

Myanmar: Note on the 2021 Amendment to the Counter-Terrorism Law

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This Note¹ was prepared by the Centre for Law and Democracy in response to the 1 August 2021 Amendment (Amendment)² to Myanmar’s Counter-Terrorism Law (Law)³ introduced by the military regime that has been ruling Myanmar since the February 2021 *coup d’état*. This Amendment increased the penalties for “acts of exhortation, persuasion, propaganda, recruitment of any person to participate in any terrorist group or activities of terrorism”. Several of these terms are overly vague to meet international standards. Consequently, the move towards increasing penalties for committing these offences represents a regressive step as far as human rights protection is concerned. This Note evaluates this Amendment in relation to international human rights standards on freedom of expression.

Human Rights Framework

Freedom of expression is enshrined in Article 19 of the *Universal Declaration of Human Rights* (UDHR)⁴, which is widely recognised as a foundational source of human rights standards. Myanmar reaffirmed its commitment to the UDHR in the 2012 *ASEAN* [Association of Southeast Asian Nations] *Human Rights Declaration*.⁵ Freedom of expression is also directly and indirectly recognised in conventions that Myanmar has ratified relating to the rights of

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² Republic of the Union of Myanmar State Administration Council Law Amendment of Counter-Terrorism Law No 21/2021, 1 August 2021, https://myanmar-law-library.org/IMG/png/sac_law_no_21_2021_law_amendment_of_counter-terrorism_law.png?1628612176.

³ The Pyidaungsu Hluttaw Law No. 23, 4 June 2014, <https://www.mlis.gov.mm/mLsView.do;jsessionid=5B029BFB369BF0AA41D22495C5A69293?lawordSn=9596>.

⁴ UN General Assembly Resolution 217A(III), 10 December 1948.

⁵ 19 November 2021, <https://asean.org/asean-human-rights-declaration/>.

children, persons with disabilities and women,⁶ as well as section 354(a) of the 2008 Myanmar Constitution.⁷

Freedom of expression is also guaranteed under Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).⁸ While Myanmar has neither signed nor ratified the ICCPR, it still reflects an important source for interpreting the scope of fundamental rights and the legitimacy of any restrictions on them.

Although States have obligations under international law to take measures to combat terrorism, they must do so in a manner that fully complies with human rights law.⁹ Under Article 19(3) of the ICCPR, national security and public order are included among the list of legitimate interests which may justify restrictions on freedom of expression. However, in order to be legitimate, any restriction must, in addition to protecting a legitimate interest, be “provided by law” and “necessary”.

Counter-terrorism measures often fail to respect international human rights standards by failing to define “terrorism” sufficiently precisely. Definitions of terrorism should incorporate three elements: aim, purpose and means, with the last element designed to clearly reflect terrorism’s status as a choice of “morally inexcusable tactics”.¹⁰ Any definition of terrorism should also incorporate the particular aims and purposes behind this phenomenon, which differ from those behind ordinary violent crimes. The special international mandates on freedom of expression have called for definitions of terrorism, at least in the context of restrictions on freedom of expression, to “be restricted to violent crimes

⁶ Specifically, the *Convention on the Rights of the Child*, UN General Assembly Resolution 44/25, 20 November 1989, entered into force 2 September 1990 (CRC); *Convention on the Elimination of Discrimination against Women*, UN General Assembly Resolution 34/180, 18 December 1979, entered into force 2 September 1981 (CEDAW); and the *Convention on the Rights of Persons with Disabilities*, UN General Assembly Resolution 61/106, 13 December 2006, entered into force 3 May 2008 (CRPD). Myanmar’s ratification status for these and other international human rights treaties can be found at <https://indicators.ohchr.org/>.

⁷ Myanmar 2008 Constitution (rev. 2015), https://constituteproject.org/constitution/Myanmar_2015?lang=en.

⁸ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

⁹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 16 August 2006, para. 10, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/477/03/PDF/N0647703.pdf?OpenElement>. See also UN Security Council Resolution 1624, preamble, <http://unscr.com/en/resolutions/doc/1624> (referencing ICCPR Article 19); Resolution 1535, 26 March 2004, preamble, <https://digitallibrary.un.org/record/518306>; and Resolution 2395, 21 December 2017, preamble and para. 21, <http://unscr.com/en/resolutions/doc/2395>.

¹⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *ibid*, para. 32.

that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public”.¹¹

To meet international standards, crimes of incitement to terrorism should be tied to sufficiently specific terrorism offences the definitions of which meet the above minimum standards. As noted in the 2008 Joint Declaration of the special international mandates on freedom of expression, States should only criminalise incitement to terrorism, “understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts (for example by directing them)” and should refrain from criminalising related concepts which are insufficiently precise.¹² In other words, although incitement to terrorism is an inchoate crime which does not require that terrorism ultimately ensue, any definition must still require the State to establish a sufficient “degree of causal link or actual risk of the proscribed result occurring”.¹³ Vague and overinclusive terms such as the “glorification” and “promotion” of terrorism fall short of international standards for defining incitement to terrorism.¹⁴

States may legitimately adopt procedures for designating certain entities as “terrorist groups” under national law. However, in doing so, to respect the principle of “legality and legal certainty”, they should be “bound by a clear and precise definition of what constitutes terrorist acts and terrorist groups and entities”.¹⁵

Overview of the 2021 Amendment

Section 3(b) of the 2014 Law defines an “Act of Terrorism” as an act or omission to “act” with “the intent to commit an act of terrorism” and then lists 18 specific offences. These include section 3(b)(xv), namely “acts of exhortation, persuasion, propaganda, recruitment of any person to participate in any terrorist group or activities of terrorism”.

A “Terrorist” is defined in section 3(u) as “any person who commits or attempts to commit unlawfully any act of terrorism by any means directly or indirectly, or participates as an

¹¹ Special international mandates on freedom of expression, 2008 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 10 December 2008, <https://bit.ly/3TpQAMZ>.

¹² *Ibid.*

¹³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 1 March 2019, para. 37, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F40%2F52&Language=E&DeviceType=Desktop&LangRequested=False>.

¹⁴ 2008 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, note 11.

¹⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, note 9, para. 32.

accomplice in an act of terrorism or directs or organizes others to commit an act of terrorism or intentionally contributes to commit an act of terrorism”.

Chapter XIV of the Law provides for penalties for several terrorism-related offences. Prior to the 2021 amendment, offences listed in section 3(b)(xv) were covered by the general penalty provision in section 53, which provides for one to three years’ imprisonment and a fine. The 2021 order amends section 52(a) of the Law to additionally cover section 3(b)(xv) (whereas previously it only covered sections 3(b)(xvi)-(xviii)), with the result that the penalty for breach of section 3(b)(xv) is now increased to three to seven years’ imprisonment and a fine. This represents a significant increase in the penalties for section 3(b)(xv) offences, rendering them equal to the penalties for such offences as organising and participating in terrorist groups, harbouring terrorist group members and providing logistical support to terrorist groups.¹⁶ Journalists are among those who have been charged and convicted under section 52(a) of the amended Law.¹⁷

Analysis

Even prior to the 2021 Amendment, the criminalisation of “acts of exhortation, persuasion, propaganda, recruitment of any person to participate in any terrorist group or activities of terrorism” raised significant human rights concerns. These include that, under the Law, the Central Committee for Counter Terrorism has the power to designate an entity as a “terrorist group” (section 6(e)), but no factors or criteria for this are listed, thus leaving this important matter largely to the discretion of the Committee.

The terms “exhortation”, “persuasion” and “propaganda” used in section 3(b)(xv) are not defined elsewhere in the Law. As a result, all would cover speech with an insufficient nexus with terrorism to meet international standards and hence fail the necessity part of the test for restrictions on freedom of expression. This part of the rules is also too vague to meet the “provided by law” part of the test. In addition, although States may legitimately prohibit certain recruitment activities for terrorism, the lack of any definition of this term in the Law also renders it susceptible to overly broad interpretation.

Section 61 of the Law does set out the following general human rights guarantee: “Any person shall, in performing the investigation and taking action for acts of terrorism under this law, be guaranteed the fair treatment and enjoyment of other entitled rights in accord with the stipulations in conformity with the International Human Rights Law”. We understand this to mean that those investigating and “taking action” against terrorism must do so in a manner consistent with human rights. Nonetheless, this provision is too general

¹⁶ See ss. 3(b)(xvi)-(xviii) of the Law.

¹⁷ RSF, “Myanmar reporter sentenced to six years in prison”, 8 July 2022, <https://rsf.org/en/myanmar-reporter-sentenced-six-years-prison>; and RSF, “Myanmar reporter gets six-year sentence on terrorism charge”, 3 August 2022, <https://rsf.org/en/myanmar-reporter-gets-six-year-sentence-terrorism-charge>.

and vague to provide a robust guarantee against the potential for abuse inherent in the ambiguous and overbroad formulations of section 3(b)(xv).

Conclusion

The offences in section 3(b)(xv) of the Law are too broad and vague to pass muster under international human rights standards. As a result, the significant increase in the penalties for these offences introduced by the 1 August 2021 Amendment represents a clear case of the further undermining of human rights in Myanmar.

Normally, CLD provides detailed recommendations as to how to amend legislation to bring it into conformity with international standards. However, in view of the illegitimate means through which the legislation was enacted, CLD recommends that the Amendment be repealed until such a time as democracy is reinstated and proper consultative and legislative processes can be followed with a view to completely revising section 3(b)(xv) of the Law.

Although this Note has focussed on section 3(b)(xv), due to it being the focus of the Amendment, this should not be understood as an endorsement of the rest of the Law, an analysis of which is beyond the scope of this Note. Many of the problems associated with section 3(b)(xv) relate to structural issues with the Law as a whole. As a result, once proper democratic consultative and legislative processes resume, a full review of this legislation should be undertaken with a goal of bringing it into line with international human rights law standards.