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

REFERENCE: OL USA 9/2016:

30 September 2016

Ambassador,

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 25/2.

In this connection, I would like to bring to the attention of the U.S. Government information I have received concerning the **proposal to request travelers' social media information on certain United States' immigration forms.**

According to information received:

The Visa Waiver Program (VWP) permits eligible citizens or nationals of participating countries to travel to the United States for tourism or business for stays of 90 days or less without first obtaining a visa, when they meet certain requirements.

One such requirement is that eligible travelers must have a valid Electronic System for Travel Authorization (ESTA) approval prior to travel. ESTA requires eligible travelers to provide information concerning their citizenship, residency, passport and contact details.

VWP and ESTA are administered by U.S. Customs and Border Protection (CBP), an agency of the Department of Homeland Security (DHS).

Under the Immigration and Nationality Act, 8 U.S.C. § 1187(c)(2)(C), a country is designated to participate in the VWP only if the Attorney-General, in consultation with the Secretary of State, has determined that "the law enforcement

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Her Excellency Ms. Pamela K. Hamamoto
Ambassador
Permanent Representative
Permanent Mission of the United States of America to the United Nations Office and other international organizations in Geneva

and security interests of the United States ... would not be compromised by the designation of the country."

On June 20, 2016, DHS proposed to add the following question to ESTA: "Please enter information associated with your online presence – Provider/Platform – Social media identifier."

This question will be an optional data field.

DHS states that collecting such information will "enhance the existing investigative process and provide DHS greater clarity and visibility to possible nefarious activity and connections by providing an additional tool set which analysts and investigators may use to better analyze and investigate the case."

Before identifying certain concerns raised by the DHS proposal, I want to note that article 19 of the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified on 8 June 1992, protects everyone's right to maintain an opinion without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be "provided by law," and necessary for "respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health and morals." Permissible restrictions on the Internet are the same as those offline (A/HRC/17/27).

In addition, 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. Articles 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood to be an essential requirement for the realization of the right to freedom of expression (A/RES/68/167, A/HRC/27/37, A/HRC/23/40, A/HRC/29/32).

Under the article 19(3) requirement of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws and regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34). While surveillance measures and other restrictions on freedom of expression may be established to protect national security and public order, they must be "necessary" to protect such objectives, and not simply useful, reasonable or desirable. The requirement of necessity "also implies an assessment of the proportionality" of those restrictions. A proportionality assessment ensures that restrictions "target a specific objective and [do] not unduly intrude upon other rights of targeted persons." The ensuing "interference with third parties' rights must [also] be limited and justified in the light of the interest supported by the intrusion" (A/HRC/29/32). Finally, the restriction must be "the least intrusive instrument among those which might achieve the desired result" (CCPR/C/GC/34).

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

Based on U.S. obligations under the ICCPR, I am concerned about the proposal on several grounds:

Scope of information requested

The proposed scope of information requested is vague and open-ended. The terms "online presence", "provider/platform" and "[s]ocial media" are extremely broad and potentially encompass information concerning a visitor's activities not only on social and professional networking platforms like *Facebook* and *LinkedIn*, but also gaming, dating, ride sharing and shopping websites and applications, to name a few.

Scope of information collected

Through its proposed collection, the DHS could potentially collect, based on disclosed identifiers, personal and sensitive information such as one's social, religious and political views and opinions, pictures, contact lists and geolocation information. Such information could be collected about not only the travelers who disclose their identifiers, but also their family members, colleagues and other contacts in their social and professional online networks.

Use of information during VWP process

The proposal does not provide guidance as to how CBP/DHS will rely on the social media information collected to "enhance the investigative process" for screening purposes. DHS has not addressed how ambiguity in the meaning and significance of social media information – such as a user's intention when she clicks the "like" button on a *Facebook* post or retweets a tweet or link on *Twitter* – will be taken into account during the investigative process.

While DHS has stated that responses are voluntary, it is unclear how leaving the data field blank will affect one's eligibility for the VWP process. For example, it is unclear whether a blank response may flag the traveler for additional screening procedures or alternative forms of scrutiny. This lack of clarity, coupled with the prospect of ineligibility, might lead individual travelers to feel pressured or obliged to provide social media information even if the question is characterized as optional.

Discretion and authority of CBP officers

The proposal does not provide guidance on the follow-up action(s) that CBP officers are permitted or required to take when they receive social media information. For example, it is unstated whether (and under what circumstances) officers may request additional information or access to private accounts. It is also unclear whether officers

can request or persuade travelers who have left the data field blank to provide information, or whether they would be questioned as to why they left the field blank.

Other uses of information collected

The proposal is silent on whether CBP and DHS will use the information collected for purposes other than assessing the traveler's eligibility under the VWP. For example, it is unstated whether such information could be used to assess the traveler's eligibility for other visas, or other government benefits or privileges. It is also unclear how CBP and DHS will share the information collected with other government agencies, such as law enforcement and intelligence authorities.

No timeline has been provided for how long such information may be stored on CBP, DHS and other government databases.

These concerns implicate the requirement that restrictions on freedom of expression must be provided by law as noted above. In particular, I am concerned that affected travelers lack sufficient guidance on what information to provide, how the information may be used, and the consequences of not providing it. I am also concerned that, without sufficient guidance, relevant government officials might have largely unfettered authority to collect, analyze, share and retain personal and sensitive information about travelers and their online associations.

These concerns also implicate the requirement that restrictions on freedom of expression must be necessary and proportionate as noted above. Since the U.S. Government has determined that countries participating in the VWP are relatively unlikely to pose a national security threat, it is unclear how additional social media monitoring of travelers from those countries is necessary to protect national security, public order or any other legitimate aim. Furthermore, given the highly subjective and conclusory nature of social media information, it is unclear how useful – let alone necessary – such information may be to detecting or countering national security threats.

In any case, the potential scope of social media monitoring – coupled with the lack of clarity on what information is relevant and how it may be used – might lead travelers applying to the VWP to restrict their social media and online activities, for fear of an adverse outcome or denial of entry. Individuals that have online contact with those traveling to the United States might also restrict their online activity in order to avoid unnecessary government surveillance. I am concerned that this chilling effect is disproportionate to any additional protection such monitoring might provide.

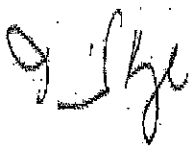
It is my responsibility under the mandate provided to me by the Human Rights Council to clarify all cases brought to my attention. Therefore, I would welcome any additional information or clarification from the U.S. Government with respect to the proposal and on measures taken to ensure that it complies with the United States' obligations under international human rights law, particularly with respect to the right to

freedom of opinion and expression. I would also welcome the opportunity to discuss the proposal in more detail with Government officials at their convenience.

Finally, I would like to inform you that this communication, based as it is on a new regulatory, legislative or policy proposal, will be made available to the public and posted on the website page of the mandate of the Special Rapporteur on the right to freedom of expression:
http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx.

The U.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, Ambassador, the assurances of my highest consideration.



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