

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE: AL
BRA 8/2015:

28 October 2015

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolutions 25/2, 24/5, 25/18, and 22/8.

In this connection, we would like to bring to the attention of your Excellency's Government information we continued to receive concerning **proposed terrorism legislation in Brazil, in particular draft law N° 101/2015, which would appear to contravene international human rights law and standards, specifically regarding the rights to freedom of peaceful assembly and of association.**

An earlier communication expressing concern, *inter alia*, about draft legislation criminalizing acts of terrorism, in particular draft laws N° 728/2011, N° 499/2013 and N° 236/2012, was sent on 4 April 2014 (BRA 3/2014).

We would like to thank your Excellency's Government for its detailed response dated 27 August 2014, which was considered by the Special Rapporteur on the rights to freedom of peaceful assembly and association in his report on 'Observations on communications transmitted to Governments and replies received' of 10 June 2015 (A/HRC/29/25/Add.3, paragraphs 108-114).

According to the new information received:

The proposed legislative changes considered in draft laws N° 728/2011, N° 499/2013 and N° 236/2012, appeared to be in reaction to protests in Brazil during the Confederations Cup in 2013, and were allegedly aimed at enhancing security ahead of the World Cup in 2014. Draft law N° 728/2011, which was focused

explicitly around enhancing security ahead of the Fédération internationale de football association (FIFA) 2013 Confederations Cup and the 2014 Football World Cup, was dismissed when law's rapporteur voted for its rejection in May 2014. Draft Law N° 499/2013, seeking to establish the crime of terrorism and giving Federal Courts the competence to hear, process and judge upon such crimes, remains in formal processing within the Senate and remains open to be put to a vote. Furthermore, Draft law N° 236/2012, which seeks to reform the criminal code to include a very broad description of terrorism, is still under discussions and it will be voted on, although no timeline for voting has been set.

It has been reported that the protest movements surrounding the World Cup in 2014 as well as the upcoming 2016 Olympic Games have provoked further responses by the Government to pursue legislation against terrorism.

In this connection, draft law N° 2.016/2015, which would provide for the regulation of terrorism as well as investigative and procedural provisions and would reformulate the concept of a terrorist organization, was proposed by the Executive and was signed by the Ministers of Justice and Finance. This law, which aims to regulate the provisions of item XLIII of article 5 of the Federal Constitution draft, would amend Act No. 7.960 of 21 December 1989, and 12.850 of 2 August 2013.

On 13 August 2015, the Chamber of Deputies of Brazil approved draft law N° 2.016/2015, reportedly without public consultation.

It is alleged that the Minister of Finance's involvement was in light of the forthcoming 2016 review of the Financial Action Task Force, in follow up to its previous recommendations to Brazil in 2010. Those recommendations included, *inter alia*, for the country to criminalize the financing of terrorism in a manner consistent with the international requirements and implement effective laws and procedures to take freezing action pursuant to the relevant United Nations Security Council Resolutions. It is alleged that the Government seeks to have a law typifying terrorism in place prior to the Financial Action Task Force's evaluation.

After having been transferred to the Senate on 19 August 2015, where it became draft law N° 101/2015, the pending legislation was assigned to the 'urgent procedure', on 20 August 2015, under Art. 64, paragraph. 1 of the Federal Constitution, combined with article 375 of the Internal Regime of the Senate. The draft law was put to vote by the Presidency with a request for urgency in order to expedite its processing. The implementation of the urgent procedure has resulted in the draft law bypassing the regular congressional processes, including submission to the consultation commission and other congressional commissions. Sources indicate that only the executive power can now remove the urgency request to expedite the law.

It is further reported that draft law N° 101/2015 does not create new offenses under legislation in Brazil, as the crimes detailed in the draft law are presently codified in existing legislation. Moreover, draft law N° 101/2015 bears apparent similarities to the previous draft laws relating to the crime of terrorism, including draft law N° 499/2013.

It is alleged that during the process of voting for draft law N° 101/2015, there was allegedly considerable debate by the general public and among senators. In this context, the Government reportedly negotiated a new rapporteur in Senate, Senator Aloysio Nunes, to push the legislation forward.

Draft law N° 101/2015 will be voted on by the Senate on 28 October 2015. Sources have indicated that it is harsher in its definitions than the earlier version of the bill, draft law N° 2.016/15, as it delineates and typifies many more behaviours as crimes of terrorism, and is considerably stricter concerning penalties. It is further alleged that draft law N° 101/2015 also removed the previous safeguard, formally in article 2.2, to ensure that the definition of terrorism ‘does not apply to individual or collective behaviour of people in political demonstrations, social movements, trade unions, religious, class or professional movements, motivated by social or collective purposes, in order to challenge, criticize, protest or support, in order to defend rights, constitutional guarantees and freedoms.’

Article 2 of the draft law N° 101/2015 allegedly considers that an ‘act of terrorism against people’ is ‘committed when an individual, either alone or in conjunction with agents, perpetrates premeditated violence and provokes widespread terror through political extremism, religious intolerance or racial, ethnic, gender or xenophobic prejudice.’ The apparent sentence for these crimes is confinement for 16 to 24 years.

The same article increases the sentence to 20 to 30 years ‘if the crime is committed against a member of the executive, the legislative or the judicial branches; the head of state or head of a foreign government; a diplomatic or consular officer of a foreign State or representative of an international organization to which Brazil is party’ (article 2.1). It further stipulates that the sentence is 20 to 30 years, if ‘the crime is committed: I - with the use of explosives, fire, a chemical, biological or radioactive weapon or other weapon of mass destruction; II - on means of public transport; III - in crowded places; IV - with the assistance, of any kind, of a foreign criminal organization, company or government’ (article 2.2). Article 2.3 stipulates that if the crime results in death, the penalty is imprisonment for 24 to 30 years.

Article 3 of the same law allegedly defines ‘terrorism against objects’ as an act that ‘is committed when an individual, either alone or in conjunction with agents, provokes widespread terror through political extremism, religious intolerance or racial, ethnic, gender or xenophobic prejudice by destruction or incapacitation of

an essential good or service, by any means, including electronic” and carries a prison sentence of 8 to 20 years.

Article 5, common to the entire draft law, considers that ‘widespread terror’ is the ‘serious social disturbance caused by means of immediate danger, real or not, against an indiscriminate number of people’ while ‘terrorism by political extremism’ is ‘an act that seriously threatens the fundamental principles of the democratic rule of law.’

The recruitment for terrorism, stipulated in Article 6, notes that ‘to recruit, solicit, enlist, unite, rally, mobilize or in any way organize, facilitate or equip individuals to commit an act of terrorism’ is punishable by 5 to 8 years in prison.

Article 7, covering the “apology of terrorism”, considers that ‘to publicly condone an act of terrorism or the perpetrator of a terrorist act’ carries a sentence of 5 to 8 years in prison.

Financing terrorism is outlined in article 8 of the draft law which details that ‘to finance, receive, provide, offer, obtain, safeguard, store, solicit or invest funds or contribute in any way, directly or indirectly, to an individual or group, for the purpose of obtaining funds, assets, resources, goods, rights or services of any nature for planning, preparing or perpetrating the crime referred to in this Law’ carries a sentence of 8 to 12 years confinement, in addition to a fine.

We express grave concern about the proposed definition of terrorism in draft law N° 101/2015. By allowing the interpretation of the definition of terrorism to include broad and subjective concepts, such as “widespread terror through political extremism” and “serious social disturbance”, ambiguities and confusion may arise as to what the State deems a terrorist offence to be and the provisions may be used to unlawfully restrict human rights. The principle of legal certainty requires that criminal liability shall be limited to clear and precise provisions in the law, ensuring reasonable notice of what actions the law covers, without unduly broadening the scope of the proscribed conducts. Draft law N° 101/2015 does not appear to conform to this principle given that its vague and subjective concepts could be interpreted very broadly and lead to legal uncertainty.

We express serious concern that several provisions of the reported draft law N° 101/2015 have the potential to severely undermine the work of human rights defenders and the exercise of human rights and fundamental freedoms in Brazil, including the rights to freedom of peaceful assembly and association and the right to freedom of opinion and expression. We express further concern that the expedited process used to push draft law N° 101/2015 through legislative channel may have a detrimental impact on human rights in the country since the fast-tracking of legislative procedures, sidesteps the democratic process by circumventing the scrutiny of committees within the Senate and leaving out civil society actors.

We note that in its response to Communication to BRA 3.2014, from 27 August 2014, the Government of Brazil stipulated that “[a]n increased severity of punishment for terrorist acts might unintendedly have a negative impact on basic rights and guarantees of peaceful assembly and association” (Brazil 27.08.14 (3.2014), page 11) and urge the Government to consider other measures to ensure that any restrictions are in strict accordance with its international legal obligations. We further urge that anti-terror legislation must not be used to intimidate and suppress dissent, undermine public participation or be used to restrict the work of human rights defenders.

We express our fear that any broad type of violence, including verbal abuse, could be typified as terrorism in article 2. Furthermore, the definition of terrorism includes practices of crimes committed for reasons related to “political extremism” (in articles 2 and 5) and may result in criminal penalties for legitimate demonstrations, organized social movements or collective protests, given the removal of a previously included article of safeguarding social movements from this law. Moreover, we are concerned that any form of assembly could be considered as a practice of terrorism under (article 6) and left to the discretion of the judiciary to clarify.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

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

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the status of draft law N° 101/2015.
3. Please provide information on the compatibility of the draft law with international human rights norms and standards, in particular how is it consistent with Articles 15, 19, 20, 21, and 22 set forth in the International Covenant on Civil and Political rights.
4. Please provide details on the opportunities for public participation including whether civil society representatives, will have an opportunity to review the draft law and provide comments thereon.
5. Please provide detailed information about the reason that this legislation is labelled as “urgent” and cannot proceed through the normal legislative channels.

We would also like to seize this opportunity to kindly ask Your Excellency to consider bringing the present letter to the kind attention of the President of the Republic,

the Ministers of Justice and Finance and representatives in the Chamber of Deputies and Senate.

While we remain available to provide advice on legislation to regulate associations which comply with international human rights law and standards, it is also our intention to publicly express our concerns as, in light of the almost final stages of the legislative process, in our view, these are matters warranting immediate public attention. The press release will indicate that we have been in contact with your Excellency's Government to clarify the issues in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

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Maina Kiai

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Ben Emmerson

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Annex

Reference to international human rights law

In connection with the above allegations and concerns, we would like to refer your Excellency's Government to articles 19 and 20 of the Universal Declaration of Human Rights (UDHR) and to articles 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR), which Brazil acceded to on 24 January 1992, on the rights to freedom of expression and the right of peaceful assembly. We would like to draw attention to the principle of legality in criminal law, enshrined in several international human rights instruments such as article 15 of the ICCPR, and made non-derogable in times of public emergency.

We would like to refer to the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/16/51. Drawing upon international treaties, resolutions adopted by international organizations and the jurisprudence of international and regional courts, the report identifies ten areas of best practices in counter-terrorism and proposes ten legislative models, for wider adoption and implementation by United Nations Member States, for the effective countering of terrorism, in full compliance with international law, including human rights, humanitarian and refugee law. The ten areas address questions relating to normal operation and regular review of counter-terrorism law and practice; the implementation of effective remedies for violations of human rights as a result of counter-terrorism laws and/or practices; the rights of victims of terrorism; the definition of terrorism and related incitement to terrorism offences; the listing of terrorist entities; as well as the arrest and interrogation of terrorism suspects .

Furthermore, in his report to the General Assembly A/63/223, the Special Rapporteur emphasizes basic principles as elements of best practice in securing the right to a fair trial in terrorism cases. In his report to the Human Rights Council A/HRC/22/52, the Special Rapporteur also sets out framework principles for securing the right to truth and the principle of accountability for gross or systematic human rights violations committed by public officials while countering terrorism.

While taking note of the fact that States' obligations to protect and promote human rights requires them to take effective measures to combat terrorism, we would like to draw your Excellency's attention to General Assembly Resolution 68/178 and Human Rights Council Resolution 19/19, whose paragraphs 1 reaffirms "that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law."

We also wish to recall the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all

conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.

Furthermore, we would like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

- article 5 (a), which provides for the right to meet or assemble peacefully; and
- article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights.

We also reiterate the principle enunciated in Human Rights Council Resolution 12/16, which calls on States, while noting that article 19, paragraph 3 of the International Covenant on Civil and Political Rights provides that the exercise of the right to freedom of opinion and expression carries with it special duties and responsibilities, to refrain from imposing restrictions which are not consistent with paragraph 3 of that article. Restrictions to the right to freedom of expression may not put in jeopardy the right itself, must be provided by law and be justified as being necessary for those purposes. Moreover, the law must, on the one hand, be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful, and on the other hand, provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Moreover, in his report to the Human Rights Council A/HRC/20/27, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, also calls upon States to “strictly and narrowly define the offence of terrorism in line with international law” and to “ensure that any restrictions on the rights to freedom of peaceful assembly and of association are prescribed by law, necessary in a democratic society, and proportionate to the aim pursued, and do not harm the principles of pluralism, tolerance and broadmindedness. Any restrictions should be subject to an independent, impartial, and prompt judicial review” (paragraph 84 (d) and (e)).

Finally, we would also like to refer to Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights.