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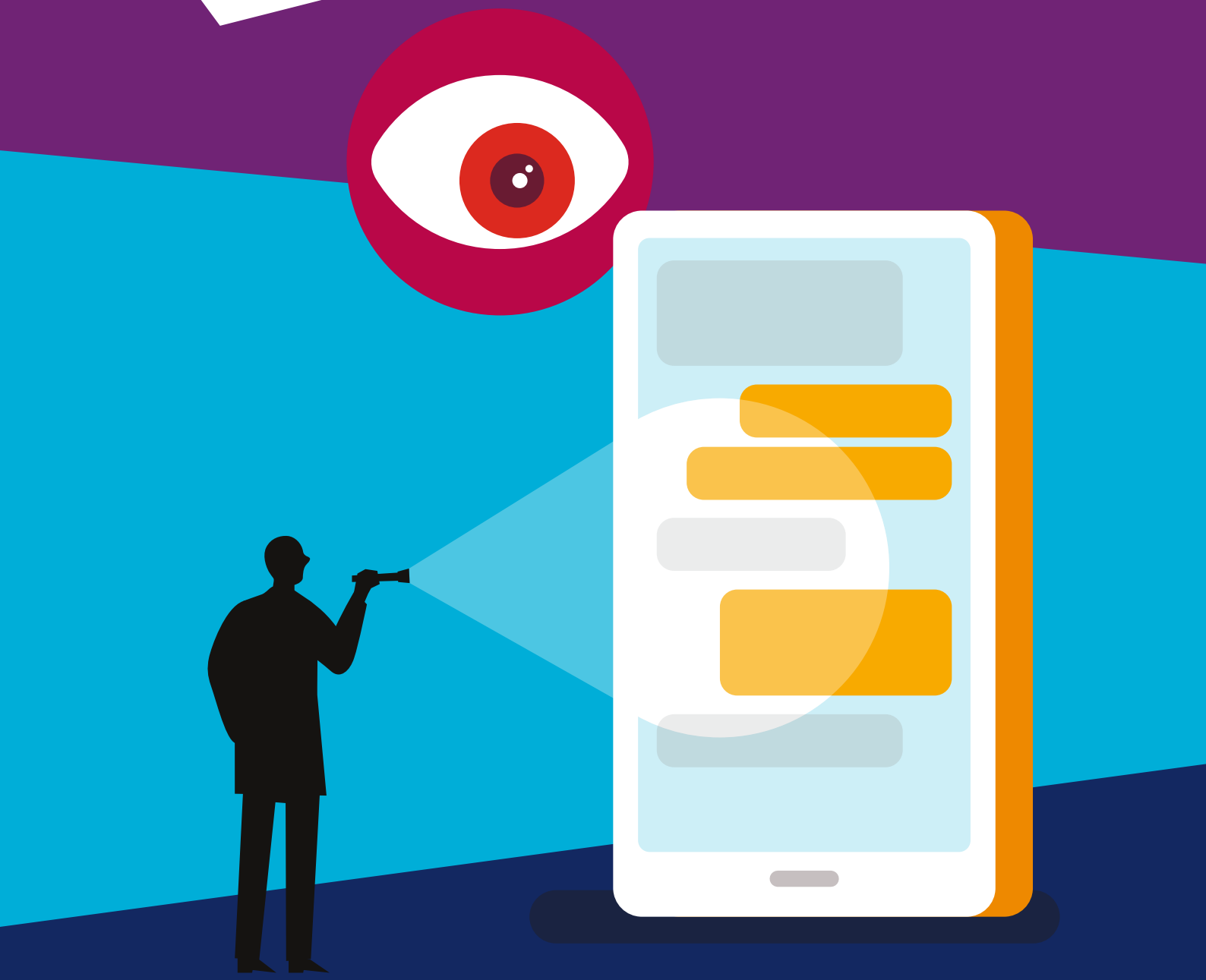

Kyrgyzstan: Draft Law on Countering Terrorism

2020

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Executive summary

In June 2020, ARTICLE 19 analysed the draft Amendments to the Law on Countering Terrorism of Kyrgyzstan (the Draft Law). Our conclusion is that the Draft Law requires a very significant revision in order to comply with Kyrgyzstan's international obligations in the field of freedom of expression.

ARTICLE 19's analysis finds that the Draft Law significantly restricts freedom of expression in several ways. In particular:

- It contains prohibition in vague and overboard way it prohibits some categories of expression in a vague and overbroad terms, including information covering essential aspects of counterterrorist operations such as the law enforcement personnel involved and the methods and techniques used.

- It imposes a number of restrictions on the media that might interfere with the essential working methods of journalists, including the confidentiality of sources.

- It contains blanket restrictions on access to large portions of essential information related to counterterrorist operations, while bestowing seemingly unlimited discretion on counterterrorist authorities in determining how much of the remaining information should be disclosed to the public.

These restrictions do not comply with the requirements of necessity and proportionality under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Their cumulative effect is more serious still, since it amounts to the complete abolishment of freedom of expression within the sphere of counterterrorism. This makes it virtually impossible to meaningfully exercise one's right to freedom of expression on issues related to terrorism, and, particularly, for the media to act as public watchdog in an area of such obvious and profound public importance.

ARTICLE 19 recommends that the Draft Law is substantially revised with a view to upholding freedom of expression, media independence, and transparency as key values and principles underlying all counterterrorist activities.

Summary of recommendations

- Only expression constituting incitement to acts of terrorism should be restricted. "Incitement" should be clearly and narrowly defined, and it should involve the element of intent on the part of the speaker to cause terrorist acts as well as the objectively existing significant likelihood that the impugned statement may leading to terrorist acts. It is equally important that acts/activities the inciting of which is prohibited are defined in a precise manner and fully aligned in their wording with the terrorist offences found in the Criminal Code.

- Other prohibited categories of expression, such as “justifying” or “rationalising” terrorism or “propaganda of terrorism” should be removed from the Draft Law altogether.

- All other restrictions on what type of information can be relayed by the media or other third parties, such as those found in Articles 13 and 29 of the Draft Law, should be also removed;

- Journalistic independence and the protection of journalistic sources should be fully upheld. All exceptions to these principles in the context of counterterrorism should be removed in their entirety, including those formulated in Article 13;

- Maximum transparency in the conduct of counter-terrorist activities and maximum disclosure should be expressly set as the default approach to informing the public about acts of terrorism and measures taken in response to them. Any exceptions to this rule should be strictly necessary and proportionate in line with the three-part test established in Article 19(3) of the ICCPR. All blanket restrictions on what information can be disclosed should be removed from the draft law. Conversely, the Draft Law should provide for categories of information that is subject to mandatory disclosure.

- Journalists and media should not be held liable for publishing classified information. The law should also protect whistle-blowers responsible for leaking classified information if that information is of public importance (e.g. revealing serious human rights violations committed in the course of counterterrorist operations).

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Introduction

This analysis has been prepared by ARTICLE 19 in order to contribute to the stakeholder consultations that the Government of Kyrgyzstan is currently holding on the Draft Amendments to the Law on Countering Terrorism (the Draft Law). The Draft Law was developed by the National Committee of State Security, allegedly "to ensure harmonisation of laws and regulations of the republic in the sphere of countering terrorism." It was put forward for public discussion at the end of March, soon after the state of emergency was declared in the country due to Covid-19 pandemic.

Our conclusion is that the Draft Law requires a very significant revision in order to comply with Kyrgyzstan's international freedom of expression obligations as it amounts to the complete abolishment of freedom of expression within the sphere of counterterrorism. The limits that the it sets on information and opinion are so narrow that virtually any critical views diverging from an official narrative or any information going beyond what is authorised by the state in the field of counter-terrorism can be easily penalised. This makes it virtually impossible to meaningfully exercise one's right to freedom of expression on issues related to terrorism, and, particularly, for the media to act as public watchdog in an area of such obvious and profound public importance.

ARTICLE 19 highlights that it is indispensable that all state responses to terrorism, from broad policies to the handling of specific counter-terror operations, are subject to rigorous independent scrutiny by the media, civil society and the public at large. Freedom of expression is not only a cornerstone of a free democratic society but also an enabler for the realisation of other human rights and a necessary condition for the realization of the principles of transparency and accountability. Consequently, the Draft Law's guiding presumption that freedom of expression is in collision with the state's duty to protect the lives and safety of its citizens is both false and counterproductive to effective and human rights compliant counterterrorist policies and practices.

The present analysis is confined to the Draft Law at hand. We note, however, that many of its problematic speech restrictions already exist in the current Law on Countering Terrorism and other legislation, including the Criminal Code. While the analysis does not specifically address any legislation currently in force, it is self-evident that to the extent that its provisions discussed below overlap with the existing legislation, our conclusions and recommendations equally apply to the latter. To some extent, the Draft Law would be a backward step, as it seeks to expand the existing scope of prohibited expression by introducing a broader and more ambiguous definition of terrorist activity and imposing additional restrictions on the media. Having said that, simply scrapping this Draft Law will not resolve the serious problems with the existing legislation.

ARTICLE 19 urges the Government to subject the Draft Law to a rigorous and comprehensive human rights impact assessment prior to its finalisation. We hope that our analysis will help in this task by highlighting the potential negative consequences of the current version of the Draft Law for freedom of expression. We also urge the Government to use this opportunity to improve the current legislative framework in order to bring it in line with Kyrgyzstan's international obligations on freedom of expression.

International standards on freedom of expression in the context of counterterrorism

The right to freedom of expression

The right to freedom of expression is protected by a number of international human rights instruments that bind states, including Kyrgyzstan, in particular Article 19 of the **Universal Declaration of Human Rights (UDHR)**[1] and Article 19 of the **International Covenant on Civil and Political Rights** (ICCPR).[2]

Its scope has been authoritatively interpreted by the UN Human Rights Committee in its General Comment No. 34. In particular, the Committee has explained:

> Paragraph 2 [of Article 19] requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse….[3]

Freedom of expression, however, is not an absolute right. Narrowly construed restrictions can be imposed on a limited number of grounds as long as they meet the requirements stipulated under so called three-part test. Specifically, restrictions must:

- **Prescribed by law:** to be characterised as a law, a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Ambiguous or overly broad restrictions on freedom of expression, deficient in elucidating their exact scope, are impermissible;

- **In pursuit of a legitimate aim:** the exhaustive list of those aims include protecting rights or reputations of others, national security or public order, or the protection of public health and morals; and

- Necessary and proportionate to the aim pursued: there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. The proportionality requirement further means that a restriction on expression must not be over-broad, and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome, and is not more intrusive than other instruments capable of achieving the same results - in principle, the least restrictive measure should be preferred.

Prohibiting incitement to discrimination, hostility or violence

It is also important to note that Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law. At the same time, inciting violence is more than just expressing views that people disapprove of or find offensive.[4] It is speech that encourages or solicits other people to engage in violence through vehemently discriminatory rhetoric.

At the international level, the UN has developed the Rabat Plan of Action, an inter-regional multi-stakeholder process involving UN human rights bodies, NGOs and academia - which provides the closest definition of what constitutes incitement law under Article 20 (2) ICCPR.[5]

The right to freedom of expression and terrorism/counter-terrorism

The protection of freedom of expression in the context of combating terrorism has been a matter of significant debate for several years. It is well understood that freedom of expression may be restricted in order to protect public order and national security and recognised that the State has a duty to protect its people from terrorist threats. However, anti-terrorism/ counter-terrorism laws trigger executive powers that are very restrictive on human rights, often with reduced judicial oversight. As a matter of principle, they should be used only in circumstances when the exercise of these powers is truly "necessary". The laws should be narrowly drafted and be proportionate to the legitimate aim pursued – protecting national security.

It is well recognised that freedom of expression, along with other human rights, must be fully respected in the context of counterterrorism. For example, the UN Security Council Resolution 1456 (2003) affirms:

> 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.[6]

The UN Human Rights Commission has also reminded that states must "refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression in ways which are contrary to their obligations under international law."[7]

Further, in General Comment No. 34, the Human Rights Committee clearly provided that:

> 46. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also

be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.

Moreover, the **Johannesburg Principles on National Security, Freedom of Expression and Access to Information**[8] (Johannesburg Principles), a set of international standards developed by ARTICLE 19 and international freedom of expression experts, are instructive on restrictions on freedom of expression that seek to protect national security. Principle 2 of the Johannesburg Principles states that restrictions sought to be justified on the ground of national security are illegitimate unless their genuine purpose and demonstrable effect is to protect the country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. The restriction cannot be a pretext for protecting the government from embarrassment or exposure of wrongdoing, to conceal information about the functioning of its public institutions, or to entrench a particular ideology.

Principle 15 states that a person may not be punished on national security grounds for disclosure of information if

- the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or
- the public interest in knowing the information outweighs the harm from disclosure.

Further, the **Tschwane Principles on National Security and the Right to Information**[9] also consider extensively the types of restrictions that can be imposed on access to information. The Tshwane Principles were developed by a number of civil society organisations and academic centres in consultation with experts from more than 70 countries and have since been endorsed by the UN Special Rapporteur on freedom of expression.[10]

Analysis on the Draft Law

Public calls for terrorism and justification of terrorism

The Draft Law prohibits "public calls to carry out terrorist activity and public justification of terrorism" (Articles 5 and 15). The same prohibition is already found in Article 242 of the Criminal Code. However, this is not to say that the draft law merely reproduces the existing criminal-law provision. While the term "terrorist activity" is referred to the Criminal Code, it is not defined there. Instead, the definition is provided in the current Law on Countering Terrorist Activity.

The Draft Law seeks to revise that definition substantially, in particular, by expanding the scope of "terrorist activity" to include "other forms of supporting organisations whose activity has been determined to be terrorist [activity]" as well as "committing other crimes for terroristic purposes." The oblique language of this new category of "terrorist activity" does not correspond to the expressly terrorism-related offences currently included in the Criminal Code. Even if one assumes that "supporting terrorist organisations" refers to the existing offence of supporting/facilitating terrorist activity under Article 241 of the Criminal Code, the second element - that is, "committing other crimes for terroristic purposes" - is inherently vague and open-ended, seemingly allowing for any crime to be recast as a form of terrorist activity regardless of whether it is expressly criminalised as a terrorist offence.

Consequently, the vagueness built into the **new definition of "terrorist activity"** makes the prohibition of "public calls" for terrorist activity equally vague and overly broad. In addition, it remains unclear if the notion of a "public call" is synonymous with "incitement" in the meaning of Article 20(2) of the ICCPR (or, indeed, in the meaning ascribed to the term "incitement" under the criminal law of Kyrgyzstan). In particular, it is unclear if it requires the existence of an objective risk that the acts publicly "called for" may indeed be committed.

More troubling still is the prohibition of **"public justification of terrorism."** This is an inherently vague category that is a priori incompatible with Articles 19 and 20(2) of the ICCPR. "Justification of terrorism" and other similarly worded speech offences have been repeatedly and unequivocally criticised by international human rights bodies[11] and experts.[12] As the Special Rapporteur on counter-terrorism and human rights pointed out in her recent report, the problem with criminalising "justification of terrorism" is that "liability is based on the content of the speech, rather than the speaker's intention or the actual impact of the speech."[13]

Recommendations:

- For the Draft Law (and the counter-terrorism legislation currently in force) to be compliant with international human rights standards, prohibited expression should be limited to incitement to terrorist activity.

- "Incitement" to terrorism in the above context should be understood to require the speaker's intent both to communicate a message and to incite the commission of a

terrorist act. It should also require the presence of an actual risk that the act will be caused by the statement.

- "Terrorist activity" should be clearly and precisely defined to cover only criminal acts that are truly terroristic in nature, to which end we recommend that the crime of "justifying terrorism" is removed from the draft law as well as the currently existing laws, while the definition of "terrorist activity" under the draft law is made to be fully aligned with the terrorist offences included in the Criminal Code.

"Terrorist materials"

The Draft Law goes further in restricting expression by introducing a ban on so-called "terrorist materials."

According to Article 5, "terrorist materials" are "any information materials about methods and means of committing terrorist acts" as well as materials containing "calls for terrorist activity or rationalising or justifying the necessity of such activity." While the Draft Law does not address the consequences of disseminating "terrorist materials" for individuals or media, it can be assumed that "terrorist materials" would fall within the already existing category of "extremist materials" and so would lead to the same sanctions as those attached to the latter category, i.e. criminal liability for individuals involved in the production and dissemination of extremist materials under Article 315 of the Criminal Code and the termination of media organisations responsible for publishing extremist materials under Article 11 of the Law on Countering Extremist Activity.

ARTICLE 19 finds that the scope of expression proscribed under the rubric of "terrorist material" is broader than "public calls" for terrorist activities and "justification of terrorism" discussed above. Thus, it additionally refers to content "rationalising" terrorist acts. Despite the inherent vagueness of this term, it is clear that it is not synonymous with "justifying," if only because the definition of terrorist material refers both to rationalising *and* justifying. The term "rationalising" is vague and broad enough to cover materials that, for instance, seek to examine the root causes of terrorism or factors contributing to the rise of terrorism, even where they cannot be viewed as condoning terrorism in any sense. Similar to justification of terrorism, the term is too vague to meet the requirements of legality and proportionality under Article 19(3) of the ICCPR.

Content proscribed under this rubric also includes information on "methods and means of committing terrorist acts." While it is understandable why the state may seek to restrict access to information that can be used as practical aid for those planning to commit acts of terror (e.g. instructions for building an explosive device), the Draft Law's blanket prohibition is too broad for that purpose. It does not require to consider the intent behind publishing such information or the level of detail (i.e. whether it is detailed enough to be of practical value for would-be terrorists). Consequently, it may cover a wide range of expression that does not pose any plausible danger but is still of public importance. Examples of legitimate speech that can potentially fall under this prohibition include studies on terrorist techniques and effective policies and measures to neutralise them, research into potential security vulnerabilities, works of fiction dealing with the subject of terrorism, media coverage of terrorist attacks that includes reporting on the "methods" employed by the perpetrators etc.

ARTICLE 19 assumes that even if it is not the intention of the drafters to outlaw such forms of legitimate expression, the restriction is so broadly worded that it will have a significant chilling effect on public discourse on issues related to terrorism and will easily lend itself to being misused by the authorities to punish media or individuals for expressing critical views about counter-terrorist policies and practices.

Recommendations:

- ARTICLE 19 advises against using the concept of "terrorist materials" as a means of introducing additional (new) restrictions on expression.

Reporting on acts of terrorism

Informing about the acts of terrorism

In addition to general speech restrictions discussed above, the Draft Law imposes stringent restrictions on disseminating information about specific terror-related crisis situations.

- **Article 29** provides that over the duration of a counterterrorist operation, the scope and methods of informing the public about the act of terror are determined by the authorities in charge of the operation.

- Article 29 para 1 lists categories of information that are not permitted to be publicly disseminated. They include information:

    - Capable to hinder the conduct of the counterterrorist operation and pose danger to the lives and health of people within the operation area;

    - Relating to individuals participating in the operation as well as supporting the operation;

    - Revealing the special techniques and methods used in the operation; and

    - Amounting to the propaganda or justification of terrorism.

ARTICLE 19 notes that the intended scope of application of Article 29 is not entirely clear. At the very least, it applies to the authorities who are in charge of a counterterrorist operation. This narrow interpretation raises its own set of concerns related to access to information and transparency (which are discussed further below). However, the ambiguous wording suggests that Article 29 - and, especially, its second paragraph - may also apply to media and other third parties.

Regardless of the actual intent of the drafters, experience shows that such an expansive interpretation is very likely to be adopted in practice. Consequently, if Article 29 is only intended to regulate the authorities' *disclosure* of information, this should be made clear in its wording. If, however, it is intended to apply in equal measure to the *dissemination* of information about ongoing terror attacks by the media or other third parties, we should

stress that such restrictions would be excessive, unjustified and, ultimately, incompatible with international freedom of expression standards.

ARTICLE 19 does not wish to deny that legitimate operational reasons may exist to temporarily restrict certain information relating to an ongoing counter-terrorist operation in order to protect the safety of law enforcement personnel, hostages or other individuals. However, the authorities have sufficient means to achieve that by controlling the flow of information from their end, that is, by determining how much information about the ongoing crisis they disclose before and during the operation and/or by temporarily restricting physical access to the crisis area. To respect the public's right to be informed on an issue of such critical importance and to ensure that the authorities remain accountable for any failures or rights violations in the course of their counterterrorist actions, the media should be able to retain its freedom to report on the unfolding terrorist attack to the fullest extent possible and in an independent manner, including the freedom to obtain information through independent channels.

This point has been repeatedly affirmed by the four special mandates on freedom expression. In their Joint Declaration of 2008 they stressed:

> The role of the media as a key vehicle for realising freedom of expression and for informing the public should be respected in anti-terrorism and anti-extremism laws. The public has a right to know about the perpetration of acts of terrorism, or attempts thereat, and the media should not be penalised for providing such information.[14]

The 2016 Joint Declaration reaffirmed:

> States should not restrict reporting on acts, threats or promotion of terrorism and other violent activities unless the reporting itself is intended to incite imminent violence, it is likely to incite such violence and there is a direct and immediate connection between the reporting and the likelihood or occurrence of such violence.[15]

Consequently, Article 29 of the Draft Law should be confined exclusively to regulating the disclosure of information by state authorities (subject to modification required to bring it in line with the right to access to information discussed below). This is not to say that the media should be free from professional/ethical standards in its coverage acts of terrorism. Those standards, however, should be a matter for self-regulation. For instance, the Council of Europe's Declaration on freedom of expression and information in the media in the context of the fight against terrorism

> Invites the media and journalists […] to adopt self-regulatory measures, where they do not exist, or adapt existing measures so that they can effectively respond to ethical issues raised by media reporting on terrorism, and implement them.[16]

Among media responsibilities that should be thus addressed, the Declaration includes

> Refraining from jeopardising the safety of persons and the conduct of antiterrorist operations or judicial investigations of terrorism through the information they disseminate" and "respecting the dignity, the safety and the anonymity of victims of terrorist acts and of their families, as well as their right to respect for private life.[17]

Obligations of the media workers covering terrorist activities

Further, **Article 13** states that media workers involved in covering terrorist activities are "are obliged to take into account that the right of individuals to life and security comes before the right to free access to information and its dissemination." These provisions go far beyond narrowly defined restrictions required by three-part test. It promotes two assumptions that are borne out by the other speech-related provisions of the Draft Law:

- Any measures restricting freedom of expression in the name of protecting a person's life or/and physical and mental integrity are automatically justified, and

- Any measures adopted by the state to combat terrorism must be automatically regarded as protecting/advancing security and the right to life.

ARTICLE 19 notes that both of these assumptions are false. Experience shows that serious violations of the right to life and other human rights are frequently committed by security forces and other public authorities in the context of counter-terrorism. In particular, it is not uncommon that excessive use of lethal force is used in counter-terror operations which results not only in unjustified loss of life among individuals directly targeted as "terrorists" but also among victims of terrorism or innocent bystanders. The state's duty to protect the right to life and other human rights is also breached when its counter-terrorism policies and practices are inadequate or even counter-productive. For instance, policies that appear to be tough and uncompromising on terrorism and its causes may actually lead to the alienation and radicalisation of minorities, resulting in an upsurge in deadly terrorist activity.

Interviewing terrorists

Further **Article 13 para 4** forbids media workers from "interviewing terrorists on their own initiative" and "disseminating information about hostages, their relatives and family members."

It is not clear whether these restrictions are meant to be operational only during an unfolding terrorist crisis or whether they were of a more general nature and apply at any in time. Evidently, the latter interpretation makes them even more intrusive and more difficult to justify on any of the grounds envisaged in Article 19(3) of the ICCPR. Thus, a blanket restriction on interviewing "terrorists" would severely restrict the media's ability to independently report on terrorism-related topics, even if one could assume that "terrorist" is an easily identifiable and predicable category.

However, ARTICLE 19 notes that this assumption cannot be made. According to Article 5 the Draft law, a terrorist is "an individual participating in terrorist activity in any manner." Given such a broad definition, it would create a considerable and disproportionate limitation on the media's capacity to engage with individuals who may provide valuable insights into terrorist activities or the mind-set of those involved in terrorism, for fear that such individuals could potentially be identified as "terrorists." Even where it is relatively clear that a person is indeed recognised as a "terrorist" (e.g. a member of a banned terrorist organisation), it does not automatically follow that media should be banned from interviewing them. As stated in Principle 8 of the Johannesburg Principles, expression "may not be prevented or

punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest."

While there may be legitimate concerns about protecting the safety of hostages and their right to privacy (which would be more pressing during an ongoing terrorist crises, but significantly less so when it is over), the blanket restriction on disseminating *any* information about the hostages and their family members is flagrantly disproportionate and cannot be justified either on the grounds of national security or protecting of the rights of those persons. Media's ability to seek and provide such information is essential to its coverage of an unfolding hostage situation as well as the subsequent analysis of the resolution of that situation.

Even if Article 13 para 4 is meant to be understood narrowly as applying only to media reporting during an ongoing crisis (but not afterwards), it is still incompatible with Article 19 of the ICCPR for the same reasons as those discussed above in connection with Article 29 of the Draft Law. It is worth repeating that the authorities involved in the handling of a counterterrorist operation have sufficient control over access to information and physical control over the operation's area to be able manage the flow of information without directly interfering with journalists' freedom to conduct their own reporting.

Recommendations:

- Article 29 of the Draft Law should be confined exclusively to regulating the disclosure of information by state authorities, subject to modification required to bring it in line with the right to access to information (see below).

- The prohibitions on interviewing individuals who are - or, potentially, can be - considered as terrorists and on publishing information relating to hostages and their relatives should be removed from the draft law.

- The Draft Law should not impose any restrictions on the freedom of expression of journalists, media organisations and other third parties beyond the general prohibition of incitement to terrorism. Potential violations of the right to privacy of victims of terrorism should be addressed through media's self-regulatory mechanisms and/or civil-law remedies.

Protection of journalistic sources and information

Article 13 of the Draft Law imposes two further obligations on media workers:

- To immediately notify counter-terrorist authorities about an impending act of terrorism upon coming into the possession of such information (Article 13 para 2);

- To pass onto the authorities any information or documents that can be used as evidence in terror-related criminal proceedings or used to prevent, expose or interrupt terrorist activity (Article 13 para 3).

As for the first of these two obligations, ARTICLE 19 notes that under Kyrgyzstani law there appears to be no general obligation to notify the authorities about an impending criminal act, including terrorist offences. We see no justification for imposing it specifically on media workers when it does not exist for any other third party who may become aware of ongoing or imminent terrorist activity.

As for the second obligation, ARTICLE 19 highlights that the rules on the protection of confidentiality of journalists' sources of information should be overridden only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means. These should apply in the context of anti-terrorist actions as at other times. For example, the 2016 Joint Declaration of four special freedom of expression mandates states that

> States should also, in this context, respect the right of journalists not to reveal the identity of their confidential sources of information and to operate as independent observers rather than witnesses.[18]

Similarly, Council of Europe's Declaration on freedom of expression and information in the media in the context of the fight against terrorism called on public authorities in member states:

> To respect, in accordance with Article 10 of the European Convention on Human Rights and with Recommendation No. R (2000) 7, the right of journalists not to disclose their sources of information; the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by these texts; [and]
>
> To respect strictly the editorial independence of the media, and accordingly, to refrain from any kind of pressure on them.[19]

Recommendations:

- Article 13 paras 2 and 3 of the Draft Law should be struck out entirely.

Transparency and access to information

Article 3 of the Draft Law lists "confidentiality of information on special methods, techniques, and tactics of counterterrorism measures as well as participating personnel" among general principles on which all counterterrorist activities should be premised.

According to **Article 29**, determining how much information about an act of terrorism should be disclosed to the public and in what manner is left essentially at the full discretion of the authorities in charge of the counterterrorist operation, except for large swathes of information that are pre-emptively excluded from public disclosure under the second paragraph of the same provision. Those excluded categories are:

- Information capable to hinder the conduct of the counterterrorist operation and pose danger to the lives and health of people within the operation area;

- Information relating to individuals participating in the operation as well as supporting the operation;

- Information revealing the special techniques and methods used in the operation, and

- Information amounting to propaganda or justification of terrorism.

It is quite clear from the wording of this provision whether restrictions (2) and (3) are limited only to the duration of the counterterrorist operation or meant to apply indefinitely. At the same time, the Draft Law does not impose any *obligation* on the authorities to disclose any amount of information at all. Consequently, the default regime established by the Draft Law is a complete lack of access to information held by counterterrorist authorities and a complete absence of transparency in their operation. This approach is not simply widely disproportionate in the meaning of Article 19(3) of the ICCPR, it is also in breach of Article 5(1) of the ICCPR that stipulates that states cannot "engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein."

ARTICLE 19 notes that it is well-established that "a right to access to information held by public bodies" is part and parcel of the right to freedom of expression guaranteed in Article 19 of the ICCPR.[20] The Human Rights Committee has stressed that to "give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest."[21] While considerations of national security are a legitimate and frequently invoked ground for restricting access to information, such restrictions should be viewed as an exception, and they must always comply with the three-part test under Article 19(3).

In this regard, the Tshwane Principles provide detailed guidance on what information can be legitimately withheld in the context of national security/counterterrorism, what information should be subject to mandatory disclosure, and to what extent individuals can be punished for disclosing classified information. Principle 3 of the Tshwane Principles explains how the three-part test under Article 19(3) of the ICCPR should be applied in the specific context of restricting access to formation on national security grounds. In particular, it highlights that restrictions may be considered as "necessary" only if the risk of harm from disclosure overweighs the overall public interest in the disclosure. Principle 4 affirms that the right to information "should be interpreted and applied broadly, and any restrictions should be interpreted narrowly" and that the burden of demonstrating that a restriction is justified lies on the public authorities.

In light of these standards, Article 29 of the Draft Law is broadly compliant with Article 19(3) of the ICCPR only insofar as it allows the authorities to withhold information capable of hindering the conduct of the counterterrorist operation and posing danger to the lives and health of people within the operation area - provided that such restrictions are narrow and strictly necessary.

However, the blanket ban on providing access to information relating to individuals involved in the counter-terrorist operation and on information revealing the special techniques and methods used in the operation is a priori incompatible with the above standards. Whether information falling into either of these two broad categories needs to be classified (and to

what extent) should be determined on a case-by-case basis, and its disclosure must not be pre-empted in a blanket manner. Thusly narrowed, however, these additional grounds for restricting access to information become quite redundant, since the first of the grounds listed in Article 29 is broad and flexible enough to allow the withholding of information on counterterrorist methods or counterterrorist personnel wherever it can be shown that the disclosure would jeopardise ongoing counterterrorist activities or the safety of personnel or other individuals.

Moreover, certain types of information should be subject to mandatory disclosure - or, there should at least be a storing presumption in favour of disclosure. Principle 10 of Tshwane Principles identifies categories of information that are strongly favoured for public disclosure because of important - and sometime overriding - public interest involved. In particular, it stipulates that:

- Information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security may not be withheld on national security grounds in any circumstances;

- Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy.

Principles 37-43 set out circumstances in which public officials should be protected from criminal and other forms of liability and other forms of retribution for disclosing classified information in the public interest, as well as the extent of the protection granted. In particular, Principle 37 explains that whistle-blowers should be protected for disclosing information that reveals wrongdoing on the part of the authorities, including human rights violations, violations of international humanitarian law, criminal offences, and dangers to public health and safety.

ARTICLE 19 is deeply concerned that the Draft Law demonstrably fails to reflect any of these standard. It establishes a regime of near total secrecy and unfettered discretion in controlling information that is antithetical to the requirements of Article 19 of the ICCPR and conducive to abusive practices. This regime effectively shields counterterrorist authorities from accountability and prevents meaningful public scrutiny of their actions.

Recommendations:

- The Draft Law is overhauled to ensure maximum transparency in the conduct of counterterrorist activities.

- Confidentiality as an overarching principle should be removed from Article 3 and, instead, maximum disclosure should be expressly set as the default approach to informing the public about acts of terrorism and measures taken in response to them. Any exemptions from this principle should allowed only on a case-by-case basis where they are shown to be strictly necessary and proportionate in line with the three-part test established in Article 19(3) of the ICCPR.

- All blanket restrictions on what information can be disclosed should be completely removed from the Draft Law.

- The Draft Law should provide for categories of information that are subject to mandatory disclosure, especially information identified in Principle 10 of the Tshwane Principles. Journalists and media should be fully immune from liability for publishing classified information. Protection should be also afforded to whistle-blowers who choose to disclose classified information where there is compelling public interest in the disclosure, such as revealing human rights violations committed in the course of counter-terrorist operations.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law and Policy team, you can contact us by e-mail at legal@article19.org. For more information on ARTICLE 19's work in Europe and Central Asia, please contact the Europe and Central Asia Division at europe@article19.org

Endnotes

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

2 GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.

3 Human Rights Committee, General Comment No. 34, CCPR/C/GC/3, 12 September 2011, para 11.

4 *C.f.* European Court of Human Rights, *Handyside v the UK*, 6 July 1976, para 56.

5 UN Rabat Plan of Action, 2012. In particular, the Rabat Plan clarifies that regard should be had to six factors in assessing whether speech should be criminalised by states as incitement. These include the general context, the speaker, intent, content of the message or its form, the extent of the speech at issue and the likelihood of harm occurring, including its imminence.

6 Resolution 1456 (2003), para 6. See also General Assembly resolution 60/288 of 20 September 2006 on "Global Counter-Terrorism Strategy."

7 Commission on Human Rights resolution 2003/42; Commission on Human Rights Resolution, 2004/42; The right to freedom of opinion and expression; or Human Rights Resolution 2005/38.

8 Adopted on 1 October 1995. These Principles have been endorsed by the UN Special Rapporteur on FOE and have been referred to by the United Nations Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996.

9 The Tschwane Principles on National Security and the Right to Information, adopted June 2013.

10 See the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362, 4 September 2013, paras 64-66.

11 See, e.g., General Comment No. 34, *op.cit.*, para 34.

12 See, e.g., 2005 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression (UN Special Rapporteur on FoE), the OSCE Representative on Freedom of the Media (OSCE RFoM) and the OAS Special Rapporteur on Freedom of Expression (OAS Special Rapporteur); the 2008 Joint Declaration on defamation of religions, and anti-terrorism and anti-extremism legislation, the UN Special Rapporteur on FoE, the OSCE RFoM, the OAS Special Rapporteur and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information (ACHPR Special Rapporteur). See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/16/51, 22 December 2010, para 31.

13 Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/40/52, 1 March 2019, para 37.

14 2008 Joint declaration on defamation of religions, and anti-terrorism and anti-extremism legislation, the UN Special Rapporteur on FoE, the OSCE RFoM, the OAS Special Rapporteur and the ACHPR Special Rapporteur.

15 2016 Joint Declaration on freedom of expression and countering violent extremism, the UN Special Rapporteur on FoE, the OSCE RFoM, the OAS Special Rapporteur and the ACHPR Special Rapporteur.

16 Council of Europe, Committee of Ministers' Declaration on freedom of expression and information in the media in the context of the fight against terrorism, 2 March 2005.

17 *Ibid.*

18 The 2016 Joint Declaration, *op.cit*, para 2d).

19 Declaration on freedom of expression and information in the media in the context of the fight against terrorism, *op.cit.*

20 See General Comment No. 34, *op.cit.*, para 18.

21 *Ibid*, para 19.

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