

Mandates of 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

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Excellency,

We have the honour to address you in our capacities as 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 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 have received concerning the Bill C-51, also called Anti-Terrorist Act, 2015, insofar as its compatibility with international norms and standards on human rights, particularly as set forth in the International Covenant on Civil and Political Rights, is concerned.

According to the information received:

Bill C-51 (or the "Bill"), an "Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts", was introduced in Parliament on 30 January 2015. The Bill is currently being considered by the House Committee on National Security and Defence. Pending approval it will eventually be re-introduced to the House of Commons for a final vote before it is enacted into Law.

Security of Canada Information Sharing Act (CISA)

Part 1 of the Bill enacts the Security of Canada Information Sharing Act (CISA), which authorizes Government of Canada's institutions to disclose information to those other Canadian Government's institutions that have jurisdiction, or responsibilities, in respect of activities that undermine the security of Canada. It also makes related amendments to other Acts.

In Section 2 of CISA, it is explained that “activity that undermines the security of Canada” includes any of the following activities, if it undermines the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada: (a) interference with the capability of the Government of Canada in relation to intelligence, defence, border operations, public safety, the administration of justice, diplomatic or consular relations, or the economic or financial stability of Canada; (b) changing or unduly influencing the Government in Canada by force or unlawful means; (c) espionage, sabotage or covert foreign-influenced activities; (d) terrorism; (e) proliferation of nuclear, chemical, radiological or biological weapons; (f) interference with critical infrastructure; (g) interference with the global information infrastructure, as defined in section 273.61 of the National Defence Act; (h) an activity that causes serious harm to a person or his/her property because of that person’s association with Canada; and (i) an activity that takes place in Canada and undermines the security of another state.

It is further explained, for greater clarity, that the above activities do not include lawful advocacy, protest, dissent and artistic expression.

Section 5 of CISA reads that “(...) a Government of Canada institution may (...) disclose information to the head of a recipient Government of Canada institution (...) if the information is relevant (...) in respect of activities that undermine the security of Canada, including in respect of their detection, identification, analysis, prevention, investigation or disruption”.

Secure Air Travel Act

Part 2 of Bill C-51 enacts the Secure Air Travel Act. The aim is to establish a new legislative framework for identifying and responding to the situation of persons who may engage in an act that poses a threat to transportation security, or who may travel by air for the purpose of committing a “terrorism” offence. The Act authorizes the Minister of Public Safety and Emergency Preparedness to establish a list of such persons and to direct air carriers to take any necessary actions to prevent the commission of such acts. The Act establishes powers and prohibitions governing the collection, use and disclosure of information in support of its administration and enforcement. In particular, section 12(2) provides that “the Minister [of Public Safety and Emergency Preparedness] may enter into a written arrangement relating to the disclosure of information [obtained in the exercise or performance of the Minister’s powers, duties or functions under this Act] ... with the government of a foreign state, an institution of such a government or an international organization and may only disclose the list, in whole or in part, to the state, institution or organization in accordance with the arrangement”.

The Secure Air Travel Act includes an administrative recourse process for listed individuals who may have been denied transportation, and it establishes an appeal

procedure for persons affected by any decision or action taken under the Act. In particular, Section 16 provides that a listed person who has been denied transportation as a result of a direction made under section 9, and any decision made under section 8 or 15, may appeal to a judge. The judge must determine, without delay, whether such a decision was reasonable. If the judge finds that a decision made under section 15 is unreasonable, the judge may order that the appellant's name be removed from the list.

Reform of the Criminal Code with regard to crimes related to "terrorism"

Part 3 of Bill C-51 amends the Criminal Code with respect to recognizances to keep the peace relating to a "terrorist" activity or a "terrorism" offence, extend their duration, provide for new thresholds, authorize a judge to impose sureties and require a judge to consider whether it is desirable to include in a recognizance conditions regarding passports and specified geographic areas.

Section 83.221 of the Criminal Code introduces the offence of knowingly advocating or promoting the commission of "terrorism" offence, punishable by a term of imprisonment of up to five years.

Section 83.222 of the Criminal Code grants judges the power to order the seizure of "terrorist" propaganda or, if the propaganda is in electronic form, to order the deletion of the propaganda from a computer system. "Terrorist" propaganda is defined as any writing, sign, visible representation or audio recording that advocates for or promotes the commission of "terrorism" offences in general, or counsels on how to commit a "terrorism" offence.

Section 83.3(2) of the Criminal Code authorizes peace officers to lay an information and bring an individual before a court if they (a) have reasonable grounds to believe that a "terrorist" activity may be carried out; and/or (b) have reasonable grounds to suspect that the imposition of a recognizance with conditions on a person, or the arrest of a person, is likely to prevent the carrying out of a "terrorist" activity. Depending on circumstances, an individual falling in these categories may be arrested without a warrant.

Section 810.011 of the Criminal Code, establishes that "A person who fears on reasonable grounds that another person may commit a "terrorism" offence may, with the Attorney General's consent, lay an information before a provincial court judge". As a result, "the provincial court judge (...) may cause the parties to appear before a provincial court judge" and "(...) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period of not more than 12 months". However, "if the provincial court judge is also satisfied that the defendant was convicted previously of a "terrorism" offence, the judge may order that the defendant enter into the recognizance for a period of not more than five years". If the defendant fails or

refuses to enter into the recognizance, “the provincial court judge may commit the defendant to prison for a term of not more than 12 months”.

Security Intelligence Service Act

Part 4 of Bill C-51 amends the Canadian Security Intelligence Service Act. Section 12.1 provides that “If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat”. In taking measures to reduce such a threat, the Service shall not “(a) cause, intentionally or by criminal negligence, death or bodily harm to an individual; (b) wilfully attempt in any manner to obstruct, pervert or defeat the course of justice; or (c) violate the sexual integrity of an individual”. In order to take measures, the Service shall first apply for a warrant. A judge may issue a warrant if satisfied that there are reasonable grounds to justify that the requested measures are required to enable the Service to reduce a threat to the security of Canada and are reasonable and proportionate.

In connection with CISA, concern is expressed at the list of activities that may be considered as undermining the security of Canada. Such list could potentially include a significant range of legitimate activities, and thus be instrumentally used to target, among others, journalists, bloggers, writers, investigators, human rights defenders, political activists, opposition representatives or religious or minority leaders for reasons un-related to terrorism. For example, it is not clear how legitimate exercise of freedom of expression, of dissent or protest that fall outside the word “lawful” remain protected. The right to freedom of peaceful assembly, for instance, does not require the issuance of a permit to hold an assembly. At most, authorities may require notification for large assemblies or for assemblies where a certain degree of disruption is anticipated. Yet, organizers of peaceful protests should not bear responsibility for the unlawful behaviour of others.

As far as the Secure Air Travel Act is concerned, and in connection with the reasonable grounds requirement justifying the decision to deny transportation, concern is expressed at the onus of proof being expected on the person concerned, and not on the relevant authorities. Concern is also expressed at the broad margin of discretion, which a judge would seem to enjoy, when considering whether to remove a person’s name from the “no-fly” list. Concern is further expressed at the provisions regulating access to evidence, as well as at the possibility, which seems to be envisaged in Section 12, that the “no-fly” list may be disclosed to any foreign State with no guarantees that this would only be done for transportation safety purposes.

In connection with the proposed amendments to the Criminal Code, concern is expressed at the formulation of the offence of promoting terrorism. The proposed offence seems overly broad and vague. Thus, it would seem to fail to provide precise and effective guidance on what “communications”, or “statements”, may, in fact, be prohibited. Concern is also expressed at the criminal intent required for the offence. The

“knowledge” and “recklessness” requirements may leave authorities with arbitrary powers to interpret what conduct would or would not fall into the definition of the offence, thus potentially resulting in undue limitations of freedom of expression. The same applies to the definition of terrorism propaganda. In the same vein, concern is expressed at Section 83.3, insofar as it would seem to allow the recourse to preventive detention in cases that may not necessarily be terrorism-related.

As far as the Canadian Security Intelligence Service Act, concern is expressed at the limited exclusions provided for in Section 12.1, which may potentially grant the Canadian Security Intelligence Service extremely broad powers, with very limited judicial control.

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.

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 therefore 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 any information that may help to explain to what extent the above mentioned provisions, as well as Bill C-51 as a whole, are consistent with international norms and standards on human rights, particularly as set forth in the International Covenant on Civil and Political rights, including its Articles 9, 12, 13, 14, 15, 17, 18, 19, 21, 22.

While awaiting a reply, we reserve the possibility to publicly express our concerns in the near future as, in our view, the information received so far is sufficiently reliable to indicate a matter warranting immediate attention. Any possible public statement will indicate that we have been in contact with your Excellency’s Government to seek clarifications on the issue/s 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.

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Ben Emmerson
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Annex
Reference to international human rights law

In connection with the above concerns, the International Covenant on Civil and Political Rights (ICCPR), acceded by Canada on 19 May 1976, include relevant provisions in articles 9, 12, 13, 14, 15, 17, 18, 19, 21, 22.

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".

Moreover, we would like to draw your attention to the report Ten areas of best practices in counter-terrorism (A/HRC/16/51), of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism where he identifies ten legislative models, for wider adoption and implementation by United Nations Member States, that he considers appropriate 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.