberty lacked a legal basis and was the result of numerous grave violations of the right to a fair trial, including a lack of effective legal assistance, the inability to access the evidence against them and undue delay in being

²³ [A/HRC/40/52/Add.3](#)

²⁴ [A/HRC/40/52/Add.3](#)

²⁵ [A/HRC/40/52/Add.3](#)

tried.²⁶ The concept of 'rehabilitation' in lieu of criminal proceedings resulting in the incarceration of persons in 'rehabilitation camps' is a violation of the detainees' right to a fair trial and will result in a violation of their right to liberty.²⁷ This use of 'rehabilitation' is also inconsistent with the understanding of this practice in the Global Counter-Terrorism Strategy and UN Security Council Resolutions. All rehabilitation and reintegration measures taken by Member States should be in compliance with their obligations under international law, including international human rights law, international humanitarian law, and international refugee law, as well as international standards and relevant Security Council resolutions.²⁸

Based on the findings above, the Regulation could lead to arbitrary detentions and jeopardize due process standards by eliminating the opportunity for a trial in which to rebut charges and evidence brought against an individual. The rehabilitation process does not presume the innocence of the individual, nor does it give the individual an opportunity for a fair hearing with access to legal counsel, which are basic international human rights guarantees. In effect, the Regulation would restrict the right to liberty and penalize an individual without any access to due process guarantees, without charge or trial. The Regulation would also have a negative impact on the domestic separation of powers, with certain judicial powers being transferred to the executive arm of government.

Problematic conditions of rehabilitation

Section 8 (1) of the Regulation provides:

The Commissioner-General of Rehabilitation shall provide a surrendee or detainee with psychosocial assistance and vocational and other training during the period of his rehabilitation to ensure that such person is integrated back to the community and to the society

We are concerned about this model of rehabilitation and conclude that it fails to meet minimal thresholds of legality under international law; rehabilitation generally follows sentencing for a specified offence and instead individuals under this Regulation can be sentenced to rehabilitation without being sentenced for any criminal offence.

We are further concerned that there is a lack of information as to what practices and procedures will be in place at such rehabilitation or reintegration centres. It remains unclear what methodology and assessment methods will be used in this 'rehabilitation' process and there appears to be no robust monitoring and evaluation of the programmes and practices.²⁹ We note our concerns about the kind of trainings and assistance the Commissioner-General of Rehabilitation might undertake to reintegrate people accused of radicalization. We specifically express our concerns on Section 8 (1) of the Regulation which states that the Commissioner-General of Rehabilitation shall provide a surrendee or detainee with psychosocial assistance and vocational and other training during the period of his rehabilitation to ensure that such person is integrated back to the community and to the society. These kinds of trainings must not violate the fundamental rights of the detainee and especially not

²⁶ [A/HRC/39/45/Add.2](#)

²⁷ [A/HRC/40/52/Add.3](#)

²⁸ See: A/RES/72/284, para. 39 (Global Counter-Terrorism Strategy), S/RES/2396 (2017), S/RES/2178 (2014).

²⁹ [A/HRC/43/46](#), para. 16.

target ethnic and religious minorities as well as domestic political opposition. These trainings must not have the objective to deprive an individual of her religious belief or political views. Indoctrination programmes, such as ‘re-education camps’, or threats of violence designed to compel individuals to form particular opinions or change their opinion, violate article 19 (1) of ICCPR. It is of concern too that the Bureau of the Commissioner-General of Rehabilitation (‘BCGR’) was initially set up under the guidance of Ministry of Defence and has been under the purview of the Ministry of Justice, and the Ministry of Rehabilitation and Prison Reforms. The BCGR is now under the supervision and management of the State Ministry of Prison Management and Prisoner Rehabilitation, seemingly positioning it consistently within the criminal justice system without providing the safeguards that criminal justice offers.

Finally, we also need to raise concern on the Regulation’s provision concerning the family visits. The family is recognized as the fundamental group unit of society and, as such, is entitled to protection and assistance under article 16 (3) of the UDHR, article 23 (1) of the ICCPR and article 10 (1) of the ICESCR. Section 8 (3) of the Regulation restricts visits contingent on the permission of the OIC of the Reintegration Centre and visits cannot exceed once every two weeks. This provision might further isolate the detainee from their society and from their communities in the case that a detainee is not granted permission to receive visits from the OIC of the Reintegration Centre. Under article 37 of the Standard Minimum Treatment of Prisoners, prisoners are allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits. This is also found in Rule 58 of the Nelson Mandela Rules.³⁰ Denying access to family during the rehabilitation of those detained would violate their fundamental rights.

Conclusion

The Regulation risks jeopardizing the rights and liberties of persons who may be detained arbitrarily, especially religious and ethnic minorities, and may curtail political dissent with no effective due process guarantees. Lack of judicial oversight and effective due process standards, the Regulation creates institutional contexts where misuse can occur. We note that two fundamental rights petitions challenging the legality of the Regulations were recently heard in front of the Supreme Court of Sri Lanka. As a result of those petitions, an interim order was issued staying the operation of the Regulation until 24 August 2021 when a hearing will determine whether the petitioners will be granted leave to proceed. We urge your Excellency’s Government to immediately commence with a thorough examination of the Regulation with a view to rescission to ensure that human rights are not further eroded under the auspices of countering terrorism. Further, we recommend repeal of the PTA and an immediate moratorium on its use.

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.

Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

³⁰ A/RES/70/175.

1. Please provide information in details of how the counterterrorism efforts of Your Excellency's Government comply with 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 solution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180, in particular with international human rights law requirements of same.
2. Please provide information on the reasons for the extensive scope of this Regulation and how your Excellency's Government considers that it respects the principles of precision and legal certainty set in the ICCPR.
3. Please explain why a period of 24 hours has been set before a person held in custody will have his or her family or legal representatives made aware of their deprivation of liberty and how this is compatible with your Excellency's Government's obligations under the ICPEED and the 1992 Declaration.
4. Please provide information on the guarantees to not resort to gender, religious or ethnic profiling and to ensure that journalists, humanitarians, human rights defenders, persons belonging to religious or ethnic minorities, or other individuals willing to express their belief or religion peacefully will not be targeted and hindered by the application of this Regulation.
5. Please also provide explanations as to the requirement and evidentiary basis needed for the Attorney General to decide to place someone in a Reintegration Centre in lieu of instituting criminal proceedings against him.
6. Please provide information on the rehabilitation trainings, what kind of programs and assistance would be given to the detainees and what monitoring mechanisms would be put in place to guarantee the respect of their fundamental rights.

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

Miriam Estrada-Castillo
Vice-Chair of the Working Group on Arbitrary Detention

Tae-Ung Baik
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

Irene Khan
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Fernand de Varennes
Special Rapporteur on minority issues

Ahmed Shaheed
Special Rapporteur on freedom of religion or belief

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment