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.

At the outset, I would like to thank your Excellency's Government for the Note Verbale of 11 June 2018 informing about the repeal of the "fake news" law, which formed the subject of a communication sent on 3 April 2018 (MYS 3/2018). I welcome this move and I stand ready to provide any support to your Excellency's Government as you believe fitting in connection with revision of laws having an impact on freedom of expression. In this regard, I welcome the initiative by the Institutional Reform Committee, set up by your Excellency's Government, to have an open call for submission on institutional reforms in Malaysia.

I would like to bring to the attention of Your Excellency's Government and of the Institutional Reform Committee, information I have received concerning **the Communications and Multimedia Act, 1998** ("CMA") **and the Malaysia Communications and Multimedia Commission Act, 1998** ("MCMCA"), and implications of these laws for freedom of expression in Malaysia.

According to information received:

The CMA was enacted in 1998 to "provide for and to regulate the converging communications and multimedia industries."

The MCMCA was concurrently enacted in 1998 to establish the Malaysian Communications and Multimedia Commission ("the Commission") with "powers to supervise and regulate the communications and multimedia activities in Malaysia, and to enforce the communications and multimedia laws of Malaysia."

Content-Based Offences

Section 211 of the CMA prohibits content application service providers and their users from providing "content which is indecent, obscene, false, menacing, or offensive in character with the intent to annoy, abuse, threaten or harass any person." In addition to imposing direct criminal liability on users, this section appears to hold content application service providers strictly liable for user-generated content.

CMA section 233(1)(a) additionally prohibits the use of network facilities, a network service or an applications service to transmit content prohibited under Section 211.

CMA section 233(2)(a) prohibits the use of a network service or applications service to provide "any obscene communication for commercial purposes."

Restrictions on Encryption and Anonymity

CMA section 233(1)(b) prohibits initiating a communication "using any applications service …with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address." This provision could be broadly interpreted to prohibit anonymous expression.

CMA section 247(2)(a) generally requires police officers to obtain a judicial warrant to search and seize "computerized data" during an investigation into an offence under the Act or its subsidiary legislation. CMA Section 249(2)(a) specifies that authorized police officers should be "provided with the necessary password, encryption code, decryption code, software or hardware and any means required to enable comprehension of computerized data."

Under CMA section 253, a person commits an offence if that person "impedes, obstructs or interferes with … an authorized officer in the performance of his duties." These duties may include conducting an electronic search during a law enforcement investigation. Accordingly, Section 253 could be broadly interpreted to prohibit the use of encryption and anonymity tools.

Lack of Protection for Whistleblowers and Journalists' Sources

CMA section 234 prohibits the unlawful interception of communications, as well as any attempt to disclose or use the contents of such communications where there is "reason to believe" that they were unlawfully intercepted. Neither Section 234 nor the CMA contains exceptions for whistleblowing activities.

CMA section 256(1) empowers authorized officers (such as law enforcement or officers of the Commission) conducting an investigation under the CMA to "examine orally a person supposed to be acquainted with the facts and circumstances of the case." CMA section 256(2) makes the person examined "legally bound to answer all questions related to the case put to him by the authorized officer," unless answering would expose that person to criminal charges or penalties. This could be interpreted to compel the disclosure of information regarding journalists' sources.

Under CMA section 74, a person commits an offence if that he or she "fails to comply with a direction of the Commission." Such direction may seek to compel journalists to disclose information about their sources.

Under CMA section 75, a person "who fails to disclose or omits to give any relevant information or evidence or document, or provides information or evidence or document that he knows or has reason to believe is false or misleading, in response to a direction issued by the Commission commits an offence."

The Malaysia Communications and Multimedia Commission ("the Commission")

Section 4 of the MCMCA establishes the Communications and Multimedia Commission. Under MCMCA Section 6, the Commission comprises a minimum of six members and a maximum of nine members.

MCMCA Section 16 empowers the Commission to, among other things, "implement and enforce the provisions of the communications and multimedia laws," "regulate all matters related to communications and multimedia activities" not provided under these laws, "supervise and monitor communications and multimedia activities" and "encourage and promote self-regulation in the communications and multimedia industry."

Under MCMCA Section 6, the Minister of Communications and Multimedia ("the Minister") has sole authority to appoint the members of the Commission. Three such members must represent the Government.

Under Section 68 of the CMA, the Minister may direct the Commission to investigate any civil or criminal offences specified under the CMA. The Commission may also conduct an investigation if it has "grounds to believe" that any such offence has, is or will be committed. Under CMA Section 69, such an investigation may also be initiated upon "a written complaint by a person."

CMA Section 71 requires the Commission to prepare and give to the Minister a report containing the findings of any investigation. CMA Section 72 provides the Minister with sole discretion to publish this report if she is satisfied that "the publication would be in the national interest."

Before explaining my concerns with the CMA and the MCMCA, I wish to remind your Excellency's Government of the obligations under international human rights standards, including Article 19 of the Universal Declaration of Human Rights ("UDHR"), adopted by the UN General Assembly in 1948.

Article 19 of the UDHR guarantees everyone "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." Article 29 states that limitations on the exercise of these

rights must be "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Even though your Excellency's Government is neither a signatory nor a party to the International Covenant on Civil and Political Rights ("ICCPR"), its provisions, which are materially similar to and based on the UDHR, are instructive. Article 19(1) establishes "the right to hold opinions without interference," while Article 19(2) establishes the right "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." Restrictions on the right to freedom of expression under Article 19(2) 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." The requirement of necessity is a logical extension of the principle that limitations on freedom of expression must be "*solely* for the purpose of" respect for the rights and freedoms of others and meeting "*just* requirements" under the UDHR (emphasis added).

Drawing on the interpretation of article 19 by the Human Rights Committee in General Comment 34 (CCPR/C/GC/34), the mandate of the Special Rapporteur on freedom of expression has concluded that limitations on freedom of expression are "provided" or "determined" by law only if they are adopted "by regular legal processes and limit government discretion in a manner that distinguishes between lawful and unlawful expression with "sufficient precision"."[1] Furthermore, such limitations must be necessary and proportionate to fulfill specified legitimate aims. [2] Under this requirement, States must "demonstrate that the restriction imposes the least burden on the exercise of the right and actually protects, or is likely to protect, the legitimate State interest at issue;" they may not "merely assert necessity but must demonstrate it, in the adoption of restrictive legislation and the restriction of specific expression."[3]

Based on these standards, I concluded in my 2018 report to the Human Rights Council that States should repeal any law that unduly criminalizes or restricts online expression.[4] States should enact "smart regulation, not heavy-handed viewpoint-based regulation," focused on ensuring that content application services providers provide robust transparency and remediation that enables the public "to make choices about how and whether to engage in online forums." In any event,

[1] Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/38/35, ¶ 7, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement.
[2] *Id.*, at ¶ 7.
[3] *Id.*
[4] *Id.*, at ¶ 65.

"States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy. States should refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on [content application services providers], given their significant chilling effect on freedom of expression."

In the 2015 report to the Human Rights Council, I concluded that encryption and anonymity tools "provide individuals and groups with a zone of privacy online to hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks."[5] The report urged States to refrain from blanket restrictions on encryption and anonymity, which are unnecessary and disproportionate. The report has also concluded that "[c]ourt-ordered decryption, subject to domestic and international law, may only be permissible when it results from transparent and publicly accessible laws applied solely on a targeted, case-by-case basis to individuals (i.e., not to a mass of people) and subject to judicial warrant and the protection of due process rights of individuals."[6]

In the 2015 report to the General Assembly, I also emphasized that the right to seek, receive and impart information of all kinds implies the public's right to know information of public interest.[7] As a result, any restriction on the confidentiality of sources "must be genuinely exceptional and subject to the highest standards, and implemented by judicial authorities only."[8] Furthermore, "State law should protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety."[9]

Based on these standards, I am seriously concerned that the CMA and MCMCA have established a censorship regime that is inconsistent with Your Excellency's Government's obligations under international human rights law. In particular, I have the following concerns:

Concerns Regarding Content-Based Offences

The key elements of these offences – such as content that is "indecent," "obscene," "menacing" and "offensive" – are not defined or explained in the

[5] Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/29/32, ¶ 9, available at https://freedex.org/wp-content/blogs.dir/2015/files/2015/10/Dkaye_encryption_annual_report.pdf.
[6] *Id.*, at ¶ 60.
[7] General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/70/361, ¶ 58, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361.
[8] *Id.*, at ¶ 62.
[9] *Id.*, at ¶ 63.

CMA. Accordingly, these provisions do not provide content application service providers or individuals with sufficient information to regulate their conduct, potentially in violation of the requirement that limitations on freedom of expression should be "determined by law." Such ambiguity, coupled with the threat of criminal liability, may exert a significant chilling effect on users of these services. It may also incentivize providers to err on the side of caution and restrict user-generated content that is perfectly legitimate or lawful.

Given the highly subjective nature of these terms, I am also concerned that they will provide authorities with a pretext to prosecute reporting, criticism or commentary they disagree with or find controversial. The prohibition of obscene communication for commercial purposes could also be broadly interpreted to penalize artistic expression or comedic material that are sold or disseminated online.

Concerns Regarding Restrictions on Encryption and Anonymity

I am concerned that Section 233(1)(b) would unduly interfere with online privacy, which is a critical gateway to freedom of opinion and expression. Although Section 233(1)(b) appears to target only anonymous communications that are intended to "annoy, abuse, threaten or harass," these terms are vaguely formulated, and could be broadly interpreted to prohibit a wide range of anonymous expression. Such a sweeping ban would unduly limit the individual's private space to hold opinions, exercise freedom of expression and seek accountability or transparency from the State without arbitrary and unlawful interference.

The provisions compelling government access to encrypted data exacerbate these concerns. Although the authorities may have legitimate law enforcement reasons for accessing such data, I am concerned that these provisions could be broadly interpreted to compel providers of applications or network services to install security vulnerabilities that enable government access to encrypted communications or secured devices (commonly referred to as "backdoors"). The mere creation of these backdoors raises a significant risk that third parties and other "bad actors" will exploit them to gain access to personal and sensitive information to commit fraud and other illicit activity. I am also concerned that these provisions may compel providers to remove end-to-end encryption from their products and services. As a result, in facilitating special government access to encrypted data, these provisions would threaten the privacy and security of all users. Given the range of investigative tools at the government's disposal, I am concerned that the privacy and security risks to users are disproportionate to any legitimate government interest.

Concerns Regarding Lack of Protection for Whistleblowers and Journalists' Sources

The broad prohibition against the unlawful interception of communications (and the use of such communications) raises concern that it will be enforced against whistleblowers for disclosing information that they reasonably believe at the time of disclosure to be true and to constitute a threat or harm to a specified public interest (such as government fraud, waste or abuse). I am concerned that this will also deter legitimate whistleblowing activities and impede the public's right to access to information.

The provisions authorizing broad executive power to compel evidence could disproportionately affect journalists, who may be compelled to disclose information about their sources. The lack of protection for the confidentiality of sources makes it more difficult for journalists to obtain information from current or potential sources and conduct investigative reporting. This would interfere with the ability of journalists to discharge their vital watchdog functions, to the detriment of the public's right to access to information.

Concerns Regarding the Malaysian Communications and Multimedia Commission (MCMC)

I am concerned that the MCMC in its current form lacks the sufficient independence from political control and is provided with overbroad powers to control expression. I urge a revision of the appointment procedure, with a view to increasing the transparency of the appointment of the MCMC's members and providing the appointment procedure with clear criteria.

The mandate of the MCMC should be reviewed in order to ensure that it does not provide the Commission with disproportionate and overreaching powers to restrict expression, including the power to seize and search communications equipment. In this regard, I urge in particular a review of the Sections 211 and 233 of the CMA, which provide the MCMC with broad powers to interpret its own mandate under the two 1998 Acts, pertaining to blocking access to online portals and to restrict online content. In line with international human rights standards, any attempts to block websites must be based on an order by an independent judiciary.

In light of the above-mentioned observations and concerns, I urge a revision of the CMA and MCMCA for the purpose of bringing the legal framework for communications and multimedia activities into line with international human rights standards. I stand ready to provide your Excellency's Government with technical assistance in this regard.

Finally, I would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, 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.

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