Freedom of expression and the internet

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'The same rights that people have offline must also be protected online'

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

An invitation to debate

More than three centuries ago, the thinker, poet and British politician John Milton published one of the most important and famous texts against censorship: Areopagitica. It was one of the catalysts for a major debate on the protection of freedom of expression and press.

Many centuries before him, the Greeks formed solid arguments on the importance of doxa (opinion) for democracy.

Discussions on the centrality of freedom of expression and access to information and knowledge for democracies, development, protection and promotion of other human rights are far from new.

However, there is no doubt that the advancement of new information and communication technologies, in particularly the growth of Internet, offers a unique and unprecedent dimension to these discussions.

As a result of this technological upsurge, we can observe impacts on the protection and promotion of human rights, on the consolidation of democracies, on fostering development, on decision-making processes, on public policies as well as on the everyday lives of citizens.

The advancement of knowledge societies is closely linked to the extensive discussions on the universal right to freedom of expression and access to information; in an increasingly connected world. Press freedom, media development, privacy, the role of ICTs in public policies, open governments, preservation of documentary heritage, media and information literacy are among the many issues that are on the table.

The UNESCO Office in Montevideo, seeking to enhance its role as laboratory of ideas, is now offering its stakeholders this Communication and Information Discussion Papers.

Written by leading experts from each field, the main objective is to provide inputs for decision makers and policy makers so they can take into account the different angles of the current issues on the international agenda, always having as a main line the international standards.

These papers do not intend to be the final word. Instead, they aim to contribute to an ever increasing, plural and well-informed debate on key issues of yesterday, today and tomorrow.

Happy reading!

Foreword
The Internet and Freedom of Expression:
New Challenges for Internationally Consolidated Principles

The deep changes the political, social, cultural, and economic landscapes have undergone in recent years, both technological and of other types, raise unavoidable questions about humanity's ability to continue protecting and promoting human rights as defined in the Universal Declaration of 1948.

The same is true of the dramatic changes that the advent of the Internet (and everything under and within its sphere) has caused and is causing in the global communications ecosystem and, therefore, in guaranteeing the human right to freedom of expression. However, it is important to notice the wisdom with which Article 19 of the Universal Declaration was drafted:

*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.*

This shows that the minds behind the Declaration did not focus only in the communication technologies available when this fundamental document was prepared and approved. Instead, they explicitly stated that the principles defined therein would hold valid, regardless of the technological changes that might take place in the future.

This is no minor challenge. But we cannot fail to acknowledge the real problems faced in asserting these principles when analyzing in detail the communications ecosystem structured by the Internet.

For this reason, in their 2011 joint declaration, the Special Rapporteurs on Freedom of Expression of the United Nations, the Inter-American Commission on Human Rights, the Organization for Security and Cooperation in Europe and the African Commission on Human and Peoples' Rights, have stressed the importance of the debate about Internet and Freedom of Expression, reaffirming the principles established by international law and drawing attention to specific aspects of the discussion, such as: intermediary liability, filtering and blocking, criminal and civil liability, network neutrality, and access to the Internet.

The 2015 UNESCO General Conference endorsed the concept of Internet Universality, which maintains that the overall development of the network must be based on four fundamental principles: (a) human rights-based; B) openness; C) accessibility, and d) multistakeholderism.

These and other issues are brilliantly discussed by Andrew Puddephatt in the pages that follow.

Enjoy your reading!

The editors

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Executive Summary

The internet a powerful technology that has major implications for freedom of expression. It's interactivity means people can become creators, co-creators, curators or editors, and not just consumers of content, and communication is peer to peer rather than hierarchical. Nor was the internet built to a central design - anyone can add to the it. It is a dynamic environment, shaped by permissionless innovation, adaptive and constantly changing, like an organic evolving ecosystem.

For freedom of expression, the internet creates:

- new abilities to create, curate and edit content, which creates new possibilities for realising human integrity and capacity;

- new abilities to organise and mobilise, strongly underpinning other rights and freedoms such as freedom of association and

- new abilities to innovate and generate economic activity and development

It 'democratises' freedom of expression, giving users the ability to bypass professional gatekeepers to act as public spokespeople for their views.

Historically media and communication technologies were regulated distinctly but these separations are increasingly less relevant. Infrastructure itself is converging and is increasingly interdependent. Spectrum is used for television, radio, 3g and 4g networks. Actors are interdependent, from telecommunications providers through to social media providers and content generators like traditional news and television companies. This chaotic convergence creates an environment that is difficult to frame, let alone understand, let alone regulate.

And there are new challenges. In the digital world content can be controlled and remade by the very technologies that deliver it so that free expression advocates need to understand the potential of technology itself to censor speech. Many states seek to censor content or create a culture of self-censorship, monitoring online activity technically or using internet 'police' to 'patrol' the web. As the internet is built and maintained by the private sector, content can be taken down by companies without recourse to the law creating a form of privatised censorship.

Two challenges face those defending freedom of expression in the digital world the jurisdictional challenge and the policy challenge.

Jurisdictionally offline there are international standards that acceptably limit speech but the internet is a global medium that does not follow national boundaries. The result is a patchwork of laws and limitations on the internet and the applications that it carries. There is an urgent need to develop and apply global norms that protect freedom of expression online which can provide the basis for national regulation.

In policy terms, the UN Special Rapporteur for Freedom of Expression produced a report in 2011 for the UN Human Rights Council, analysing the impact of the internet on freedom of expression and arguing that the rights which apply offline apply equally online. There is now a need to examine in detail what implementation of this overarching principle might mean in practice. In turn, this level of detail requires an understanding of how decisions are made in the internet environment.

No global treaty body runs the internet. Instead it is run by a mixture of technical bodies whose concern is simply to keep the network running, treaty bodies dealing with issues such as intellectual property, national government regulations and standard setting policy bodies such as the Human Rights Council and UNESCO itself. Governance of technical bodies is open to different stakeholders and working methods are consensual, and transparent unlike traditional intergovernmental decision making, which tends to be exclusive, interest focused, and secret.

Debates about the governance of the internet have intensified. Since 2005, the Internet Governance Forum has been the main forum for considering how the internet should be governed and how freedom of expression (and other values) should best be protected. However many governments would like a more regulatory international forum while the exact roles of different stakeholders in multi-stakeholder forums remains fluid and often undefined.

Policy recommendations.

If the internet can be considered has comprising a number of layers – infrastructure, applications, content and the socio political layer, then human rights norms and values need to be protected within each layer. For example, at the **infrastructure layer**, the regulatory framework should aim to ensure universal access at an affordable price. There should be provisions against monopolies and adequate security and encryption. Within the **applications layer**, there should be no unreasonable discrimination between the data carried across networks (network neutrality), security applications should be consistent with human rights and open standard software readily available. At the **content layer**, law and policy should protect freedom of expression, necessary restrictions on freedom of speech should be subject to judicial oversight and be compliant with human rights norms and positive steps taken to provide plural and diverse content. Finally at the **socio political layer**, the right to freedom of association online should be protected in law and practice, in line with international human rights standards and there should be greater transparency about eh collection of information by companies and governments.

Resumen ejecutivo

El internet es una poderosa tecnología con grandes repercusiones para la libertad de expresión. Su interactividad permite que las personas se conviertan en creadoras, co-creadoras, mantenedoras o editoras, más allá de simples consumidoras de contenidos, mientras las comunicaciones ocurren entre pares y no como una jerarquía. La internet tampoco ha sido construida con un dibujo centralizado – cualquier persona puede contribuir a ella. Es un ambiente dinámico, modelado con base en la innovación y sin la necesidad de permisiones; un ambiente adaptativo que está en continua transformación, semejante a un ecosistema orgánico en evolución.

Para la libertad de expresión, el internet genera:

- Nuevas habilidades de creación, conservación y edición de contenidos, que proporcionan nuevas posibilidades para la realización de la integridad y de las capacidades humanas;

- Nuevas habilidades de organización y movilización, propiciando una fuerte fundamentación buscar otros derechos y libertades, por ejemplo la libertad de asociación; y

- Nuevas habilidades de innovación y generación de actividad económica y desarrollo.

El internet 'democratiza' la libertad de expresión, dando a los usuarios la capacidad de circunvalar los controladores formales de acceso y actuar como portavoces públicos de sus propias visiones.

En la historia, los medios y tecnologías de comunicación han sido distintamente reglados, pero esas separaciones se han tornado cada vez menos relevantes. La infraestructura misma vivencia una convergencia e se torna más interdependiente. El espectro es utilizado para las trasmisiones de TV, radio y redes 3G y 4G. Hay una interdependencia de los actores, desde los proveedores de telecomunicación hasta proveedores de redes sociales y generadores de contenidos, como las empresas tradicionales de noticias y televisión. Esa convergencia caótica genera un ambiente que no puede ser fácilmente enmarcado, ni comprendido o, por fin, reglado.

Hay también nuevos desafíos. En el mundo digital, es posible controlar y manipular los contenidos por medio de las tecnologías que los suministran, e por ello los defensores de la libertad de expresión deben entender el potencial que la tecnología misma tiene para censurar el discurso. Muchos Estados buscan censurar contenidos o crear una cultura de autocensura, por medio del monitoreo técnico de la actividad *on-line* o vigilancia de la internet. Una vez que el internet es construido y mantenido por el sector privado, los contenidos pueden ser removidos por las empresas sin la posibilidad de recurso a la ley, propiciando una forma de censura privatizada.

Hay dos desafíos centrales en el camino de los defensores de la libertad de expresión en el mundo digital: el desafío jurisdiccional y el desafío de políticas públicas.

En el ámbito de la jurisdicción *off-line*, hay estándares internacionales que limitan aceptablemente el libre discurso. A su vez, el internet es un medio global que no se deja detener por las fronteras nacionales. El resultado es un mosaico de leyes y límites al internet y sus aplicaciones. Hay una necesidad urgente de desarrollar y aplicar normas globales que puedan proteger la libertad de expresión *on-line*, para proporcionar una base de referencia para el reglamento en nivel doméstico.

En materia de políticas públicas, el Relator Especial de la ONU sobre la Libertad de Expresión ha elaborado un informe en 2011 para el Consejo de Derechos Humanos de la ONU con un análisis del impacto de la internet sobre la libertad de expresión y especificando que los derechos aplicables al medio *off-line* se aplican igualmente al medio *on-line*. Actualmente, es necesario examinar en detalle el significado práctico de la implementación de este principio amplio. A su vez, este nivel de detalle requiere una comprensión de cómo las decisiones son adoptadas en el ambiente de la internet.

No existe un organismo establecido por un tratado global para gestionar el internet. En lugar de ello, la gestión de la internet es realizada por un conjunto de organismos técnicos que se dedican simplemente a mantenerla en funcionamiento, juntamente con organismos de tratados que trabajan con temas como propiedad intelectual o regulación gubernamental nacional, y organismos que establecen estándares para políticas globales, como el Consejo de Derechos Humanos y la UNESCO. La gobernanza de los organismos técnicos es abierta a las distintas partes interesadas y los métodos de trabajo son consensuales y transparentes, a la diferencia del proceso decisorio intergubernamental tradicional, que tiende a ser exclusivista, centrado en un interés y secreto.

Los debates sobre la gobernanza del internet se han intensificado. Desde 2005, el Foro de Gobernanza de la Internet ha sido el principal foro para la consideración de cómo gobernar al internet y cómo la libertad de expresión (y otros valores) pueden ser mejor protegidos. Sin embargo, muchos gobiernos desean que exista un foro internacional más regulador; mientras tanto, los roles exactos de las diferentes partes interesadas en foros multiparticipativos siguen flojos y frecuentemente indefinidos.

Recomendaciones de políticas

Considerándose que el internet incluye un conjunto de capas – de infraestructura, aplicaciones, contenidos y la capa socio-política –, las normas y valores de derechos humanos deben ser protegidos dentro de cada capa. Por ejemplo, en la **capa de la infraestructura**, el marco regulador debe buscar garantizar el acceso universal a un precio asequible. Deben existir disposiciones contra los monopolios y las actividades irrazonables de seguridad y encriptación. Dentro de la **capa de aplicaciones**, no debe existir cualquier discriminación irrazonable entre los datos transmitidos en las redes (la neutralidad de la red); las aplicaciones de seguridad deben ser consistentes con los derechos humanos; y deben existir *softwares* abiertos prontamente disponibles. En la **capa de contenido**, las leyes y políticas públicas deben proteger la libertad de expresión; las restricciones necesarias a la libertad de discurso deben ser sometidas a la supervisión judicial y cumplir las normas de derechos humanos; y se deben dar pasos positivos hacia la oferta de contenidos plurales y diversos. Finalmente, en la **capa sociopolítica**, el derecho a la libertad de asociación *on-line* debe estar protegido en ley y en la práctica, en conformidad con los estándares internacionales de derechos humanos; y debe existir más transparencia en términos de obtención de información por las empresas y los gobiernos.

Resumo executivo

A internet é uma poderosa tecnologia com grandes implicações para a liberdade de expressão. Sua interatividade permite que as pessoas se tornem criadoras, cocriadoras, mantenedoras ou editoras, e não apenas consumidoras de conteúdos, enquanto que as comunicações acontecem entre pares, e não como uma hierarquia. A internet também não foi construída com um desenho centralizado - qualquer pessoa pode contribuir a ela. Ela é um ambiente dinâmico, moldado a partir da inovação sem a necessidade de permissões; um ambiente adaptativo que está em constante mudança, assim como um ecossistema orgânico em evolução.

Para a liberdade de expressão, a internet gera:

- Novas habilidades de criação, curadoria e edição de conteúdos, que geram novas possibilidades para a realização da integridade e das capacidades humanas;

- Novas habilidades para organizar e mobilizar, proporcionando um forte embasamento para a busca de outros direitos e liberdades, a exemplo da liberdade de associação; e

- Novas habilidades de inovação e geração de atividade econômica e desenvolvimento.

A internet 'democratiza' a liberdade de expressão, dando aos usuários a capacidade de dispensar os controladores formais de acesso e atuar como porta-vozes públicos de suas próprias visões.

Ao longo da história, as mídias e tecnologias de comunicações foram reguladas de modo distinto, mas essas separações estão se tornando cada vez menos relevantes. A própria infraestrutura está convergindo e tornando-se mais interdependente. O espectro é utilizado para as transmissões de TV, rádio e redes 3G e 4G. Os atores são interdependentes e vão desde os provedores de telecomunicações até os provedores de mídias sociais e geradores de conteúdos, juntamente com as empresas tradicionais de notícias e televisão. Essa convergência caótica gera um ambiente que não pode ser facilmente enquadrado, entendido ou, por fim, regulado.

Há também novos desafios. No mundo digital, os conteúdos podem ser controlados e retrabalhados pelas próprias tecnologias que os veiculam, e por isso os defensores da liberdade de expressão precisam entender o potencial que a própria tecnologia tem para censurar o discurso. Muitos Estados buscam censurar conteúdos ou criar uma cultura de autocensura, fazendo um monitoramento técnico da atividade *on-line* ou valendo-se de um policiamento da internet. Como a internet é construída e mantida pelo setor privado, os conteúdos podem ser retirados do ar pelas empresas sem que se possa recorrer à lei, criando assim uma forma de censura privatizada.

Existem dois desafios no caminho dos defensores da liberdade de expressão no mundo digital: o desafio jurisdicional e o desafio de políticas públicas.

No âmbito da jurisdição *off-line*, existem padrões internacionais que restringem aceitavelmente o livre discurso. Por sua vez, a internet é um meio global que não se deixa deter pelas fronteiras nacionais. O resultado disso é uma colcha de retalhos de leis e restrições à internet e às suas aplicações. Há uma necessidade urgente de desenvolver e aplicar normas globais que protejam a liberdade de expressão on-line, capazes de proporcionar um embasamento para a regulação em nível nacional.

Em termos de políticas públicas, o Relator Especial da ONU sobre a Liberdade de Expressão redigiu um relatório em 2011 para o Conselho de Direitos Humanos da ONU analisando o impacto da internet sobre a liberdade de expressão e afirmando que os direitos aplicáveis ao ambiente *off-line* aplicam-se igualmente ao ambiente on-line. Hoje, é necessário examinar em detalhe o que a implementação deste princípio amplo pode significar em termos práticos. Esse nível de detalhamento, por sua vez, requer uma compreensão de como as decisões são adotadas no ambiente da internet.

Não há um órgão estabelecido por um tratado global para gerir a internet. Ao invés disso, ela é gerida por uma série de órgãos técnicos que se dedicam simplesmente a mantê-la em funcionamento, juntamente com órgãos de tratados que trabalham

com temas como propriedade intelectual ou regulações governamentais nacionais, e órgãos que definem padrões para políticas globais, como o Conselho de Direitos Humanos e a própria UNESCO. A governança dos órgãos técnicos é aberta às diferentes partes interessadas e os métodos de trabalho são consensuais e transparentes, à diferença do processo decisório intergovernamental tradicional, que tende a ser exclusivista, focado em interesses e sigiloso.

Os debates sobre a governança da internet se intensificaram. Desde 2005, o Fórum de Governança da Internet vem sendo o principal fórum para a consideração de como a internet deve ser governada e como a liberdade de expressão (e outros valores) podem ser mais bem protegidos. Porém, muitos governos gostariam que houvesse um fórum internacional mais regulatório, enquanto que os papéis exatos das diferentes partes interessadas em fóruns multiparticipativos continuam difusos e, com frequência, indefinidos.

Recomendações de políticas

Considerando-se que a internet abrange uma série de camadas – de infraestrutura, aplicações, conteúdo e a camada sociopolítica –, as normas e valores de direitos humanos precisam ser protegidos dentro de cada camada. Por exemplo, na **camada infraestrutural**, o quadro regulatório deve visar a garantir o acesso universal a um preço exequível. É preciso haver disposições contra os monopólios e as atividades inadequadas de segurança e encriptação. Dentro da **camada de aplicações**, não deve haver qualquer discriminação desarrazoada entre os dados transmitidos nas redes (a neutralidade de rede); as aplicações de segurança devem ser consistentes com os direitos humanos; e programas de uso aberto devem estar prontamente disponíveis. Na **camada de conteúdo**, a legislação e as políticas públicas devem proteger a liberdade de expressão; as restrições necessárias à liberdade de discurso devem estar sujeitas à supervisão judicial e em conformidade com as normas de direitos humanos; e devem-se dar passos positivos com vistas à oferta de conteúdos plurais e diversificados. Por fim, na **camada sociopolítica**, o direito à liberdade de associação *on-line* deve ser protegido por lei e na prática, em conformidade com os padrões internacionais de direitos humanos; e deve haver uma maior transparência quanto à coleta de informações pelas empresas e pelos governos.

Freedom of expression and the internet

1. The internet and the means of communication

The internet has changed the way people communicate dramatically. Thousands of years ago, early humans painted hunting scenes on cave walls, leaving messages that communicate to us even today, though the meaning has been lost. For most of human history communication was limited and local, based as much upon rumour and personal anecdote as anything more authoritative. The decisive stage in the promotion of freedom of expression came with Johannes Gutenberg and the invention of the printing press. This enabled the mass production of information and opinions and their circulation on a scale previously unimaginable. It is still hard to assess, in retrospect, the impact of the printing press – we cannot imagine a world without print - but arguably, in Europe, the Reformation and the Renaissance were outcomes – as was the Thirty Years War (demonstrating that all innovation has a dark as well as light side). The advent of the printing press also required new skills among the population – literacy, numeracy, and, more subtly, the ability to understand literary metaphor and similes.

The twentieth century saw the advent of radio and analogue television across the world. This enabled communication to reach directly into each household, with news and information communicated rapidly across populations in their millions. The power of communications to shape events became very apparent in this era – radio and TV stations became axes of power, so much so that the first step in any coup was to physically seize and occupy the stations. Control of communication – what people can know and say – became central to the exercise of any repressive power.

Until recently, people relied on communication gatekeepers to access information, journalists, editors, or governments. Wall posters, books, billboards, newspapers, television all use a 'one-to-many' model of communication, where owners and distributors of content have the power. How these means of communications are regulated and controlled has therefore been a vital concern to organisations like UNESCO and the Special Rapporteurs for freedom of expression, who seek to promote and protect freedom of expression. The right to freedom of expression has meant that we need to be able to buy a newspaper free of government control, or listen to a radio station of our choice, or read the books and articles that reflect a wide range of views. We have come to realise that, in order to protect democracy, the media must be plural and diverse and have the freedom to provide the means of information exchange, debate and variety of opinion that is necessary for all of us to realise our freedom of expression in the fullest sense.[1] Over the past years a consensus has emerged as to the shape of a media environment that best supports freedom of expression – an independent press, a balanced and regulated broadcast environment, professional self-regulated journalism, etc. The Media Development Indicators, developed by UNESCO[2], have provided a guide for governments to build a media environment that matches this model.

2. After the printing press

The emergence of the internet has ushered in an era of change as profound as that of the original printing press. It is a powerful technology that is changing the way we work, socialise, organise and consume. Consequently, it has enormous implications for freedom of expression.

In essence, our communication with each other has been transformed by the ability to turn different kinds of information, voice, sound, image or text into digital code, accessible by a range of devices from the personal computers to the mobile phones. Digitalising information in this way has enabled the transmission of large volumes of data almost instantaneously across the world.

For most of human history, our ability to communicate beyond our immediate physical environment has been through 'one-to-many' communication modes – cave paintings, wall posters, newspapers, radio and TV. In each case the creator/ editor/ controller of content has had the power to shape and frame our perceptions of the world. With the internet there is the potential to have a truly interactive communication medium where people can become creators, co-creators, curators or editors, and not just consumers of content. It creates the potential for lateral communication relations between people rather than simply relying upon exclusively hierarchical relations.

1. Andrew Puddephatt, *The Importance of Self Regulation of the Media in Upholding Freedom of Expression*, UNESCO, Communication and Information Debate Series, N. 9, BR/2011/PI/H/4 , February 2011.

2. *Media Development Indicators: A framework for assessing media development*, endorsed by the Intergovernmental Council of the International Programme for Development of Communication (IPDC) UNESCO, CI/COM/2008/PI/3, 2008.

3.   Where did the internet come from?

The US President Eisenhower created the Advanced Research Projects Agency (ARPA) in 1958 as a direct response to the launch of the Russian satellite Sputnik, panicked by the evidence of Soviet technological advance. ARPA created a computer network linking just four computers and called the network ARPANET. In 1973, engineers began to look at ways to connect ARPANET computers through radio instead of sending data across phone lines (PRNET – packet radio network). In 1977 satellite communications were added (SATNET) and the connections between multiple networks was called inter-networking, or the internet for short. In one phrase, the internet is simply a network of networks.

As crucial as the creation of the network itself was the creation of the service that made the networks accessible, the World Wide Web (WWW).

The WWW turns a series of blank networks requiring knowledge of the exact configuration in order to use it, into a comprehensible map of networks. It does this through three key functions:

- a publishing format, Hypertext Markup Language (HTML);

- an address for each piece of information (known as its Uniform Resource Locator or URL); and

- a means of transferring information, through the Hypertext Transfer Protocol (http).

  These functions enables ordinary people to navigate around the network, send messages, publish and share information, and access enormous volumes of content. It is this combination of networks and services operating globally that make communication on this scale possible in the digital world.

So in one environment the entire range of support for freedom of expression is encapsulated. Whereas in the offline world a letter is distinct from a phone call, a radio broadcast or a library, (and each is subject to a different regulatory structure) with the internet all of those functions are contained in one medium. The distinct norms and values we associate with offline means of communication (we expect phone calls and letters to be private, but not radio of TV broadcasts) apply to the internet simultaneously. One of the great challenges in developing free expression norms and value online is the co-existence of different modes of communication in the same space. For example, many people using twitter imagine that

they are having a conversation when in fact they are publishing.

Another crucial difference between the internet and other communication technologies is that it has not been built to a central design – it has mutated from a defence network, through an academic network, into a global communication medium. Anyone can build on the internet. Unlike radio or television, that require prior permission from regulators before licences are issued, simply plugging a computer into a network makes it part of the internet itself. It is a dynamic environment, constantly changing, more like an organic evolving ecosystem than a mechanical series of cables and switches. In turn this creates the need for a regulatory system that is more appropriate to managing an ecosystem.

This open character of the internet, its ability to adapt to users own needs (something that Vint Cerf famously called 'permissionless innovation'[3]), and its flexible architecture means that it has grown very fast. This growth has been at an astonishing rate compared to any other media in history, from 16m users worldwide in 1995 to 2.5bn[4] users now and rising. Today, more than a third of the world's population have access to the internet. What was an English language, elite medium until a few years ago, is now increasingly diverse mass media for the planet.

And the volume of data held online is also growing rapidly[5] – the amount of data on the internet is estimated to be 467 billion gigabytes of data, the equivalent of a stack of books stretching from Earth to Pluto ten times (3.2 billion kilometres), and this amount of data is doubling every 18 months. Furthermore, storage is practically infinite. Of course access is still very uneven with 70% of households in the global North connected but only 20% of households connected in the global South.

4.   How the internet is changing freedom of expression

Freedom of expression has long been recognised as one of the most important human rights both in itself and as the foundation of other rights and democratic freedoms. In international law, freedom of expression underpins the right to freedom of thought and opinion (UDHR, Article 18), freedom of association (UDHR, Article 20), and participation in government (UDHR, Article 21). It is protected in a range of significant international and regional human rights instruments including Article 19 of the International Covenant on Civ-

3.   Vint Cerf, "Keep the Internet Open", *The New York Times*, 24 May 2012.

4.   http://www.internetworldstats.com/emarketing.htm (last visited 28 February 2014)

5.   http://goodmenproject.com/technology/the-internet-needs-a-new-pair-of-pants/ (last visited 28 February 2014).

il and Political Rights (ICCPR); Article 13 of the American Convention on Human Rights; Article 9 of the African Charter (elaborated by a specific declaration agreed in October 2002); and Article 11 of the European Convention on Human Rights (ECHR). Some have argued that if the right to freedom of expression is guaranteed, no other civil and political rights are necessary.

Why is freedom of expression regarded as so important within the international system of human rights protection? Why is it protected in so many regional and global human rights instruments?

There are three main reasons why freedom of expression is seen as important.

Firstly, it is essential for our integrity as human beings that we can express ourselves. It is a human need to have our own identity, and realise our own capacities. What distinguishes us as human is the fact that we experience our identity in the act of communication. It is communication that distinguished early human beings from hominoid apes, and communication that was the basis of early human communities. So the ability to express ourselves in words, music, dance or any other form of expression is essential to the realisation of our humanity.

Secondly, freedom of expression is the foundation of other rights and freedoms. Without freedom of expression it is not possible to organise, inform, alert, or mobilise in defence of human rights and democracy. Political parties and legislatures cannot function properly without the ability of people to communicate freely with each other. Moreover, the individual right to freedom of expression is meaningless unless it can take public form, which requires an independent media that offers a public platform for the exchange of views. In turn this is not conceivable without freedom of expression guarantees.

Thirdly, as Amartya Sen has persuasively argued freedom of expression is a precondition of social and economic development.[6] Transparent and open communications are necessary to ensure economic and social development that benefits everyone. For example, Sen argued that famine is almost never caused by a lack of food but by a lack of information. More broadly, businesses cannot operate without access to information, opinions and news. Corruption cannot be tackled in secrecy – it needs the transparency provided by the free flow of information and opinion to be tackled.

The right to freedom of expression should be thought of as having both negative and positive requirements. People not only have the right to *receive* information and ideas, but also the right to be able to *seek* and *impart* them. To fully realise the right to free expression, the exchange of opinions, ideas and information should therefore be a public act, not something confined to private conversation. It is the *public* nature of free expression that makes it a strong foundation for democratic societies in which the rights of all individuals and communities are upheld. It is in this aspect that the internet has been so transformative.

The internet reshapes and reforms these core arguments. Its unique features taken together – the merging of different communication modes in one environment, its adaptive architecture, and the effects of effectively infinite digital storage capacity – show how the internet has become such a powerful democratising force, transforming freedom of expression across all of its core rationales. Specifically the internet creates:

- new abilities to create, curate and edit content (enhancing the ability to express oneself across physical boundaries), which creates new possibilities for realising human integrity and capacity;

- new abilities to organise and mobilise (strongly underpinning other rights and freedoms and opening new ways of bypassing censorship and controls on freedom of association as was seen during the Arab Spring); and

- new abilities to innovate and generate economic activity and development (many argue that the internet has had a greater impact on Africa than aid).

Probably the single most important factor in understanding the impact of the internet on freedom of expression is the way in which it increases our ability to receive, seek and impart information. It enables the collaborative creation and sharing of content – it is world where anyone can be an author and anyone can publish. The internet is helping develop spaces that can empower people, helping them communicate, collaborate and exchange views and information. This represents, in a real sense, the 'democratisation' of freedom of expression as it is no longer necessary to rely upon professional journalists or gatekeepers to act as public spokespeople for our views.

Peer-to-peer communication allows people to get past the gatekeepers and communicate directly with each other. In this viral world, people can more easily question official sources of information and share what they find. Mobile phones stream police brutality in Iran to the web. Text messages can mobilise millions and topple presidents. Farsi websites can open up spaces for Persian poetry and Iranian politics that have been shut down elsewhere.

6.   Amartya Sen, *Development as Freedom*, Oxford University Press, 1999

5. Changes and challenges

One complicating challenge arising from these changes is that communication mediums are no longer distinct either in terms of their architecture or their interaction with each other. Print, broadcast, traditional telecommunications, even mail are no longer distinct and separate categories. Traditional media has converged with digital media. Telephone can be accessed over the internet, as can mail (through email or instant messaging), or television, radio or even newspapers. As a recent report for UNESCO states:

> *Technological convergence has expanded the number of and access to media platforms as well as the potential for expression. It has enabled the emergence of citizen journalism and spaces for independent media, while at the same time fundamentally reconfiguring journalistic practices and the business of news.[7]*

Historically different media and communications were regulated distinctly in accordance with different norms and principles but these separations are increasingly less relevant. Infrastructure itself is converging and is increasingly interdependent. Spectrum is used for television, radio, 3g and 4g networks – most information communications utilise it. And the actors in these spaces are interdependent, from telecommunications providers through to social media providers and content generators like traditional news and television companies. This chaotic convergence creates an environment that is difficult to frame, let alone understand, let alone decide upon the appropriate type of regulation.

Moreover just as these new technologies create, they also destroy. The explosion of self-generated content, from videos to blogs, threatens traditional media organisations that are struggling to survive in an online world as their revenue streams collapse. Money is flowing from traditional communications companies, who generate content, to those who provide platforms and aggregate content (such as Google). The media environment that free expression activists have grown comfortable with is being transformed into something more fluid, undefined and harder to understand.

It is also creating a crisis in journalism as revenue flows away from those who create content towards those who establish platforms for content. This is drying up resources for investigative journalism, making it increasingly difficult to generate accurate high quality professional content. This is more pronounced in the global north than south where the internet has a greater penetration but we can expect to see the same trends emerging across the globe in the next ten years. The evidence from the north is that only media organisations able to survive comfortably are organisations such as the BBC in the UK who are willing to invest resources without a direct return (thanks to their tax funded status) or those specific journals able to charge significant funds for access to high quality and specialised content such as the New York Times or the Financial Times. But this is not a solution for most media organisations in most societies. Media organisations and the profession of journalism are facing a gathering crisis.

A particular challenge is to understand how this new developing environment shapes freedom of expression. Freedom of expression has always required there to be a debate about who controls content, but there was no need to think about the technology that carried that content. The type of printing press or a camera used to convey content was not important because the device could not change the message. The content controller was a journalist, editor, publisher or censor.

But in the digital world, content can be controlled and remade by the very technologies that deliver it. Servers that give access to the network can be used to block particular websites. Powerful figures accused of corruption can pay the mafia to attack dissident websites. Software can be built to screen out free expression information from its search results (through software installed on users' computers that blocks access to certain Web addresses). Internet service providers (ISPs) can be required to block access to the addresses of websites that contain certain key words denying users access. Text messages can be intercepted and used to track protestors.

The equipment that provides network access can be adjusted so that it blocks access to the internet. Censorship software can be built into personal computers to prevent people from accessing online content – but in a way that is effectively hidden from users so that they do not know that the content has been made unavailable. Web pages can be prevented from appearing in the results listed by internet search engines – instead the search engines can be used to redirect requests for information into 'safe' sites that carry censored and controlled information. All the user will see is a failed search request.

In addition, many states create a culture of self-censorship by monitoring online activity through automatic mechanisms and by internet 'police' who actively 'patrol' the web. Arrests and detention of high profile 'cyber dissidents' can add to this chilling effect.

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7. UNESCO *World Trends in Freedom of Expression and Media Development* 2014 http://unesdoc.unesco.org/images/0022/002270/227025e.pdf

Nor are the threats to freedom of expression and broader human rights confined to actions by governments. The capacity of the internet to manage large volumes of data means that there are new opportunities for private companies to encroach upon people's privacy as well as enabling overarching surveillance of vast amounts of communication. Modern communications companies have become some of the wealthiest and most powerful companies on the planet[8]. This wealth can be deployed to recruit an army of lobbyists to defend their interests or to directly fund campaigns[9]. Increasingly the open character of the internet is threatened by companies seeking to create 'walled gardens' where users are directed to, and sometimes confined in environments where only that companies applications and services are allowed. Controversial content can be taken down by companies without recourse to any judicial process creating a form of privatised censorship.

6. New tools for freedom

On the other hand, there are an increasing number of tools that help promote freedom of expression– mobile phones can stream content directly to the web or use Bluetooth technology to exchange data from a single server; encryption software such as Tor can ensure high degrees of privacy for communications; digital media can record evidence of ill treatment or abuse. A series of applications developed in recent years allow the encrypted, secure exchange of information between people who are denied access to offline communications.

This means that, in considering how to protect freedom of expression online, free expression safeguards need to apply not just to the protection of content, but to the means of carrying that content. They need to apply to the whole communications environment: to the applications used to find information, to the codes and protocols that connect devices to the digital world, and to the hardware itself; the cables and wireless towers that carry the data.

7. Facing the challenge

Two overarching challenges face those defending freedom of expression in the digital world can be framed as:

a. the jurisdictional challenge; and

b. the policy challenge

The jurisdictional challenge

It has long been established in the offline world that the right to freedom of expression is not absolute with international human rights law permitting restrictions in certain circumstances. Over the years the international human rights framework has developed a framework at international and national levels to manage the different rights and responsibilities that individuals have, and balance those rights of individuals with the rights of the public or community in which they live. Article 19 of the ICCPR states that the right to freedom of expression can be limited because it 'carries with it special duties and responsibilities'.[10] Restrictions to freedom of expression are only permitted if they are provided for by law and are necessary (a) to protect the rights or reputations of others and (b) for the protection of national security, public order, public health or morals. A restriction should be prescribed by law, necessary in a democratic society, and proportionate.[11] However the technological, political, economic and social trends and dynamics within digital communication environments threaten to undermine the careful balance between rights that has evolved with the development of human rights law.

Ensuring that limitations are prescribed by law is problematic as the internet is a global medium that does not follow national boundaries. What is prescribed by law in one country is not necessarily prescribed by law in other countries, yet the internet allows citizens to access content that may be illegal in their own country but that is legal in the country in which it was uploaded. Flows of information are more difficult to control online than offline. The nature of the global internet makes it difficult to take measures to control information

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8.   Apple Inc. regularly tops the list of the world's largest company by market capitalisation according to the FTSE Global 500 http://www.ft.com/indepth/ft500 (last visited 27 March 2014)

9.   One observer claimed that Google Inc, Facebook, eBay Inc and Amazon.com and others in the computer and Internet sector spent $1.2 billion on lobbying and campaigning between 1998 and 2011 compared with $906.4 million spent by the television, movie and music industries over the same period. http://craigeisele.wordpress.com/2012/01/22/who-is-funding-the-sopa-and-pipa-debate/ (last visited 27 March 2014)

10. Article 19(3), ICCPR, available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited 28 February 2014).

11. Ibid.

and activity online in ways that comply with the principles of international human rights law, i.e. which are necessary, proportionate, narrowly targeted and which do not undermine the rights and freedoms of others. The international, networked structure of the internet and the ease with which digital content can be copied and distributed means that it is difficult both to track down and destroy unwanted material.

This leads to governments imposing a patchwork of laws and limitations on the internet and the applications that it carries – for example YouTube is banned in some countries while across the border it is freely available. The burden for internet providers, seeking to deal with conflicting jurisdictional requirements is growing. It also increases the risk of 'forum shopping', where those seeking to control content online look for the jurisdiction which is likely to be sympathetic. As the OAS Special Rapporteur Catalina Botero warns:

> 'States' right to jurisdiction or the prosecution of crimes should not become an indirect limitation that threatens the free circulation of information because of the multiple layers of litigation and punishments in different jurisdictions.'[12]

Increasingly those who provide platforms for content – so called internet service providers – are coming under pressure to take down content that governments find offensive or threatening. Such take downs often happen outside of any legal framework as they result from a request by government directly to the company itself which leads to what might be termed a 'privatisation' of censorship.

There is an urgent need to develop and apply global norms that protect freedom of expression online which can provide the basis for national regulation. The United Nations Human Rights Council resolution of 2012 stating that human rights online are the same as human rights offline is a starting point for such a task (see below). The challenge is to interpret and apply existing jurisprudence concerning the balancing of human rights in the light of current problems in digital environments. This needs to be done carefully and sensitively, ensuring that human rights are not violated, that the capacity of the internet to support human rights is not undermined, and that the rights and responsibilities of different stakeholders are clearly defined and understood by all.

The policy challenge

Until relatively recently however there was no policy statement about freedom of expression online from any significant international authority. However in 2011, the UN Special Rapporteur for Freedom of Expression produced a ground breaking report for the UN Human Rights Council, analysing the impact of the internet on freedom of expression and arguing that the rights which apply offline apply equally online. This was followed by a resolution agreed at the 2012 UN Human Rights Council which stated in its first three provisions that:

> …the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[13]

The resolution also recognised 'the global and open nature of the internet as a driving force in accelerating progress towards development in its various forms;' and called upon states to 'promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries.'[14]

Further elaboration of these issues can be seen in a detailed report by the OAS Office of the Special Rapporteur for Freedom of Expression, which makes detailed recommendations on a wide range of internet issues relevant to freedom of expression[15]. UNESCO itself has recently put forward a position paper suggesting the concept of Internet Universality which argues that an internet environment should be rights based, open, accessible and multistakeholder[16].

This set a normative frame for internet policy but operating as it does, at a high level of abstraction, there is now a need to examine in detail what implementation of this overarching principle might mean in practice. In turn, this level of detail requires an understanding of how decisions are made in the internet environment.

12. Report of Special Rapporteur on Freedom of Expression for the Organisation of American States 2014.

13. Human Rights Council Resolution, A/HRC/20/L.13, para. 1.

14. Human Rights Council Resolution, A/HRC/20/L.13, para. 3.

15. Report of Special Rapporteur on Freedom of Expression for the Organisation of American States 2014.

16. UNESCO Internet Universality 2014.

8. Governance online

Policy debates about the internet however are unusual and often difficult for traditional actors such as UNESCO to grasp. There is no overarching treaty body or regime for the internet and many free expression actors in the field would be nervous about introducing such a regime. The internet is run by a mixture of technical bodies whose concern is simply to keep the networks running (like car mechanics who keep your car on the road); treaty bodies dealing with issues such as intellectual property, national government regulations; and standard setting policy bodies such as the Human Rights Council and UNESCO itself. Furthermore, the internet is built and maintained by the private sector and operational decisions are often made by companies. It is difficult to conceive of a single overarching treaty body having the skills or capacities to operate across such a broad range of fields.

The technical governance of the internet is particularly interesting. It is shared by international jurisdictional bodies such as the Internet Corporation for Assigned Names and Numbers[17] (ICANN), various engineering groups, and the World Wide Web Consortium[18] (W3C). All of these, like the national bodies which administer the national domains, are concerned with the efficient working of the system, its *functionality*, rather than governing the environment in the way that regulators govern broadcast media. Additionally, the governing culture of the technical environment, shaped by early engineers, has been libertarian – 'the [internet] interprets censorship as damage and routes around it.'[19]

Governance of these technical bodies is open to different stakeholders (i.e. governments, but also businesses, engineers, civil society). The working methods are consensual (it is about fixing technical problems rather than making difficult judgments), it is normative (it arrives at best practice which is then open for others to adopt), and is very transparent – anyone can see the deliberations.

This is not like traditional intergovernmental decision making, which tends to be exclusive, interest focused, and secret. This model of decision-making has often been called multistakeholder as it is based upon the participation of all those who can contribute rather than any principle of political representation. Many argue that this multistakeholder approach should be applied to policy decisions, a view recently endorsed by UNESCO itself[20] as well as by the UN Special Rapporteur for Freedom of Expression and the OAS Special Rapporteur for Freedom of Expression.

Shaping public policy online - global

As the importance of the internet became evident, the UN sought to establish a policy framework driven by the ITU which – at the behest of its members – had woken up to the impact of this environment that was trading over the infrastructure of telecommunications. This UN process culminated in a controversial World Summit on the Information Society (WSIS)[21] meeting in Tunis in 2005, where an attempt by governments to institute ITU control over the internet was resisted by the USA and its allies – at least in part through a desire to maintain a multistakeholder approach to internet policy issues. As a result the meeting established an open multistakeholder forum for discussing policies – the Internet Governance Forum – and agreed to look for ways of ensuring inter-governmental, enhanced co-operation on internet public policy issues.

But diplomatically this postponed a number of ongoing debates. How global internet public policy issues, such as the balance between privacy and freedom of expression, should be resolved remains uncertain, particularly if they require decisions rather than discussions. No one is able, as yet, to articulate what kind of enhanced co-operation is necessary to manage international public policy issues. Since 2005, the demands for more control by countries anxious about the perceived threat of popular peer-to-peer communications among their citizens grew. Alongside this was the developing world's increasing frustration with what they perceive to be the political and commercial hegemony of the US and the uneven nature of benefits accruing from the internet.

In the absence of an overarching regulatory framework, the Internet Governance Forum became the main forum for considering how the internet should be governed and how freedom of expression (and other values) should best be protected. As well as providing a forum for collaborative discussion on issues ranging from freedom of expression and child protection through to technical standards, it became an environment where normative frameworks were developed. One example is the Internet Charter of Rights and Principles, which is an attempt to analyse the specific human

17.   http://www.icann.org/ (last visited 28 February 2014).

18.   http://www.w3.org/ (last visited 28 February 2014).

19.   John Gilmore in Philip Elmer-Dewitt, "First nation in Cyberspace, Twenty million strong and adding a million new users a month, the Internet is suddenly the place to be", *TIME International*, 6 December 1993, No. 49.

20.   UNESCO Internet Universality 2014.

21.   http://www.itu.int/wsis/index.html (last visited 28 February 2014).

rights implications of the internet using existing international standards.

These normative principles, alongside policies such as the UN 2012 Human Rights Council Resolution can form the basis of national regulation where appropriate, or provide guidance for technologists and users, or even inform the self-regulatory standards for businesses.

Shaping public policy online – national

Of course there is considerable scope for governments to set a national framework for the internet that protects and promotes freedom of expression online but there is also – given the global nature of the internet – an important role for states to promote free expression values in other international arenas such as the OECD[22], the WTO[23] and WIPO[24] as well as the United Nations, Council of Europe and other bodies that traditionally promote normative human rights values.

Alongside a legal and regulatory framework – which should be light touch as explored below, national policy makers will need to engage in a more active partnership and dialogue with companies, including technology, media, software, and hardware companies. Private companies build and operate the internet at every level. There is a potential alignment (though not a perfect alignment) between internet companies' business interests and free expression values. Forums that bring together free expression and human rights groups with key communications companies (applications and telecoms), to promote free expression values, should be developed further. National policy forums can play an important role in this kind of dialogue.

There is also the need for an investment in judicial education. The OAS Special Rapporteur has argued that there are significant challenges in applying international human rights standards to the internet when dealing with potential conflicts between the right to freedom of expression and other rights, such as the rights to reputation, privacy, copyright, and the interests of children and adolescents.[25] In an environment where technology transcends national boundaries, where the distinction between publishing, conversation and communicating becomes blurred and where technical solutions may be offered to solve policy questions, judges and lawyers need greater understanding of how the internet environment works.

Finally, there is a need for policy makers to engage in public education and advocacy, to encourage users to care about human rights, while working to find and mobilise the communities of users that already exist. It will be crucial to bring civil society constituencies across the fields of human rights, democracy, technology groups and communication media activists together as well as reaching across other sectors to include government and business.

No national government on its own can create a good internet environment – as a global medium it requires cooperation with other governments and other stakeholders in business and civil society. But governments and policy makers can set goals to ensure that the internet environment in their country flourishes and provides support for freedom of expression and human rights as well as providing increased economic benefits for its citizens and encourages innovation and enterprise.

This will involve recognising that the internet environment is not like a traditional media environment where only the content matters for free expression. Online, the structure and operation of the infrastructure supporting the internet may be crucial in determining how freedom of expression works. Equally the applications that enable us to utilise the net to its maximum potential also matter. Of course the plurality and diversity of content and whether it is regulated or controlled are key issues. And finally the social character of the internet, the way it permits certain kinds of association and assembly requires human rights protection. All of these 'layers' are important in considering human rights and freedom of expression online. Each of these layers will require a different set of considerations to protect freedom of expression.

9. Policy recommendations

Infrastructure

The infrastructure layer can be thought of as the physical cables, hardware, software, data-links and protocols that establish the network on which the various services and applications operate. The internet can best be thought of as a growing and continually evolving ecosystem, rather than a centrally planned system with a goal or final configuration. The ability to simply plug in a new network without seeking prior permission means it is a rapidly evolving, 'viral' space shaped by what users want and need, and by businesses aiming to fulfil these needs. But it is also shaped by what technology and the infrastructure make possible. Without infrastructure there is no internet – so the

22.   http://www.oecd.org/ (last visited 28 February 2014).

23.   http://www.wto.org/ (last visited 28 February 2014).

24.   http://www.wipo.int/portal/en/index.html (last visited 28 February 2014).

25.   ibid

technical environment is crucial in providing the conditions for the realisation of freedom of expression.

The internet is built and maintained by the private sector, even if it functions in many aspects as a public sphere of communication. To protect freedom of expression therefore there are various commercial factors government and regulators should address. In particular, the regulatory framework should have the prime goal of ensuring universal access at an affordable price. Policy and regulatory frameworks should support infrastructure development, investment and access at affordable prices including in remote and rural areas. Given that the internet rests upon telecommunications structure is it also important that telecommunications infrastructure is available even in remote and rural areas. In considering the awarding of telecommunication licenses – given that these companies provide the physical infrastructure over which the internet is delivered – regulators should consider imposing requirements for network companies to provide access to wider communities, perhaps with the availability of universal service funds to subsidise access.

In order to achieve regulatory approaches that foster affordability and access for the poorer members of communities it may be necessary for governments to consider fostering public-private solutions to infrastructure investment for less economically viable, remote and rural areas in order to ensure internet access for the poor and marginalised.

Market conditions also matter. There is an important role for anti-monopoly regulation to prevent technological and economic concentration in communications devices and infrastructure, to ensure an absence of single points of control. One policy goal should be to create a plural and diverse market that encourages infrastructure development and the roll out of competitive services. Competition should be encouraged and monopolies, at any level of the internet infrastructure, avoided. Through the application of competition law there should be appropriate liberalisation of fixed line and mobile telephony markets and appropriate liberalisation of internet provider market.

Other steps could include ensuring, through competition law that the internet infrastructure is owned and controlled by multiple non state actors and, at least in part, is open to ownership by citizens themselves through appropriate community based forums. There should be non-state national domain name management. Competition, badly applied, can increase costs so an additional requirement for regulators should be to insist upon the interoperability of devices.

Finally, governments should consider ways of encouraging domestic entrepreneurs to establish internet related companies – for example, by simplifying company set up and registration process-

es as well as stimulating hubs of innovation and entrepreneurship.

One important aspect from a free expression point of view, is to ensure that the internet cannot easily be closed down and people denied access. For this reason there should be no technical kill-switch which could turn off the internet at device or network level. To make censorship technically more difficult governments should also facilitate the creation of redundant, competing communications networks employing diverse technological infrastructures as well as encourage the growth of multiple internet exchange points (IXPs), which has the added benefit of reducing overall costs of access. To increase resilience in the system governments should ensure permanent stable access to emergency services via all appropriate communications networks and channels.

To keep domestic networks connected to the wider international environment there should be multiple, independently operated international links and gateways per country. Policy makers should also allow access to and support of privacy protections, and encryption, authentication, and anonymity technology for internet users. The growing number of cyber-attacks on human rights defenders emphasises the fact that policy makers and civil society should ensure that technical support is available to defend human rights sites against DDOS and other forms of attack.

Summary infrastructure layer recommendations for policy makers:

a. Policy and regulatory frameworks should support infrastructure development, investment and access at affordable prices including in remote and rural areas and public-private solutions to infrastructure investment should be considered;

b. Anti-monopoly regulation should prevent technological and economic concentration in communications devices and infrastructure;

c. Domestic entrepreneurs should be encouraged by simplifying company set up and registration processes

d. There should be no technical kill-switch to turn off the internet at device or network level and multiple, independently operated international links and gateways per country should be provided;

e. There should be access to and support of privacy protections, and encryption, authentication, and anonymity technology for internet users.

The applications layer

The applications and code layer is that reserved for communication protocols that allow connections and communications across the network and allow devices to connect to the network.

One of the most discussed issues at this level is network neutrality. Network neutrality means that network operators should not unreasonably discriminate between the data carried across their networks. It represents a fundamental design principle of the internet: that networks do not discriminate between different types of traffic – the content they carry is only intelligible once it emerges from the net. This 'net neutrality' makes censorship much more difficult. As Tim Berners Lee has said '[t]he moment you let net neutrality go, you lose the web as it is. You lose something essential – the fact that any innovator can dream up an idea and set up a website at some random place and let it just take off from word of mouth. Companies cannot limit what webpages you can see, and governments cannot slow down or block information going down to particular sites.'[26]

Without this net neutrality – this dumbness in the middle – intermediaries and carriers can select which traffic they carry, or charge more for separate streams, or bundle packages of pre determined content and charge differentiates for them. This would allow powerful content providers to dominate the internet at the expense of new entrants or smaller companies. This will severely damage innovation and potentially freedom of speech online.

Among the steps policy makers can take to protect the essential elements of net neutrality are provisions that anyone can launch innovative applications and services – no permission should be required or charges levied to reach others on the network.

In addition, broadband providers should be obliged to disclose information about their network management practices, performance, and the commercial terms of their broadband services to ensure that there is no undue discrimination between the content carried on their networks. In addition there should be provision that fixed broadband providers do not block lawful content, applications, services, or prevent non-harmful devices from being attached to the network.

In general, the regulator should require that there is no unreasonable discrimination between lawful traffic by broadband providers (subject to reasonable network management).

Another issue in the applications layer is that of open technologies and standards. There needs to be clearly defined open standards and access to, and availability of, open technologies and software. Regulators can insist that free, publicly available standards are available, so that anyone can access and build onto the internet, with all traffic across the network treated in approximately the same way. Additionally, mobile broadband providers should not be allowed to block lawful websites, or applications that compete with their voice or video telephony services.

The increasing concern among governments about cyber security means that security controls or restrictions are increasingly applied at the application and code layer. To avoid damaging freedom of expression it is important that cybersecurity controls and restrictions are in line with human rights standards, are proportional to the nature of threats, and are aimed at protecting, rather than harming users.

Finally, one of the reasons for the extraordinarily rapid growth of the internet and its rapid adoption is that people can add to the internet and innovate without requiring prior permission. To ensure that creation and innovation are fostered the environment it is essential that people are able to innovate and create new technologies, code and applications without the need for prior permission.

Summary applications layer recommendations for policy makers:

f. There is no unreasonable discrimination between lawful traffic by broadband providers (subject to reasonable network management);

g. Anyone can launch innovative applications and services without permission required or charges levied;

h. There should be clearly defined open standards and access to, and availability of, open technologies and software;

i. Cybersecurity controls and restrictions should be in line with human rights standards, proportional to the nature of threats, and be aimed at protecting, rather than harming users.

The content layer

The content layer embraces the information, opinions, data, sound and images produced, published, distributed on the internet, whether mass

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26. Sir Tim Berners-Lee at Nokia World, reported by Matt Warman, "Tim Berners-Lee defends net neutrality", *The Telegraph*, 15 September 2010, available via http://www.telegraph.co.uk/technology/internet/8003908/Tim-Berners-Lee-defends-net-neutrality.html (last visited 28 February 2014).

generated content or user generated content. In considering an approach to protecting freedom of expression on the internet, international human rights law should provide the normative framework for any domestic policy framework and domestic internet governance arrangement. As a minimum, the framework should involve recognition that laws or policies affecting freedom of expression apply equally online and offline, and states should review national policy to ensure this is the case.

There are many existing laws and regulations that provide special protection to specific groups, for example journalists. However, there is a need to recognise the changing context of journalism – with the emergence of citizen journalism, blogging, tweeting and greater degrees of interactivity, public interest protections accorded to journalists should be extended to those providing, exchanging or curating content online.

Of course the internet offers new possibilities for hate speech, crime and exploitation of children and, as a new communication environment, it inevitably attracts those denied access to conventional communication spaces. It is important to recognise the need to protect vulnerable groups but in doing so, any arrangements – for example requests to intermediaries to take down material that incites hatred or crime – should be subject to judicial oversight.

Finally, governments are one of the main generators and providers of information about public policy issues. The internet creates new capacities to make that information available to citizens. Recent technological changes allow information to be provided in a machine readable format, which means that citizens and civil society organisations can access that data and analyse it in ways that are suitable to themselves. Of particular value, is the ability to disaggregate centrally held data locally (by zip/post code) so that people can choose the information most relevant to their lives. To foster this openness, governments should commit to providing government data in machine readable formats capable of local disaggregation.

Freedom of expression also requires there to be rich, diverse and plural content available, one that reflects the diversity of society and which has material in all relevant languages. Government and regulators cannot intervene directly in the generation of content and this itself would violate norms of freedom of expression. But policy makers can examine ways of ensuring the entrance to the environment is without undue barriers, that positive steps are taken to ensure plural and diverse content, and that large scale media content providers online are not allowed to drown out more local or distinct voices.

Free expression on the internet also requires there to be policies on issues that have particular salience for the internet environment rather than a conventional media environment.

One obvious area is that of intermediary liability. Intermediaries play a crucial role in the internet – they bring together third parties on the internet and provide access to content, host content themselves, organise content, and provide products and services produced by third parties. They are the connective tissue of the internet and support free expression and human rights by helping individuals publish, share and curate content as well as improving access to information and knowledge held online. Intermediaries can provide or host social platforms and collaborations, as well as providing the very infrastructure and critical internet resources.

These benefits accrue from the status of ISPs as 'neutral' carriers. As the internet developed as a medium relatively free from government regulation, and because ISPs are recognised to have a crucial role in facilitating freedom of expression and information, many have been exempted for liability for the communications content that they transport or host (just as a telephone company is not held liable for crimes commissioned in a telephone call). This is an important characteristic that allows the internet to function as a powerful medium.

Governments should therefore locate liability for illegal content (such as hate speech or child pornography) with the source of the material or even the end user, as with child pornography, rather than the ISP. There is an evident international trend for governments to use the law to require ISPs to censor content in violation of freedom of expression, deny internet access to those accused of violations, and handover data about internet users in the name of protecting security. Many intermediaries practice voluntary self-regulation, recognising their moral and ethical responsibilities, and develop better self-regulatory systems that uphold both the rights of end user and the wider public interest. The role of governments should be confined to providing normative policy guidance, but insisting that any system operated by the intermediaries themselves should be subject to some kind of public oversight and accountability.

Another important issue is copyright – understood as the right to ownership, for a period of time, of the products generated by the owner. From a human rights point of view there are clear benefits for some degree of ownership, as it encourages innovation and creativity. The internet has created new opportunities to create and share and distribute content but also challenges in how to protect content that is legitimately owned from theft. The challenge is how to foster an environment that supports innovation and creativity online, by appropriately rewarding the creators of content without unduly restricting the free flow of information and access to knowledge. Currently the dominant tendency is to emphasise intellectual property protections disproportionately in protection of large powerful companies without balancing these

rights against the public interest in accessing culture and knowledge.

For national policy makers the dilemma is that a strong body of international law has developed that protects IP interests, which are often enforced through international agreements such as the Berne Convention. There is national flexibility on the interpretation of exemptions and limitations for 'fair use', and in this field policy makers should be flexible recognising the value of allowing people to share existing knowledge and ideas. It can also set a normative lead by encouraging the development of open source software (for example the UK government is considering migrating its software to open source away from Microsoft). Policy makers should also be encouraged to push for a better balance in trade negotiations, such as those at WIPO.

Summary content layer recommendations for policy makers:

a. Laws or policies affecting freedom of expression apply equally online and offline;

b. Public interest protections accorded to journalists should be extended to those providing, exchanging or curating content online;

c. In protecting vulnerable groups any arrangements – for example requests to intermediaries to take down material that incites hatred or crime – should be subject to judicial oversight;

d. Without imposing restrictions policy makers should take positive steps to ensure plural and diverse content is available online including local or distinct voices;

e. Governments should commit to providing government data in machine readable formats capable of local disaggregation;

f. Liability for illegal content (such as hate speech or child pornography) with the source of the material or even the end user, as with child pornography, rather than the ISP;

g. Policy makers should be flexible in interpreting copyright and recognise the value of allowing people to share existing knowledge and ideas.

The socio- political layer

Finally, the internet has created a new set of possibilities for interaction and exchange. This interactive, peer to peer dimension of the internet, and the policies that impact on such activities could be considered as the socio-political layer of the internet.

The peer to peer nature of the internet creates new opportunities for people to associate, organise and gather online. This social dimension to the internet means that it is important to protect freedom of association online so that citizens are able to mobilise and exercise their right to assembly using the internet. This means that the right to freedom of association online is protected in law and practice, in line with international human rights standards, and that restrictions are defined in law and proportionate to the potential for harm.

The internet also creates a new set of challenges to privacy. As a publication by UNESCO in 2012 set out, privacy and privacy protections have always evolved in relation to technological advance (modern debates began with controversy over the publication of pictures of people in 19th century newspapers. The internet creates vast new opportunities to share and exchange data. It therefore requires data protection laws to be updated to take account of these changes. Many business models on the internet aim to provide services for free in exchange for the harvesting of personal data. At the very least, policy makers should insist that such trade-offs are made more open and transparent.

But privacy is also threatened by new capabilities for communications surveillance on a mass scale. It is necessary for policy makers to establish clear guidance as to the acceptable scope and purpose of surveillance, which should be defined by law and consistent with norms of international human rights principles. There should be a commitment to transparency about the scope and purpose of such surveillance with appropriate rule of law and due process guarantees. It is also important that there is effective judicial and legislative oversight of any interventions on users' communication and the sharing of any information gathered as a result of such interventions.

The arrival of the printing press meant that people need to learn new skills – literacy and numeracy – as well as understanding the significance of metaphor and imagery. Similarly, the internet requires there to be better citizen 'internet' literacy. While there is a responsibility upon all users to understand the environment they are dealing with it is also obvious that more could be done to prepare people for living and working in this new environment. The internet is becoming an increasingly proprietorial place, where people are encouraged to consume the products others have made for them. There is a danger that the internet will simply create a new market for existing content and application providers rather than providing new opportunities for creative innovation. Governments should consider providing basic coding skills within secondary or tertiary education to help their people become creators rather than consumers.

Generally, there is a need for more education in schools about the nature of the internet, what kind of environment it represents, its dangers and advantages. There is confusion in many peoples' minds between the internet as a network and the services (the World Wide Web, Facebook or Google) that rest upon those networks. The fact that the internet is a means of communication which feels private but is actually more often a means of publication needs emphasis. There is also a body of evidence to suggest that some people feel able, under the anonymity offered by the internet, to be more abusive and hostile to others in a way that would not be the case in offline discourse. An education programme should therefore emphasise the importance of ethics and appropriate uses of the internet.

More specifically, education programmes should make clear how users can properly assess, manage, mitigate and make informed decisions on communications and internet-related risks. Citizens should also be guaranteed access to communications networks without providing personally identifiable information.

Finally, governments should encourage and support multistakeholder approaches to governance of the internet. Multistakeholderism is used to mean many things – here we mean the full involvement of all stakeholders in key decisions along with consensus-based decision-making where possible, with a commitment to operate in an open, transparent and accountable manner. Real multistakeholderism can lead to a more comprehensive consideration of issues and result in the best outcomes.

However, defining stakeholders is not always straightforward – conventionally an analysis of stakeholders can be based upon constituency – business, government, civil society, technical community or it can be composed more broadly based upon power (can the stakeholder impose its will in a relationship), legitimacy (is the stakeholder accepted as a critical resource), and representation (does the stakeholder represent a view or perspective that is critical but otherwise not present in the policy arena).

To ensure an effective form of multistakeholder policy making, governments should establish multistakeholder policy forums, perhaps modelled on national IGFs or the Brazilian CGI.br. Any other national policy processes should be committed to ensuring multistakeholder participation. There should be multistakeholder governance of key internet resources and of IP address management.

To avoid confusion, there should be clear and transparent processes to define how multistake-holder processes operate – whether they exist for information sharing, developing consensus or making decisions. Multistakeholderism should not be thought of as a static way of enshrining the interests of dominant players but a dynamic means of securing greater democratic participation in the governance of an environment in which we all have a stake.

Summary socio-political layer recommendations for policy makers:

a. The right to freedom of association online should be protected in law and practice, in line with international human rights standards;

b. Business models that provide services for free in exchange for the harvesting of personal data should be made more open and transparent;

c. Clear guidance should be available as to the scope and purpose of surveillance, which in turn should be defined by law and consistent with norms of international human rights principles;

d. There should be education in schools about the nature of the internet, the kind of environment it represents, its dangers and advantages and education programmes should help users properly assess, manage, mitigate and make informed decisions on communications and internet-related risks, as well as teaching basic coding skills;

e. There should be clear and transparent processes to define how multistakeholder processes operate and governments should establish multistakeholder policy forums.

Addressing inequalities

On a cautionary note, specific groups of people may find it much harder to access the benefits of the internet than others. Without targeted efforts, the internet can exacerbate existing inequalities rather than address them. For example, there is a body of evidence to suggest that a gender divide in access and use of the internet are common in many parts of the world, though there is little accurate data about. Very few countries disaggregate data by gender – though it is obvious that public speech forums, of all kinds, have been dominated by men so that men decide what content should be made available.

It is unlikely that this kind of discrimination and exclusion can be tackled in the internet sphere alone, in isolation from other parts of society, but research is necessary to collect disaggregating data on internet users and how it is used. There could also be initiatives to address the under-representation of women in internet industries at all levels – infrastructure, applications and content providers.

People with disabilities have much to gain from the internet. Physical barriers to communication and information are being broken down, with access potentially available in many forms in the home or in care institutions. New tools such as automated text readers can help visual impaired people gain access to written material. The internet also enables people with disabilities to participate more actively and improve their prospects of work. More consideration should be given to raising awareness about the importance of companies building non-discriminatory and inclusive internet capacities, and provide training programmes for people with disabilities to take advantage of these products.

Conclusion

The internet is a transformative and disruptive medium. It's power to transform – and disrupt – freedom of expression is all too evident through the peer to peer creating and sharing of content, the way that viral organisation becomes possible, its global character which enables people to bypass censorship in repressive societies, the way that users seek and share information on a large scale, often through 'below the radar' social media and the enabling of people and groups to communicate globally at virtually no cost.

What is particularly unusual is that this global environment is run on a series of voluntary agreements and understandings rather than a predetermined regulatory framework. It has been built by libertarian engineers who are can be compared to car mechanics – they keep car on road but don't care how it is driven it or where it goes. This approach, the voluntary adoption of consensus based standards, has facilitated the rapid, dizzying speed of growth. It allows what Vint Cerf calls 'permissionless innovation' and a speed of growth twice as fast as television and five times as fast as radio. It is adaptive policy making rather than predictive policy making. It is best conceptualised as an eco-system that is constantly, chaotically changing, something to be managed like a garden rather controlled like a machine.

While internet was an English language elite medium used by small groups of people, it attracted little attention. Now it is a mass medium with 2.5bn

users and has a contested track record where it is believed to have helped undermine stable governments. The democratisation of freedm of expression has led many government to seek control of the internet by creating a series of 'national internet segments' and policies to practice surveillance, censorship and control access to and use of the internet. Early optimism has been somewhat dented. Governments have shown that with the right kind of technical capacity and willingness to deploy technical skill, along with normative, legal measures and considerable resources, you can start to break the global open character of the internet. At the same time the amount of wealth generated by internet services has grown exponentially. Private companies operating in the environment have become wealthy beyond the dreams of most – and mostly in the last ten years. While the speed of innovation and change is dazzling and exciting there is also the real danger that new monopolies will emerge that will shatter the open and accessible character of the internet and drown innovation by local entrepreneurs, eliminating the generation of plural, diverse content and services.

It is therefore understandable that in recent years human rights champions – UNESCO, the UN Special Rapporteur for Freedom of Expression, the OAS Special Rapporteur for Freedom of Expression and other regional representatives in the Africa Union or the OSCE have begun to address the free expression and human rights implications of the internet. They have recognised that there are emerging public policy issues that should not simply be the domain of engineers. There has also been a recognition that freedom of expression online is not simply a matter of what content is available and what controls are applied to that content – as might have been the case with print, radio or television. The nature of the medium means that the type of infrastructure, the coding and applications, the market conditions, all have significant implications for freedom of expression and other related rights. Hence the recommendations in this paper try to take a comprehensive overview of the issues that underpin free expression online, one that embraces questions arising from the public and private sectors.

Finally it should be noted that this is an emerging area of debate. It is less than three decades since the first e-mail was sent and the word wide web was created. Thirty years after the printing press was invented it would have been impossible to predict the scale of its impact. These issues will require continual debate and review and the virtue of the internet is that debate need no longer be confined to those who control the means of communication – they are issues where every user can express a view and contribute to creating a human rights based and democratic internet.

About the author:

Andrew Puddephatt

Andrew Puddephatt leads Global Partners Digital's work on human rights, communications policy and transparency. This includes support for civil society groups in Africa, Latin America and South and South East Asia; leading the Secretariat for the inter-governmental freedom Online Coalition and leading GPD's major policy work. This has included developing a methodology for assessing the impact of media on democracy in partnership with UNESCO as well as journalist safety and internet indicators; a major scoping study of global digital communication trends for the Ford Foundation, advice to the Swedish government on implementing its development policy in support of freedom of expression, helping the Brazilian government implement its right to information law.

He has published widely on different aspects of freedom of expression, written guides on assessing the impact of development programmes on human rights policy for UNDP and UNESCO, and made strategic assessments of future trends for European governments.

He was previously director of Article 19, an international human rights organisation; is currently chair of International Media Support in Denmark; is Deputy Chair of the Sigrid Rausing Trust; and a management board member of the European Council on Foreign Relations.

He was awarded an OBE for services to human rights in January 2003.

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