Introduction

On May 28, 2018, the Royal Government of Cambodia (RGC) issued the *Inter-Ministerial Prakas on Publication Controls of Website and Social Media Processing via Internet in the Kingdom of Cambodia* (Prakas). The Prakas tasks the Ministry of Interior (MoI), Ministry of Posts and Telecommunications (MoPT) and the Ministry of Information with several responsibilities to prohibit online speech.

Before beginning the analysis, it is worth noting that the Prakas was issued two months before Cambodia’s National Elections, which are set to be held on July 29, 2018. The period before elections should be a time for vigorous, informed debate. However, the Prakas may have had the opposite effect because it limits broad swaths of speech, requires robust filtering and blocking of websites, and empowers these three ministries to take legal action against any entity publishing content deemed to be “illegal.”

ICNL is concerned that the Prakas will be used to restrict the freedom of expression in violation of international law. Article 19 of the ICCPR requires State parties to guarantee the right to freedom of expression, including the right to receive and impart information and ideas of all kinds regardless of frontiers. ¹ The UN Human Rights Committee has stated that, “any restrictions on the operation of websites, blogs, or any other internet-based electronic or other such information dissemination systems” must comply with Article 19.²

Restrictions to the speech and expressions guaranteed in Article 19 are lawful only when such restrictions pass a three-part, cumulative test.³ According to the test:

1. the restriction must be provided by law, which is clear and accessible to everyone (i.e., adheres to principles of predictability and transparency);
2. the restriction must pursue one of the purposes set out in article 19(3) of the ICCPR, namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and
3. the restriction must be proven as necessary and the least restrictive means required to achieve the purported aim (i.e., adheres to principles of necessity and proportionality).

The Prakas is a restriction to the freedom of expression. Therefore, the RGC has the burden of showing that the Prakas and all of its provisions pass the Article 19’s three-part test.⁴

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¹ The Kingdom of Cambodia became a party to the ICCPR on 26 August 1992.
⁴ Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, para. 27, UN Doc # CCPR/C/GC/34 (2011).
The Prakas’s stated objective is to: “manage publication of all news contents [sic] or written messages, audios, photos, videos and/or other means on website[s] and social media...in the Kingdom of Cambodia.” Its main function is to stop any business or social media page that: (1) operates illegally, and/or (2) publishes information (including written messages, audios, photos, videos, and other mediums) that will create “turmoil in the society leading to undermine national defence, national security, relation with other countries, national economy, public order, discrimination [or] national culture and tradition.” (For the purposes of this legal analysis, these categories of speech will be referred to as “Prohibited Content”). Put another way, the Prakas charges the MoI, MoPT and Ministry of Information with preventing the publication of any Prohibited Content and to take legal action against any entity that publishes such content.

The Ministry of Information, MoPT and MoI are charged with separate tasks to achieve the Prakas’s objective and are ordered to cooperate with each other. Each ministry must “establish specialized unit” to “monitor, study, research, find out illegal business activities and publications on websites and social media in order to take legal action following the procedure.”

The following tasks of each ministry are problematic under international law.

- The Ministry of Information must: (1) “manage” all information published [online]; (2) inform the MoPT and “take action against illegal publications” that have a license with the MoPT; and (3) “inform the MoI about addresses (not specified if physical address or web/social media address or both) websites and social media that illegally publishes information.”
- The MoPT must: (1) require all Internet Service Providers (ISPs) to “install software programs and equip internet surveillance” to “easily” filter and block “social media” and “businesses” that “run their business activities and/or publicize illegally;” and (2) cooperate with several ministries and other institutions to “block” or “close” social media pages or business [websites] that publish Prohibited Content or content that is considered as “incitement” or “breaking solidarity.”

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5 Prakas, Clause 1.
6 Prakas, Clause 2, “The Prakas aims at obstructing and preventing all publications or news content sharing or written messages, audios, photos, videos, and/or other means intended to create turmoil leading to undermine national defence, national security, relation with other countries, national economy, public order, discrimination and national culture and tradition.”
7 Prakas, Clause 4.
8 Prakas, Clause 6(a).
9 Prakas, Clause 6(b) and 6(c).
10 Prakas, Clause 6(e).
11 Prakas, Clause 7(b).
12 Prakas, Clause 7(c), “Cooperate with Ministry of Information or relevant ministries and institutions, and/or offer cooperation/help from other relevant ministries or international institutions, in order to block or close the websites and/or social media page who run business activities and/or publicize illegally which considered as incitement, breaking solidarity, discrimination, create turmoil by will, leading to undermine national security, and public interests and social order.”
• The MoI must: (1) search the source (websites and social media) that either publishes illegally or publishes Prohibited Content; and (2) shut down any “illegal business activities on social media networks” that “publicize news” or other messages that is “considered as contrary to law” of Cambodia.

The Prakas itself and the specific tasks noted above violate Article 19 of the ICCPR.

Illegitimate Aims

The Prakas does not satisfy the second-prong of Article 19’s three-part test. The principle of legitimacy – the second prong of Article 19’s three-part test – requires that the restriction be used to protect the rights or reputations of others or national security, public order, or public health or morals.

The stated objective and main functions of the Prakas are not legitimate aims under Article 19(3) of the ICCPR. Even if the RGC believes that the Prakas is necessary to protect national security, public order or public health or morals, the RGC must establish a direct and immediate connection between the expression restricted and the threat said to exist. National security can only be used to justify restrictions to the freedom of expression upon it being demonstrated that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. “Using ‘national security’ as a grounds to restrict speech should be limited to situations in which the interest of the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government, regime or power group...Similarly, public order (ordre public) must be limited to specific situations in which a limitation [to speech] would be demonstrably warranted.”

The stated aims of the Prakas are not to protect the rights or reputations of others or to protect national security or public order, or public health or morals. Rather, the Prakas aims to manage all speech online and empowers the Ministry of Information, MoPT and MoI to utilize broad powers to restrict speech made online. Therefore, the Prakas does not satisfy the ‘principle of legitimacy’ requirement under Article 19(3) of the ICCPR.

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13 Prakas, Clause 8(a), “Study, research, find out source of websites and social media that publicize illegally, create social turmoil, leading to undermine national defence, national security, relation with other countries, public order, discrimination and national culture and tradition, in order to take legal actions against them following the procedure.”

14 Prakas, Clause 8(c), “Cooperate with relevant ministries and institutions to shutdown illegal business activities on social media networks operated through internet and/or publicize news or written messages, audios, photos, videos, and/or other means which considered as contrary to the law of the Kingdom of Cambodia.”


Prohibited Content

The Prakas’s ban on Prohibited Content does not meet the first-prong – ‘provided by law’ – or the third-prong – adherence to the ‘principles of necessity and proportionality’ – of Article 19’s three-part test.

VAGUENESS AND OVERBREADTH OF PROHIBITED CONTENT

The ‘provided by law’ requirement is not met just because a law or regulation is officially enacted. To satisfy this requirement, restrictions to the freedom of expression must be both predicable and transparent. To meet the requirement of predictability, the law in question must be formulated with sufficient precision to enable both the individual and those charged with its execution to conform their conduct to the law.18

The categories of Prohibited Content are too vague to meet the principles of predictability and transparency. The Prakas prohibits the publishing of any information in any form that is intended to create turmoil in society, that is likely to undermine national defence, national security, relations with other countries, national economy, public order, and national culture and tradition, lead to discrimination, or is considered as “incitement” or “breaking solidarity.” The categories of prohibited speech are too broad and too vague for citizens to know what content is or is not permissible. Prohibiting such overly broad and ambiguous categories of content is an unlawful restriction on the freedom of expression.

The types of speech prohibited by the Prakas are wide-ranging and undefined, making it impossible for the public to know in advance what conduct or speech is permissible and what speech is illegal. For example, the Prakas seemingly prohibits broadcasting of news regarding violent crimes, demonstrations or protests, news related to corruption, taxes or development projects, or campaigns highlighting the need to improve aspects of Cambodia’s development. Furthermore, abuses of citizens by police or other authorities, such as unnecessary violence against protesters or marginalized groups—information that clearly is the public’s right to know – appear to be prohibited under the Prakas. As a result, discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent could be restricted or prohibited, and these types of expression are explicitly “never to be subject to restrictions.”19

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18 United Nations Human Rights Council, A/71/373, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye” September 6, 2016, para. 12 (“The first prong of the three-part test requires restrictions to the freedom of expression to be both predicable and transparent; a restriction “must be formulated with sufficient precision to enable both the individual and those charged with its execution to regulate conduct accordingly…”)

Legal provisions similar to the Prohibited Content in the Prakas - “undermining public order,” “undermining national defence,” and “creating turmoil” are used to unlawfully restrict and penalize criticism of governments in contravention of Article 19 of the ICCPR. The vague terms used in the Prakas are open to interpretation and therefore give the government broad discretion to pursue criminal actions against individuals based on arbitrary and subjective grounds. Under international law, individuals and authorities must know precisely what speech is permitted and what is prohibited; the Prakas fails to meet this standard.

DISPROPORTIONATE SANCTIONS

Moving the third-prong of Article 19’s three-part test, the Prakas provides for punishments that do not adhere to principles of necessity and proportionality. The publication of Prohibited Content would lead to three types of punishments under the Prakas: (1) shutdown of businesses or organizations; (2) take legal action – presumably arrest and prosecution – against individuals; or (3) blocking of offending content (addressed in the next section).

Closing businesses or organizations and prosecuting individuals for speech made online are likely disproportionate penalties under international law. “Imprisoning individuals for seeking, receiving and imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under article 19, paragraph 3, of the [ICCPR].” The Prakas’s requirement for ministries to take legal action against those who publish Prohibited Content is even more troubling given the fact that Cambodia’s penal code criminalizes protected speech like insult and criticism of government and public officials, and criminalizes defamation – these provisions are

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21 It should be noted that the Prakas requires that any action taken under the Prakas must “follow the procedures.” However, it is unclear which procedures must be followed.
violations of international law – and the RGC is systematically using these provisions of the penal code to jail human rights defenders and others deemed critical of the RGC.

In addition to targeting individuals for speech, the Prakas also imposes penalties on legal entities, such as media organizations, civil society organizations and other businesses. The penalties include the closure of the entity, which is incompatible with the freedom of association.

Involuntary dissolution is a remedy of last resort that should be utilized only for the most serious abuses and generally after notice and an opportunity to rectify the deficiency has been given:

*The suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.*

Every media organization, civil society organization and private entity is now in danger of being shut down if one of its employees makes or publishes a statement that is deemed to be Prohibited Content. The organization is liable even if that employee was acting outside of his or her official duties. Actions by governments against associations must be proportionate. The dissolution or closing of a business, organization or other legal entity is not proportionate to the act of publishing Prohibited Content.

### Blocking of Websites

The Prakas tasks the MoPT with: (a) requiring ISPs to install software and hardware to filter and block websites and webpages, and (b) blocking or closing social media pages or websites of businesses that publish Prohibited Content or content that is considered to be “incitement” or “breaking solidarity.” Filtering of internet content, including web

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pages or entire websites is a form of censorship, and violates the freedom of expression unless the rationale cited for the content’s removal is valid, i.e. the rationale complies with the requirements of Article 19 of the ICCPR.²⁸

The rationale for blocking websites and filtering of content will be based on an individual or legal entity publishing Prohibited Content or publishing content deemed to be “incitement” or “breaking solidarity.” The filtering and blocking of websites as called for under the Prakas violates international law.

*States’ use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression... Firstly, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner, which risks content being blocked arbitrarily and excessively. Secondly, blocking is not justified to pursue aims which are listed under article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and blocking lists are generally kept secret, which makes it difficult to assess whether access to content is being restricted for a legitimate purpose. Thirdly, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal. Lastly, content is frequently blocked without the intervention of or possibility for review by a judicial or independent body.*

²⁹

Each of the concerns noted by the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, are present in the Prakas. First, the conditions to block or filter websites are based on overly broad and vague categories of speech. Second, such blocking does not pursue a legitimate aim under Article 19(3) of the ICCPR. Third, there is no requirement that the blocked sites or filtered content will be published or publicly accessible. Fourth, there is no guarantee in the Prakas that the blocking measure will be sufficiently targeted. Finally, the Prakas does not require that a judicial or independent body review and authorize such blocking or filtering.

The Prakas’s requirement for the MoPT to ensure blocking and filtering systems are installed by ISPs and to then require ISPs to block and filter websites will likely lead to impermissible restrictions to the freedom of expression. Blocking and filtering can be ordered based on subjective arbitrary grounds, which could stifle speech critical of the RGC, “It is also inconsistent with [Article 19] paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may


be critical of the government or the political social system espoused by the government.”

The blocking and filtering of websites authorized by the Prakas is not compatible with international law. The reasons to introduce such blocking or filtering do not satisfy the requirements of Article 19(3) of the ICCPR, and the order to block and filter content does not include any of the safeguards under international law.

Conclusion
The Prakas raises serious concerns about the exercise of the freedom of expression in Cambodia. It bans the publication of several broad, undefined categories of speech and empowers three ministries – the Ministry of Information, Ministry of Posts and Telecommunications, and Ministry of Interior - with wide-ranging authority and power to remove and block any offending content, and take legal action against those individuals and legal entities that publish such content. The Prakas’s provisions highlighted in this analysis do not meet Cambodia’s international legal obligations under the ICCPR, and as a result the Prakas likely constitutes a violation to the freedom of expression. The Royal Government of Cambodia should consider repealing the Prakas to ensure that its citizens and those under its jurisdiction can exercise the fundamental right to freedom of expression.

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