

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

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights in Cambodia; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolutions 42/37, 43/4, 37/2.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received **concerning the establishment of the National Internet Gateway**.

According to the information received:

In July 2020, the Ministry of Post and Telecommunications drafted a Sub-decree on the Establishment of the National Internet Gateway. The sub-decree was subsequently signed by the Prime Minister on 16 February 2021. The sub-decree requires all internet traffic within Cambodia and the data entering the country to be routed through a regulatory body charged with monitoring online activities before it reaches users. The sub-decree requires internet service providers in Cambodia to reroute their services through the National Internet Gateway before February 2022.

In a press statement issued on 19 February 2021, the Ministry of Post and Telecommunications claimed that consultations with experts, private operators and relevant institutions were held before the adoption of the sub-decree. However, it is not clear whether civil society organisations were part of the groups consulted and they were also not provided any avenues to raise concerns about the human rights implications the sub-decree could have on the rights to privacy, freedom of expression and access to information. It is also not clear whether human rights assessments were carried out before its adoption. The Sub-decree permits the Cambodian authorities to monitor and conduct surveillance of internet activity, intercept and censor digital communications, and collect, retain and share personal data of users. Concerns have been expressed that the creation of a National Internet Gateway would pose serious risks to the right to freedom of expression, including the right to seek, receive and impart information and ideas, as well as the right to privacy.

Article 6 of the Sub-decree allows for the blocking of all online connections or content that are deemed to "*affect safety, national revenue, social order, dignity, culture, traditions and customs*". Concerns have been brought to our attention that these overly-broad and ambiguous terminology and undefined grounds for action may enable the authorities to carry out arbitrary mass surveillance of private communications and widespread censorship of online

content. Article 14 of the Sub-decree requires National Internet Gateway (NIG) operators to “prepare and maintain technical records and lists of allocated IP Address and identification of route of traffic through NIG, compile and maintain reports and relevant documents concerning the connections and all internet traffic, and provide other information as required by the Ministry of Post and Telecommunications and Telecommunication Regulator of Cambodia.” While article 15 of the Sub-decree provides complaint mechanisms against any penalty measures taken by the Telecommunication Regulator of Cambodia, fears were raised about the independent, fair and transparent process of decision-making in such a process. The threat of penalties may compel gateway operators to comply with requests by the authorities even if contrary to international human rights standards. Additionally, the sub-decree would also fail to provide for any independent oversight, due process, or procedural safeguards, denying affected people or entities the right to appeal decisions made by the government before an independent body.

While we do not wish to prejudge the accuracy of the information received, we wish to express our concern at the above information, which could be in contravention of articles 17 and 19 of the International Covenant on Civil and Political Rights, ratified by Cambodia in 1992. Article 17 of the ICCPR, which provides that “1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and 2) Everyone has the right to the protection of the law against such interference or attacks.”¹ Article 17 of the ICCPR also includes the right to the protection of personal data, which, among other things, prevents States from requiring the mass retention of personal data by companies and access to personal data outside of clearly defined circumstances and subject to safeguards. The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law.²

Article 19 of ICCPR provides that: “Everyone shall have the right to freedom of expression; 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 his choice.”³ Article 19 (2) also embraces the right to access information held by public bodies.⁴ In July 2012, the United Nations Human Rights Council unanimously approved a resolution to “continue its consideration of the promotion, protection and enjoyment of human rights, including the right to freedom of expression, on the Internet and in other technologies, as well as of how the Internet can be an important tool for development and for exercising human rights, in accordance with its programme of work.”⁵⁶

Furthermore, the Sub-decree gives the Royal Government of Cambodia power to arbitrarily block and disconnect certain websites, domains and broad swaths of the

¹ The right to privacy is also established in Article 12 of the UDHR.

² See UN Human Rights Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, and A/HRC/39/29, paras. 26-41.

³ It also violates Article 19 of the Universal Declaration of Human Rights: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”

⁴ General Comment No. 34 of the United Nations Human Rights Committee on article 19 of the ICCPR, para. 18.

⁵ Resolutions 20/8 of the United Nations Human Rights Council, A/HRC/20/L.13 (2012), para. 5.

⁶ It is reaffirmed by the United Nations Human Rights Council in 2018, A/HRC/38/L.10/Rev.1, para. 20.

Internet because all data has to pass through one centralized point. As such, it may go beyond the permissible restrictions to freedom of expression established in article 19(3) of the ICCPR, which provides strict conditions to restrict the enjoyment of these rights. The restrictions must be provided by law, imposed for the purpose of respecting the rights or reputations of others and for the protection of national security or of public order (*ordre public*), or of public health or morals. These conditions must conform to strict tests of necessity and proportionality.⁷In August 2017, the Spokesperson of OHCHR in Geneva raised concerns of the Royal Government of Cambodia’s measures to shut down and block some websites and online programmes of independent human rights and media organisations which appeared to be done in a selective and discriminatory manner.⁸ The Sub-decree seems to indicate that the Royal Government of Cambodia is not taking appropriate measures to encourage and enable civil society, including independent media, to play a constructive role in consolidating democratic development in Cambodia as urged by the Human Rights Council.⁹

Additionally, article 6 of the Sub-decree appears to be in contravention of the right to freedom of expression guaranteed by article 41 of the Constitution of the Kingdom of Cambodia. The Constitution states, “Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security. Such measures may also be in breach of article 40 of the Cambodian Constitution, which protects the right to privacy of “residence, and the secrecy of correspondence by mail, telegram, fax, telex and telephone”. A privacy breach occurs when an individual’s personal data is accessed, collected, used or published in contravention of applicable privacy legislation without prior consent or permission. It begins with penetrating a protected computer network and ends with the exposure or theft of personal data. In December 2020, three UN human rights experts, for example, highlighted a deplorable breach of privacy by the Cambodian governments naming and shaming in public of those who have contracted the COVID-19.¹⁰ A number of other legislations also protect the right to privacy. These include the law on Telecommunications¹¹, Press Law¹², Civil Code¹³ and Criminal Code.¹⁴ In terms of redress mechanisms, except for civil cases in which redress may be sought from a court in relation to personal rights, the abovementioned laws do not provide an independent mechanism that may oversee and protect against violations to the right to privacy.

We are concerned that provisions of the Sub-decree do not detail the measures in place in order to protect the rights to freedom of expression and privacy of individuals. We fear that the lack of such measures poses risks to the fundamental freedoms of individuals, namely the freedoms of expression and opinion and the right to privacy and may expose individuals’ personal information without their consent, which would contravene international human rights instruments and Cambodian laws.

⁷ General Comment No. 34 of the United Nations Human Rights Committee on article 19 of the ICCPR, para. 22.

⁸ See <https://news.un.org/en/story/2017/08/563882-cambodia-un-human-rights-wing-concerned-media-civil-society-curbs>

⁹ Resolutions 42/37 of the United Nations Human Rights Council, A/HRC/42/37 (2019), para. 30.

¹⁰ See <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=26599&LangID=E>

¹¹ Article 65 b

¹² Article 7

¹³ Articles 10, 11 and 12

¹⁴ Articles 301, 302, 314 and 318

We urge your Excellency's Government to revisit the sub-decree and bring it in line with international human rights standards.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we 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 above-mentioned allegations.
2. Please explain how provisions of the Sub-decree are in compliance with international human rights standards, especially articles 17 and 19 of the ICCPR.
3. Please explain how the decision by the Ministry of Post and Telecommunication is necessary and proportionate and how it is in line with the right to privacy and freedom of expression and opinion.
4. Please provide information on the measures taken/to be taken to protect the privacy and data of individuals and freedoms of expression and opinion, including safeguards to ensure an independent authority is responsible for the oversight of the implementation of this sub-decree and appeal process
5. Please provide information on whether there are future plans to invite civil society to comment and be able to raise concerns on the sub-decree, in a public and transparent manner, in light of the impact this legislation will have on all citizens.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may 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.

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

Rhona Smith
Special Rapporteur on the situation of human rights in Cambodia

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

Joseph Cannataci
Special Rapporteur on the right to privacy

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to remind your Excellency's Government's obligations under the International Covenant on Civil and Political Rights, ratified by Cambodia in 1992, especially its articles 17 and 19 which 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).

Article 17 of the ICCPR provides that “1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and 2) Everyone has the right to the protection of the law against such interference or attacks.”¹⁵ Article 17 of the ICCPR also includes the right to the protection of personal data, which, among other things, prevents States from requiring the mass retention of personal data by companies and access to personal data outside of clearly defined circumstances and subject to safeguards.

We would like to refer your Excellency's Government to the report of the High Commissioner for Human Rights, which states that “any limitation to privacy rights reflected in article 17 must be provided for by law, and the law must be sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances. The limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available” (see A/HRC/27/37, para. 23). We also draw to your attention to the recommendations of the Special Rapporteur on the right to privacy to the General Assembly on personal data and its use (A/73/45/12).

Article 19 of ICCPR provides that: “Everyone shall have the right to freedom of expression; 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 his choice.”

Article 19 (2) ICCPR notably embraces the right to access information held by public bodies. In this context, we would like to highlight some key findings of a Joint Declaration on access to information, issued in 2004, in which the Special Rapporteur on the right to freedom of opinion and expression noted that: “The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions. The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of

¹⁵ The right to privacy is also established in Article 12 of the UDHR.

the system of exceptions.”¹⁶

In a report on access to information presented to the General Assembly (A/68/362), the Special Rapporteur on freedom of opinion and expression further recommended that: “National laws should contain a clearly and narrowly defined list of exceptions or an explanation of the grounds for refusing the disclosure of information. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information, and should be determined by an independent body, preferably a court, and not the body holding the information” (para. 99).

In this context, we would like to recall that per international human rights norms and standards, especially Article 19 (3) of the ICCPR, restrictions to freedom of expression can only be imposed by narrow limitations pursuant to standards of legality, necessity and legitimacy and according to an order by an independent and impartial judicial authority, in accordance with due process guarantees.

¹⁶ <https://www.osce.org/files/f/documents/6/f/38632.pdf>