

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

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Excellency,

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 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **Cybercrime Law, signed into law on 24 June 2017 and published in the Official Gazette on 9 July 2017. Since June, the law has allegedly been used to block at least 30 websites, including websites posting news or opinions critical of the Palestinian Authority. The law gives rise to concerns about freedom of expression and privacy online.**

According to the information received, the law has been prepared and approved in secrecy and away from earlier civil society discussion. It contains provisions that allows for the blocking of websites and provisions criminalizing legitimate expression, which would represent a significant decline in media freedom in Palestine.

Before identifying the concerns raised by the law, I would like to note that article 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded by the State of Palestine on 2 April 2014, 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. Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be "provided by law", and necessary for "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).

Under the article 19(3) requirement of legality, it is not sufficient that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34). The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions "target a specific objective and do not unduly intrude upon the rights of targeted persons". The ensuing interference with third parties' rights must also be limited and justified in the interest supported by the intrusion (A/HRC/29/32). Finally, the restrictions must be "the least intrusive instrument among those which might achieve the desired result" (CCPR/C/GC/34).

In addition, article 17(1) of the ICCPR provides for the rights of individuals to be protected, inter alia, against unlawful or arbitrary interference with their privacy and

correspondence, and provides that everyone has the right to the protection of the law against such interference. “Unlawful” means that no interference may take place except in cases envisaged by the law which in itself must comply with provisions, aims and objectives of the ICCPR. 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).

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

In light of the above standards of international human rights law, I would like to present the following observations and concerns raised by several provisions of the law:

I. Criminalization of access to websites

Article 5 of the law criminalizes the “illegal access” of “electronic websites, information systems, or information networks” and also access that “exceeds authorized access”. Under article 2 of the law, “illegal access” is defined as “deliberate access...which such a person is not authorized to access”. “Authorization” is defined as “the permission given to one or more person(s) or to the public to access or use the system...”. As such, any person accessing or visiting a website in a way that is not expressly “authorized” may be committing a crime.

While it is legitimate to protect information systems from unauthorized access, the wording of article 5 is overbroad and effectively criminalizes the accessing, copying and transmitting of any information system or data. The provision may, in particular, have a chilling effect on media activities in Palestine and pose a serious threat to the ability of journalists to work freely, especially investigative journalists, whose work consist of accessing information. These provisions could also seriously deter whistleblowers who, by definition, reveal information of general interest by transmitting data and information they are not authorized to access, copy or transmit.

Article 32 mandates internet service providers to cooperate with security agencies by collecting, storing and sharing users’ information data for at least three years, in addition to blocking any website on the orders of the judiciary. Article 40 of the law allows the Attorney General or one of his assistants to request the court to issue an order to block any website within 24 hours.

II. Criminalization of encryption

Article 10 of the law criminalizes encryption devices and certain acts of encryption, and interferes directly with the privacy and security necessary for freedom of opinion and expression. While this effort likely involves a genuine commitment to preventing crime, it has been demonstrated that limiting encryption devices to only those that are licensed or authorized by the component authorities is a necessary or

proportionate measure in the light of the specific threats caused to privacy and freedom of expression.

The criminalization of encryption that is executed “without a legitimate cause” gives excessive discretion to authorities to determine what is “legitimate”, constitutes a threat to the work of journalists and the confidentiality of their sources, and disproportionately undermines all users’ security.

As I have noted in my previous report to the Human Rights Council, any proposal to impose restrictions on encryption or anonymity “should be subject to public comment and only be adopted, if at all, according to regular legislative process. Strong procedural and judicial safeguards should also be applied to guarantee the due process rights of any individual whose use of encryption or anonymity is subject to restriction. In particular, a court, tribunal or other independent adjudicatory body must supervise the application of the restriction” (A/HRC/29/32).

III. Criminalization of online expression or sharing of online expression on grounds that are incompatible with international law

a) Criminalization of the establishment, publication, distribution, storage and use of material that infringes upon public morals

Article 16 of the law criminalizes anyone who produces material that infringes upon public morals, or has “arranged, prepared, sent or stored it for the purpose of exploiting, distributing or presenting it to others” through “electronic network, an information technology means, or through animated cartoons”.

Article 16, moreover, criminalizes the creation of any website, App, or electronic account that publishes information online that “facilitates programs and ideas” that infringe upon public morality. The sanction is a prison term of minimum one year and between 1000 and 5000 Jordanian Dinars.

These provisions appear likely to restrict expression that falls short of expression that constitutes incitement to violence, hatred or discrimination under article 20 of the ICCPR. While article 19(3) of the ICCPR allows for restrictions that are necessary and legitimate for the protection of public order or morals, article 17 of the law provides no guidance on what is deemed to disrupt or go against public order or morals. As such, this provision permits officials excessive discretion to determine who is in violation of the provision. In addition, this provision could effectively limit media freedom and chill discourse deemed controversial or critical because journalists and whistleblowers often publish or share information that is controversial in nature.

b) Criminalization of publication of news that endangers security and public order

Article 20 of the law criminalizes the establishment or administration of a website which publishes news that endangers the “integrity of the Palestinian state, the public order or the internal or external security of the State”. Moreover, article 20 prohibits the propagation of such news by any means, including broadcasting or publishing. The sanction is minimum one year imprisonment and a fine of between 1000 and 5000 Jordanian Dinars. The provision does not provide any further definition of what such news is and how it is determined to “endanger” the integrity or security of the State. As such, this provision gives the authorities excessive discretion to determine who is an offender. There is therefore a risk that this provision will criminalize the activity of journalists that are critical of the government and of whistleblowers who reveal information of public interest. The possibility of excessive discretion made possible by the provision’s lack of clarity raises concerns under article 19(3) of the ICCPR, which requires that restrictions on freedom of expression be prescribed by law and be necessary and proportionate to protect legitimate interests such as national security and public order.

c) Criminalization of publication of information that infringes upon the sanctity of private or family life

Article 22 of the law criminalizes anyone who creates a website, an App or an electronic account or who publishes news, photos, audio or video recording, with the intent to infringe upon “family principles or values”, including in cases where that information is true. The sanction is prison term of minimum two years and a fine of 3000-5000 Jordanian Dinars. If taken together with article 21 of the law, this provision could censor the media from reporting on sensitive and critical information that is relevant to the public interest but controversial to the government. This provision may lead to self-censorship of individuals and the media. Because there is no knowledge or intent requirement, this provision may deter individuals from expressing themselves.

d) Criminalization of insult or offense of anything considered sacred or religious

Article 21 of the law criminalizes anyone who creates a website, an App or an electronic account, or who disseminates online information with the intent to “offend or to violate a sacred or religious rite or belief”. The offense is punishable with minimum one year imprisonment and a fine of between 2000-5000 Jordanian Dinars. The provision does not provide any definition of what constitutes “offense” or “insult” or on how these are to be evaluated.

The Human Rights Committee has emphasized that prohibitions of displays of lack of respect for a religion are incompatible with article 19 of the ICCPR (CCPR/C/GC/34). Additionally, under article 19 of the ICCPR, it is impermissible to use such prohibitions to prevent or punish criticism of religious leaders or commentary on religious doctrine or tenets of faith.

Based on the above, I express serious concern that the Cybercrime Law uses overly broad terms that lack sufficiently clear definitions, permits authorities to

criminalize online expression and imposes overly harsh penalties for violations. In the absence of a Freedom of Information Act, this could lead to the institutionalization of violations of fundamental rights, such as the rights to privacy and freedom of expression for Palestinian citizens, as well as to the work and safety of media workers, including journalists in Palestine. The law could result in significant censorship and self-censorship by the media and individuals, especially those critical of the government. I am further concerned that the multiple references to harsh penalties under the law are incompatible with article 19 of the ICCPR, and could create a deterrent effect, particular on the media and on issues deemed sensitive. These penalties do not meet the proportionality requirement under article 19(3) of the ICCPR as they are not proportionate to the activities they are designed to sanction.

Finally, I also express concern at the reported arrests for “insulting the president” and other political statements made on social media, the lifting of parliamentary immunity of PLC members, and an alleged order by the Prosecutor General to confiscate a new book from the local market under the charge of “offending general values”. I express concern that the new law will enable these and similar actions to grow in number.

In view of the aforementioned comments, I would like to call on your Excellency’s Government to take all steps necessary to review and revise the law to ensure its compliance with the obligations of the State of Palestine under international human rights law.

I would appreciate receiving a response within 60 days.

Finally, I would like to inform your Excellency’s Government that this communication will be made available to the public and posted on the website page for 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 the regular periodic Communications Report to be presented to the Human Rights Council.

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

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