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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; and the Special Rapporteur on freedom of religion or belief

REFERENCE: OL RUS 7/2016:

28 July 2016

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; and Special Rapporteur on freedom of religion or belief, pursuant to Human Rights Council resolutions 25/2, 24/5, and 22/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **recently adopted amendments to the Criminal Code and other laws, collectively known as the "Yarovaya Law," which raise concerns about potential interference with the exercise of the right to freedom of opinion and expression both within and outside Russia.**

In addition to the specific issues noted below, we are concerned with the accelerated timeline of the legislative process for such a significant set of amendments. The State Duma approved the amendments on 24 June 2016, and the Federal Council approved them on 29 June 2016. The amendments were signed by the President of the Russian Federation on 7 July 2016. We are concerned that this timeline did not enable the legislative process to adequately take into account the views of relevant stakeholders, including government agencies, the Commissioner for Human Rights in the Russian Federation, civil society, the private sector, academics and the technical community.

In this communication, we would like to bring to the attention of your Excellency's Government a number of specific amendments that are of particular concern.

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His Excellency Mr. Alexey Borodavkin
Ambassador Extraordinary and Plenipotentiary
Permanent Representative
Permanent Mission of the Russian Federation to the United Nations Office and other international organizations in Geneva

According to the information received, the newly enacted law includes, *inter alia*, the following provisions:

Mandatory duty to assist in deciphering users' messages

Entities that are deemed to be "organizers of information distribution on the Internet" (hereinafter referred to as "Information Distribution Entities") will be required to assist the Federal Security Service ("FSB") in deciphering any message sent by its users, including through providing the FSB with keys to all encrypted messages sent by users. Failure to comply is punishable by a fine of up to 1,000,000 roubles.

To comply with this law, it is likely that Information Distribution Entities will be compelled to establish backdoor access or other security vulnerabilities on their platforms and services. Even if such loopholes are intended solely for legitimate law enforcement and security service access, they can still be exploited by unauthorized entities, including other States and non-State actors. This in turn compromises the ability of users in Russia and worldwide to communicate securely.

Statements concerning terrorism on the Internet

The law would criminalize public statements that convey the position that "the ideology and practices of terrorism are correct and worth supporting and following". Terrorism is defined as "an ideology of violence and practice of influencing the decisions of State authorities by threatening the population or other forms of violent actions." Publishing such statements on the Internet will be considered an aggravating factor. Such statements will be punishable with a fine of up to 1,000,000 roubles and a prison term of five to seven years.

As drafted, this provision would appear to restrict expression, even if offensive or ill-conceived, that nonetheless does not amount to incitement to violence under article 20 of the ICCPR. Protections for the sharing of information, such as through journalism or other mechanisms, do not appear in the law. Moreover, the law makes it difficult to determine with reasonable certainty which statements (particularly those made online) would be considered public justification of terrorism. For example, it is unclear whether the mere act of "liking" or sharing a blog or social media post containing a banned statement is also banned. Such uncertainty could chill public discourse concerning terrorism and terrorism-related subjects, particularly on the Internet.

Ban on "missionary activities"

Any association seeking to perform "missionary activities" must register with local State authorities. Individuals performing "missionary activities" on behalf of such entities must be authorized by the relevant registered association. Such activities must be carried out only in specially designated places. This restriction applies to activities online and in private residences

"Missionary activities" are defined to include the activities of any religious association, aimed at disseminating information about the association's doctrine among non-participants in order to engage, enlist or convert them. Such activities encompass any activities carried out publicly by religious associations or citizens, or legal entities authorized by them with the use of media, Internet and other means.

"Missionary activities" that violate public security and order, incite extremist action, "coerce" the "ruining" of families, induce suicide, create obstacles to mandatory education, persuade individuals to refuse performing their legally mandated civic duties, coerces members and followers of a religious association and other persons to alienate their property in favour of religious association, or encroaches on the freedom of the person and rights and freedoms of citizens, would be banned.

Conducting "missionary activities" in violation of these laws is punishable with a fine of 5,000 to 50,000 roubles for individuals, and a fine of 100,000 to 1,000,000 roubles for organizations.

All printed, audio and video content distributed by a religious association must have proper marking and bear the association's full name. Failure to comply with these labelling requirements is punishable with a fine of 30,000 to 50,000 roubles, and confiscation of the offending materials.

These rules significantly restrict the ability of individuals and organizations to disseminate religious materials or engage in other public forms of religious expression. The registration and identification requirements may also lead religious individuals and associations to self-censor for fear of criminal prosecution and other punitive restrictions.

Inducing people to join mass unrest

A new criminal code article that outlaws "inducing, recruiting, or otherwise involving" others in the organization of mass unrest is established. Violations of this law are punishable with a fine of between 300,000 and 700,000 roubles, or imprisonment between five and ten years.

This law significantly limits the ability of ordinary citizens to express political dissent and criticism through peaceful protests, demonstrations and related activities. We are concerned that this will have a disproportionate chilling effect on minorities, activists, political opposition and other vulnerable groups that rely on such peaceful means to convey their opinions and views.

Increase in penalties for extremism-related offenses

For the crime of financing extremist activities, Article 282.3 of the Criminal Code would be amended to increase the maximum sentence for citizens of Russia from three

years to eight years, and the maximum fine from 500,000 roubles to 700,000 roubles. For foreigners, the punishment is now 30,000 to 50,000 roubles, with the possibility of administrative deportation.

For the crime of financing extremist activities with the use of an official position, the maximum sentence is increased from six years to ten years.

Notwithstanding the legitimacy of targeting activities that support terrorism and the incitement to violence, the legislation does not specifically define "extremist activity". Rather, it provides examples of activities that would include the "forcible change of the foundations of the constitutional system and violation of integrity of the Russian Federation," and the "dissemination of knowingly false accusations against federal or regional officials in their official capacity, alleging that they have committed illegal or criminal acts." The legislation does not protect against interpretations of "extremism" that would penalize support for political dissent, minority opinions or views, and criticism of government leaders, officials, agencies, institutions and the country as a whole. The significant increase in penalties enhances the chilling effect on these forms of protected speech and expression.

Mandatory data retention by telecommunications operators and Internet platforms

Telecommunications operators (including Internet access providers and mobile carriers) will be required to store all call and text message content for a period of six months, and the metadata of all calls and text messages for three years. Failure to comply may lead to revocation of the operator's license.

"Information Distribution Entities" must also store content for up to six months, and metadata and user data for one year. Failure to comply is punishable by a fine of 800,000 to 1,000,000 roubles.

Operators and Information Distribution Entities are required to provide such information to agencies authorized to conduct "operational-search activity": the Ministry of Internal Affairs, the Federal Security Service, the State Security Agency, the Customs Agency, Foreign Intelligence, the Penitentiary Agency, and the Drug Enforcement Agency. An authorized officer requesting access to content during the course of an investigation is required to seek prior approval from a court. Metadata and user data may be requested without prior judicial approval.

These provisions effectively require operators and Information Distribution Entities to create vast repositories of personal and sensitive information belonging to or concerning their Russian and non-Russian users, regardless of any connection or relevance to specific and legitimate government investigation or proceeding. The process for law enforcement access to retained metadata and user data also lacks independent and external oversight. The mass retention of personal information, coupled with the lack of

safeguards concerning government access, increases the risk of unnecessary and disproportionate State surveillance.

The storage of user information for extended periods of time also increases the risk of security breaches by third parties, further compromising the ability of users worldwide to communicate securely.

We have serious concern that the enacted amendments will establish undue restrictions on the rights to freedom of opinion and expression, to privacy and to thought, conscience and religion, both inside and outside of Russia, and both online and offline. As such, we would like to draw the attention of your Excellency's Government that the amendments would implicate a number of rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR), which the Russian Federation ratified on 16 October 1973.

The right to freedom of opinion and expression is protected under article 19. The freedom of opinion is absolute, and no interference, limitation or restriction is allowed. Any restriction on the right to freedom of expression must be consistent with article 19(3) of the ICCPR, and thus be provided by law, be necessary in a democratic society and serve a legitimate government interest, namely for respect of the rights or reputations of others; for the protection of national security or of public order (ordre public); or of public health or morals. The Human Rights Committee has stated that when a "State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat." (General Comment 34, para. 35.)

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. In this connection, Articles 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression (see A/HRC/23/40 and A/HRC/29/32).

Article 18 of the ICCPR protects the right to freely manifest one's religion or belief in worship, observance, practice and teaching. Missionary activities are also protected by article 19 of ICCPR, which provides that this right shall include 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 [one's] choice. Furthermore, the right to freedom of association is protected under article 22 of the ICCPR.

To satisfy the requirements set out above by the Human Rights Committee, "[l]egislation must stipulate that State surveillance of communications must only occur

under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority. Safeguards must be articulated in law relating to the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law" (see A/HRC/23/40, para. 81). In addition to the normal rules that apply to surveillance, "a higher burden should be imposed in the context of journalists and others gathering and disseminating information" and in particular measures to "circumvent the confidentiality of sources of journalists, such as secret surveillance or metadata analysis, must be authorized by judicial authorities according to clear and narrow legal rules" (see A/70/361, paras. 24 and 62 respectively).

Moreover, States are bound by the same duties and obligations under the ICCPR when they require or request corporate actors (both domestically and abroad) to participate in or cooperate with their surveillance activities (see A/HRC/23/40, para. 51). In particular, "States must not require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means." Further, "[a]ny demands, requests and other measures to take down digital content or access customer information must be based on validly enacted law, subject to external and independent oversight, and demonstrate [necessity and proportionality]" (A/HRC/32/38, para. 85).

In the context of mandatory third party data retention, the Special Rapporteur has stated that "[t]he provision of communications data by the private sector to States should be sufficiently regulated to ensure that individuals' human rights are prioritized at all times. Access to communications data held by domestic corporate actors should only be sought in circumstances where other available less invasive techniques have been exhausted" (A/HRC/23/40, para. 85).

We should also note that Human Rights Council Resolution 32/13, adopted recently, "[c]alls upon all States to address security concerns on the Internet in accordance with their international human rights obligations to ensure protection of freedom of expression, freedom of association, privacy and other human rights online, including through national democratic, transparent institutions, based on the rule of law, in a way that ensures freedom and security on the Internet." The Special Rapporteur on freedom of expression has also concluded that States may only adopt those restrictions on encryption and anonymity, key security tools for individuals online, that "meet the requirements of legality, necessity, proportionality and legitimacy in objective." (A/HRC/29/32, para 57). States should "avoid all measures that weaken the security that individuals may enjoy online, such as backdoors, weak encryption standards and key escrows." On the other hand, regulations compelling targeted decryption may be permissible provided that they result from "transparent and publicly accessible laws applied solely on a targeted, case-by-case basis to individuals and subject to judicial warrant and the protection of due process rights of individuals" (A/HRC/29/32, para. 60).

Lastly, we would like to refer to Human Rights Council resolution 24/5 (operative paragraph 2) in which the Council "reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law."

It is our responsibility under the mandate provided to us by the Human Rights Council to seek to clarify all cases brought to our attention. Therefore, we would welcome any additional information or clarifications from your Excellency's Government on measures taken to ensure that the proposed amendments under Yarovaya Law comply with the Russian Federation's obligations under international human rights law, particularly with regard to the right to freedom of opinion and expression, the right to privacy and the right to freedom of thought, conscience and religion. We would also welcome the opportunity to discuss the amendments in more detail with your Excellency's Government at your convenience.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

This communication will be available to the public and posted on the OHCHR website together with other examples of commentary on legislation. Your Excellency's Government's response will also be made available on the same website and in the regular periodic Communications report to be presented to the Human Rights Council.

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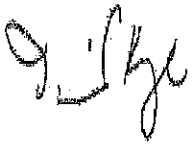
Please accept, Excellency, the assurances of our highest consideration.



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