

**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights in Cambodia**

REFERENCE:  
OL KHM 5/2016

27 October 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; and Special Rapporteur on the situation of human rights in Cambodia, pursuant to Human Rights Council resolutions 25/2 and 30/23.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the newly-enacted "**Telecoms Law**", which contains a number of provisions that unduly restrict the right to freedom of expression.

According to the information received:

In December 2015, the Cambodian Parliament passed a new Telecoms Law with the intention of establishing industrial regulation of the telecommunications sector within the country. The law is currently in effect.

Under Article 80, the "establishment, installation and utilization of equipment in the telecommunications sector, if these acts lead to "national insecurity", shall be punished by sentences from seven to 15 years imprisonment".

Article 66 includes a general prohibition on telecommunications activity that "may affect public order or national security". There is no requirement of actual harm. Any act that can be construed as one that "may affect public order or national security" could therefore be deemed to represent a violation of this law, incurring penalties for the actor.

Under Article 93, new telecommunications "expression" offences replicate existing Criminal Code provisions while imposing higher penalties, particularly those relating to threats expressed via telecommunications means.

Article 99 introduces sentences of six months to two years' imprisonment and heavy financial penalties for "any act of producing, installing or distributing software or hidden audio recorders for recording dialogue" without approval from the authorities.

Before identifying certain concerns raised by the Telecoms Law, we want to note that article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Cambodia ratified on 26 May 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 restrictions on freedom of expression may be established to protect national security or 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 person” (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](http://www.ohchr.org) and can be provided upon request.

Based on Cambodia’s obligations under the ICCPR, we are concerned about the above-mentioned provisions on several grounds:

*Use of national security as grounds for limitation of the right to freedom of expression*

Article 80 of the law potentially allows for the criminalization of any expression, public or private, that is conducted by any electronic means if it were to promote “national insecurity”. By not defining “national insecurity”, the Telecoms Law is vague and subject to arbitrary application. Further, the Telecoms Law does not require that potential violators have had an intention to create national insecurity. If the judiciary determines that someone’s expression somehow did lead to national insecurity, the defendant would be subject to harsh penalties regardless of the intent. The vagueness of what constitutes “national insecurity” allows for the easy exploitation of the law by Cambodia’s judiciary, potentially imposing strict liability on individuals for simply expressing their views on an electronic forum. Similarly, under the general prohibition established by Article 66, any act that can be construed as one that “may affect public order or national security” could thus be deemed to have violated this law, incurring penalties for the actor.

*Broad and vague criteria for the limitation of the right to freedom of expression*

Articles 66 and 99 contain unclear language that criminalizes telecommunications activity that “may harm public order or national security”, as well as the use, sharing, or development of software if it records voice. Numerous smartphone application developers and anyone who uses these applications would potentially be subject to penalties under this provision. The punishments established under this Article violate the proportionality standard as expressed in Article 19(3) of the ICCPR, as well its interpretation by the Human Rights Committee in its General Comment No. 34. Because any use of the related technologies stated within can lead to severe penalties, the Article potentially represents disproportionate consequences to the supposed illegal conduct criminalized within.

We are concerned at the implications that these provisions may have on the freedom of expression of all individuals, and especially the negative impact on the work of human rights defenders, journalists and whistle-blowers, who could be prosecuted for expressing and publishing opinion and criticism of the Government or report on possible misconduct by State officials, including on cases of corruption. The possibility of such a prosecution could prevent critical reporting and increase media self-censorship.

In this regard, we would like to recall that any restriction to the right to freedom of expression must comply with the provisions of the ICCPR, can only be imposed on legitimate grounds as set out in article 19(3), and must conform to the strict tests of necessity and proportionality. The UN Human Rights Committee has established that to be characterized as a “law”, the norm must be formulated with sufficient prevision to enable an individual to regulate his or her conduct accordingly. The law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution, and must provide sufficient guidance in order to ascertain what sorts of expression are properly restricted and what sorts are not (CCPR/C/GC/34).

*Increased restrictions on freedom of expression exercised online*

According to the information made available to us, the offenses in the new law duplicate many existing provisions of Cambodian law. For example, Article 93 contains provisions that are broadly equivalent to Articles 231 (threats); 232 (threats with extortion); 233 (death threat); and 234 (death threat with extortion) of the Criminal Code. Telecoms Law Article 95 broadly replicates Articles 423 (threats to cause damage) and 424 (threats to cause damage followed by an order) of the Criminal Code. However, Articles 94 and 96 of the Telecoms Law enact higher penalties for these offences than for their Criminal Code counterparts. The Telecoms Law also expressly permits additional penalties under Article 168 of the Criminal Code concurrent to those levied under the Telecoms Law. In this connection, we are concerned that the Telecoms Law unnecessarily singles out those exercising their right to freedom of expression online.

In summary, we are concerned that the aforementioned Articles of the Telecoms Law fail to meet the ICCPR’s conditions for permissible limitations under Article 19(3) of the ICCPR. While national security concerns are a valid rationale for limiting the right to freedom of expression under Article 19(3) of the ICCPR, the Law’s vagueness in

defining national security and other unclear language do not meet the standards of Article 19(3) of the ICCPR. We would therefore urge Cambodia to reconsider the Telecoms Law and bring it into line with its obligations under the international human rights standards.

Finally, we would like to inform you that this communication, based as it is on a new regulatory, legislative, or policy adoption, 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>

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 our highest consideration.

David Kaye

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

Rhona Smith

Special Rapporteur on the situation of human rights in Cambodia