

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

REFERENCE:
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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the Counter-Terrorism and Border Security Bill, currently before the Public Bill Committee.

I share your Excellency's Government's position about the need to ensure that counter-terrorism legislation is fit for the digital age and it reflects contemporary patterns of acts of terrorism. At the same time, it is important to ensure that the legislative response to the threat of terrorism is in line with the UK's obligations under international human rights law. In this communication, I would like to bring to your attention some of the provisions of the Counter-Terrorism and Border Security Bill that are of particular concern with respect to these obligations.

I welcome the opportunity to submit the present observations to your Excellency's Government and to the Parliamentary Public Bill Committee for consideration as part of the established procedure in response to the call for written evidence.

According to the information received:

On 6 June 2018, the Government introduced the Counter-Terrorism and Border Security Bill ("the Bill") to the House of Commons. The Bill amends existing counter-terrorism legislation.

The Bill consists of four parts. The first part entitled "Counter-terrorism" prescribes new crimes and penalties, as well increased penalties for existing terrorist offences; the second part addresses border security; and the third part contains transitional provisions and minor amendments.

Before explaining my concerns, I would like to reiterate your Excellency's Government's obligation to respect and protect the right to freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United Kingdom of Great Britain and Northern Ireland on 20 May 1976.

Article 19(2) of the ICCPR provides that “[everyone] shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

The right to freedom of expression may only be restricted if the high threshold established by Article 19(3) is met. Article 19(3) states that restrictions must be provided by law, and necessary for the protection of “the rights or reputations of others”, of “national security or of public order (ordre public), or of public health or morals”. The Human Rights Committee has stipulated that these restrictions must be “the least intrusive instrument” among those which might achieve the desired result and must be “proportionate to the interest to be protected.” With respect to counter-terrorism legislation, the Human Rights Committee has stated that States parties should ensure that counter-terrorism measures are compatible with article 19(3) of the ICCPR, and that offences should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has urged States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the principle of legality, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds. (A/70/371).

In light of the above-mentioned standards, I am concerned that several of the provisions of the Bill would, if adopted, be incompatible with the obligations of the United Kingdom under international human rights law.

Clauses 1-3: Criminalization of the right to freedom of expression

Clauses 1-3 of the Bill establish new offences or broaden the scope of existing offences under the Terrorism Act of 2000 and the Terrorism Act of 2006. Clause 1 makes it an offence to express support of a proscribed organization, and in doing so being “reckless” as to whether a person to whom the expression is directed will be encouraged to support a proscribed organization under the Terrorism Act of 2000. Through this clause, the requirement of “inviting” support in the Terrorism Act of 2000 is removed, and replaced with “expressing support”. The offence can be punishable by up to 10 years imprisonment, or extended if clause 8 is adopted.

I am concerned at the criminalization of the mere expression of an opinion or belief that is deemed “supportive” of a proscribed organization, without any intent to invite support or to cause harm. The Act does not define what is meant by “supportive”, and would cover a broad range of opinions. I am also concerned that this overbroad wording may apply to the activities of human rights organizations and associations, including those providing legal opinions defending the rights of members of a proscribed organizations. In the absence of a qualification of the expression, such as an outward facing action, I am concerned that this offence may amount to a thought crime, whereby

persons who aspire to the same political objectives as terrorist groups run the risk of prosecution. As a result, this would criminalize an individual's association with terrorist views, not with terrorism.

Clause 2 criminalizes the publication of an image of an item of clothing or "any other article" in such a way or circumstances as to arouse "reasonable suspicion" that a person is member or supporter of a proscribed organization. Clause 2 extends the offence under section 13 of the Terrorism Act of 2000 which criminalizes the wearing of clothing in a public place such as to arouse suspicion of membership of a proscribed group. Unlike section 13, however, the new offence replaces "public place" with "publish". As a result, the offence is one of publication and behaviour in the streets. The offence is punishable by 6 months imprisonment. The government has noted that the new offence is intended to cover circumstances in which individuals take photos or film themselves against the background of an ISIS flag.

I am concerned that the new offence is overly broad, and falls short of any form of incitement to violence or intent to cause harm. Similarly, the offence could lead to prosecution of those who are documenting human rights abuses, including journalists, activists and academics. The provision as currently drafted would also criminalize the publication and display of historical photographs.

Clause 3 criminalizes the viewing or streaming, on three or more occasions, of material of kind "likely to be useful to a person committing or preparing an act of terrorism". This offence would be punishable by up to 15 years imprisonment if clause 6 of the Bill were adopted. The clause amends section 58 of the Terrorism Act of 2000.

I am concerned that this provision as currently drafted is applicable to a wide range of legitimate activities, including those by investigative journalists, academics or individuals. The right to freedom of expression, includes "the right to seek, receive and impart information and ideas of all kinds". I am concerned that clause 3 covers a wide range of information and material, and that the criteria that it is "useful" to a person preparing an act of terrorism is not sufficiently precise for the purpose of criminalization. The mere act of viewing a website is not sufficient to establish an intent to commit acts of terrorism. While section 58 of the Terrorism Act of 2000 provides for a "reasonable excuse" defense, I am concerned that this is not sufficient and that the provision may lead to a chilling effect on the right to seek information online. I am also concerned that the offence does not comply with the necessity requirement under international human rights law, and that the proposed sentence is disproportional.

Increased sentences for certain offences

Clauses 6, 8, 9 and 10 provide for harsher sentences for certain offences. Clause 6 increases maximum sentences for certain offences from 10 to 15 years. The offences include collection of information (section 58 of the Terrorism Act of 2000); and encouragement of terrorism and dissemination of terrorist publications (sections 1 and 2 of the Terrorism Act of 2006).

Clause 8, 9 and 10 add terrorist offences to the list of offences for which extended sentences can be given in certain circumstances under the Criminal Justice Act of 2003. These include: inviting support for a proscribed organization; collection of information; encouragement of terrorism and dissemination of terrorist publications.

I am concerned that the increased sentences are disproportionate. The increased sentences equate information, collection and dissemination as being just as harmful as collecting materials for a bomb under the Terrorism Act of 2000.

In light of the above-mentioned observations and concerns, I urge a revision of the Counter-Terrorism and Border Security Bill for the purpose of bringing the legal framework into line with international human rights standards.

Finally, I would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression:
<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>.

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

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression