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Mandate of the Special Rapporteur on the right to privacy

REFERENCE:
OL JPN 3/2017

18 May 2017

Hon. Prime Minister,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolutions 28/16.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning a proposed **bill revising parts of the Act on Punishment of Organized Crimes and Control of Crime Proceeds**, also known as the 'anti-conspiracy' bill which due to its broad scope may, if adopted into law, lead to undue restrictions to the rights to privacy and to freedom of expression.

According to the information received:

A bill revising parts of the Act on Punishment of Organized Crimes and Control of Crime Proceeds, also known as the 'anti-conspiracy' bill was submitted by the Japanese Government to the Parliament last 21 March 2017.

Reportedly, the amendments proposed significantly expand the scope covered by Article 6 (Preparation for organized homicide and other organized crimes) of the law. According to the translation made available to us the new article would read as:

"Article 6 : 2(1)Two or more persons who plan, as part of activities of terrorist groups or other organised criminal groups, the commission of criminal acts listed in the following sections by such groups, are subject to the punishment prescribed in each of those sections, if any of them have arranged funds or goods or carried out preliminary inspections of relevant locations pursuant to the plan or other preparatory acts for the purpose of committing the planned criminal acts. An organized criminal group means a group of persons whose common purpose is to carry out the crimes enumerated in Appendix 3. However, those who surrender prior to executing the crime will have a reduced or exemption from that sentence."

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Prime Minister Shinzo Abe
Cabinet Secretariat, Government of Japan

Further to this amendment, 277 new types of crime would be added through the "Appendix 4". Concerns were raised that such an important part of the law is part of an attachment to the law since it makes it much harder for citizens and experts to understand the actual scope of the provision.

Additionally, appendix 4 would permit the application of laws for crimes which appear to be totally unrelated with the scope of organized crime and terrorism, such as those related to Article 198 of the Forest Act which criminalizes theft of forestry products in reserved forests, Articles 193, 195, 196 of the Cultural Properties Preservation Act which prohibit, *inter alia*, exporting without permission and destroying important cultural properties, and Article 119 of the Copyright Act, which prohibits violations of copyrights.

Reportedly, the bill was submitted with the aim of adapting national legislation to the United Nations Convention on Transnational Organized Crime, supporting the international community in its efforts to combat terrorism. Yet, questions were raised on the pertinence and necessity of this additional legislation.

Reportedly, the government alleged that the targets of investigations to be pursued because of the new bill would be restricted to crimes in which an "organized crime group including the terrorism group" is realistically expected to be involved. Yet, the definition of what an "organized criminal group" is vague and not clearly limited to terrorist organizations. It was further stressed that authorities when questioned on the broad scope of application of the new norm indicated that the new bill requires not only "planning" to conduct the activities listed but also taking "preparatory actions" to trigger investigations. Nevertheless, there is no sufficient clarification on the specific definition of "plan" and "preparatory actions" are too vague to clarify the scope of the proscribed conducts.

Additional concerns indicate that in order to establish the existence and the extent of such "a planning" and "preparatory actions" it is logical to assume that those charged would have had to be subjected to a considerable level of surveillance beforehand. This expectation of intensified surveillance calls into question the safeguards and remedies existing in Japanese law with regard to privacy and surveillance.

Concerns were also raised on the potential impact of the legislation in the work of non-Governmental Organizations, especially those working in sensitive areas for national security. The government allegedly reiterated that the norm application would not affect this sector. Yet, it was alleged that the vagueness in the definition of "organized criminal group" could still create the opportunity for legitimizing, for example the surveillance of NGOs considered to be acting against national interest.

Finally, reports underline the lack of transparency around the drafting of the original draft and the pressure of the Government for the rapid adoption of the law during the current month, undermining the promotion of adequate public debates.

Serious concern is expressed that the proposed bill, in its current form and in combination with other legislation, may affect the exercise of the right to privacy as well as other fundamental public freedoms given its potential broad application. In particular I am concerned by the risks of arbitrary application of this legislation given the vague definition of what would constitute the "planning" and the "preparatory actions" and given the inclusion of an overbroad range of crimes in the Appendix which are apparently unrelated to terrorism and organized crime.

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. The "anti-conspiracy bill" in its current form 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.

The right to privacy appears to be particularly affected by the possibility of broad application of this law. Further concern is expressed that the allegedly expedited process used to push draft law may have a detrimental impact on human rights since the fast-tracking of legislative procedures unduly limit broader public debate on this crucial matter. Five specific areas of my mandate's concern focus on the absence of privacy-relevant safeguards and remedies:

1. Our initial assessment of the current draft would suggest that the new law or accompanying measures would not introduce any new additional specific articles or provisions which would establish appropriate safeguards for privacy in an environment where increased surveillance would be required to establish the existence of an offence under the new proposed anti-terror law.
2. As far as knowledge in the public domain permits us to establish, there are also no plans to either reinforce ex-ante warrants for the carrying out of surveillance;
3. There seem to be no plans to establish a statutory independent body in order to pre-authorise the carrying out of surveillance for national security purposes. This suggests that the establishment of such vital checks remains at the discretion of the specific agencies carrying out the operations.
4. Additionally, there are concerns about the oversight of the operations of law enforcement and security and intelligence services especially insofar as their activities are compliant or the extent to which they may interfere with the right to privacy through methods which are neither necessary nor

proportionate in a democratic society. A sub-set of these concerns is the quality of judicial oversight and review when police request surveillance measures in order to carry out observations such as GPS detection or monitoring of activities on electronic devices.

5. Concerns are raised particularly with regard to the impact of the application of the new norms on the right to privacy given the broad opportunity the new norm would create for the Police to request for warrants to search for information on suspect individuals. According to information received, courts in Japan have to date demonstrated themselves to be extremely prone to accept warrant requests: practically all applications for wiretapping made by the police were reportedly accepted by courts in 2015 (figures made available to us suggest that approximately only 3% or less of all requests for warrants were rejected).

While I do not wish to prejudge the accuracy of the information on the proposed law reforms and their potential impact on the right to privacy in Japan, I would like to draw the attention of your Excellency's Government to the obligations regarding the right to privacy, established by the International Covenant on Civil and Political Rights (ICCPR), which Japan ratified in 1978. Article 17(1) of the ICCPR provides for the rights of individuals to be protected, inter alia, against arbitrary or unlawful interference with their privacy and correspondence and provides that everyone has the right to the protection of the law against such interference. Furthermore, I would also like to call your Government attention to General Assembly resolution A/RES/71/199 where States note that "while concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law."

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

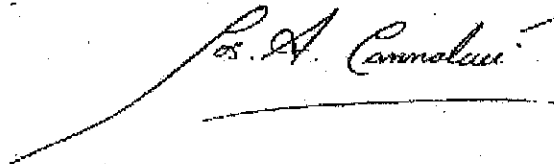
1. Please provide any additional information and/or comment(s) you may have on the accuracy of the above-mentioned allegations.
2. Please provide information on the status of the **bill revising parts of the Act on Punishment of Organized Crimes and Control of Crime Proceeds**
3. Please provide information on the compatibility of the draft law with international human rights norms and standards.
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.

If requested, I would be honored to provide any expertise and counsel on the matter to support the Japanese government in order to improve the pending legislative act as well as other existing legislation in Japan as appropriate and required by the international legal order.

Finally, in light of the advanced stages of the legislative process, in my view, these are matters warranting immediate public attention. Therefore, I would like to inform your Excellency's Government that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to privacy and I will prepare a press release explaining my concerns and indicating that we have been in contact with your Government to clarify the issues in question.

Your Excellency's Government's response will also be made available on the same website as well as in a report to be presented to the Human Rights Council for its consideration.

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

A handwritten signature in cursive script, reading "Joseph Cannataci". The signature is written in dark ink and is positioned above a horizontal line that serves as a separator between the signature and the typed name below.

Joseph Cannataci
Special Rapporteur on the right to privacy