Freedom of Expression Online and Revising the International Telecommunication Regulations

This brief outlines potential threats to freedom of expression on the internet posed by revisions to the International Telecommunication Regulations (ITRs) by identifying proposed amendments to ITRs that are inconsistent with the 2011 Joint Declaration on Freedom of Expression and the Internet, and thus pose a threat to rights protected under Article 19 of the ICCPR. It is important to note that some threats are a result of proposed definitional changes to the ITRs, which would extend the international regulatory framework to the internet (see 1C); other threats come from explicit provisions regarding spam and cybersecurity.

NOTE: Citations for all proposals included in this brief refer to leaked compilation of proposals, CWG-WCIT12 Temporary Document 62 Rev.2 and the most problematic proposals are appended.

General Principles (as set out in the 2011 Joint Declaration)

a. Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law (the 'three-part' test).

- A number of proposed amendments to the ITRs that aim to counter cybercrime and enhance network security are overbroad and are inconsistent with established international standards. For example, the Arab States propose to define spam as any information transmitted over telecommunication networks “bearing advertising nature or having no meaningful message, simultaneously or during a short period of time, to a large number of particular addressees without prior consent of the addressee (recipient) to receive this information or information of this nature".

  ○ This definition of spam is inconsistent with Article 19, which protects information and ideas "of all kinds", even frivolous or commercial expression. It is also ripe for abuse, as subsequent provisions call on Member States to take measures to counter spam. Under this definition,

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1 The ITRs, adopted in 1988 are being reviewed and updated at the UN World Conference on International Telecommunications (WCIT), which will be held from December 3-14 in Dubai.
3 CWG-WCIT12 Temporary Document 62 Rev.2 (heretofore referred to as TD 62 Rev. 2) can be accessed at: http://files.wcitleaks.org/public/T09-CWG.WCIT12-120620-TD-PLEN-0062R2.pdf
4 See 1C.
5 TD 62 Rev.2, Article 2.13 Option 3 ADD 3 (pg. 62).
mass communications by human rights groups, for example, could be deemed to have “no meaningful message” by some governments.

- This proposal is also unnecessary in light of Article 19(3), which already allows states to limit speech in order to protect others or public policy objectives.
- The inclusion of the term “prior consent” in this proposal could potentially limit the “right to impart information...through any...media of his choice” under Article 19(2).

- Several proposals also threaten online anonymity, which is closely linked with the ability to express oneself freely on the internet.\(^6\) Russia has proposed that governments require subscribers of international telecommunication services to be duly identified by operating agencies.\(^7\) Proposals by Egypt and Côte d’Ivoire together with a proposal from the Arab States can be interpreted as requiring that IP addresses be made available to duly authorized law enforcement agencies.\(^8\)
- The above proposals fail to provide for any limiting principles, or explain why this information is necessary to protect an interest recognized under international law. It can be argued that limits on anonymity must meet the requirements of 19(3) because they are indirect limitations on speech. By requiring identification, these proposals would remove limits on anonymity from the important protection of 19(3).

\(b\). When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.

- Cybersecurity and countering spam are legitimate global concerns, however, as noted above, some of the proposed revisions to the ITRs do not provide for adequate protections for freedom of expression. Moreover, by identifying independent state obligations in connection with cybersecurity and spam, the ITRs pose the risk of taking these issues out of the protective ambit of 19(3), which already permits states to take steps to ensure cybersecurity and spam as long as they meet the three part test. Therefore the problem with the proposals is not only that they do not provide independent protection for speech but that they take these issues out of the existing protections provided in Article 19(3).
- As a purely intergovernmental process which is meant to produce guiding principles for the interoperability of international telecommunications, WCIT is not the appropriate venue to be debating such issues. Human rights experts, for example, cannot participate in discussions over draft text unless they are invited as part of a national delegation.

\(c\). Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.

- Some Member States have proposed to change definitions in the ITRs that would have the effect of extending the international regulatory framework to the internet. Russia and Egypt have proposed to

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\(^{6}\) See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, May 2011

\(^{7}\) TD 62 Rev.2, New Article 8.8 (p. 181)

\(^{8}\) TD 62 Rev.2, Article 2.18 Option 1 ADD (pg. 69) and Article 3.6 Option 7 ADD 7 (pg. 97)
redefine “telecommunication,” to including the “processing” of signs, signals, writing, images, and sounds or intelligence.9 The bloc of former Soviet states, known as the RCC, has proposed dropping the modifying aspect of the definition of “international routes,” so that it would simply be defined as “a route for the transmission of traffic between technical facilities and installations located in different countries.”10

- Both of these changes would have the effect of expanding the scope of the ITRs beyond their current application to traditional telecommunications mediums to include the internet. It is not clear that Member States have taken into account the internet’s specific characteristics in proposing these definitional changes and it is important to be cautious in applying one framework to a different technology because we don't know if it is appropriate. The "sending party pays" model (see below) is an example of such a mismatch. Additionally, it is possible that some governments will use a narrow interpretation of this definition to expand their role in internet governance, adversely affecting the current multistakeholder model.

- A group of European telecom companies (European Telecommunications Network Operators, known as ETNO)11 has urged ITU Member States to impose the telephony model of payment, known as “sending party pays,” to internet traffic. This proposal would have the effect of requiring online content providers to pay to reach users, which would likely result in less content delivered to the developing world because large companies may be reluctant to deliver content to smaller markets due to high costs and low revenue from online advertisements.12

Filtering and Blocking (as set out in the 2011 Joint Declaration, Principle 3)

a. Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.

- Revisions to an article concerning international routing raise concerns over filtering and blocking because of the definitional changes mentioned above. These modifications range from granting Member States a “right to know” how its traffic is routed, to permitting them to “impose restrictions on routing.”13 In addition to presenting technical challenges that could require fundamental changes in the architecture of the internet, these proposals could also increase governments’ ability to identify, filter, and block online communications and information, depending on how they are implemented. They also raise privacy and anonymity concerns.

9 TD 62, Rev. 2; Article 2.1, OPTION 1 MOD 1
10 TD 62, Rev. 2; Article 2.6, OPTION 2 MOD 1
11 Note: Because ETNO is a sector member and cannot introduce proposals on its own, it is reliant on an ITU Member State to take up its proposal.
12 The ETNO proposal would amend Articles 2-4 of the ITRs. For the full proposal visit: http://tinyurl.com/8eyz3p9
13 TD 62, Rev. 2; Article 3.3 OPTION 4 MOD 3, OPTION 6 MOD 5, and OPTION 5 MOD 4 (pgs. 85-89)
A proposal from Egypt concerning internet stability and security uses broad language to encourage member states to “take measures” to “fight cybercrime and to counter spam.” This proposal can be viewed as inviting governments to filter content and block websites.

Network Neutrality (as set out in the 2011 Joint Declaration)

a. There should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.

- The “quality of service” requirement of the ETNO proposal, which would have carriers prioritize certain traffic, is based on what network operators believe has “value,” for which they will guarantee a level of end-to-end speed. This would violate network neutrality by encouraging operators to distinguish between priority content and that which gets left behind.
- The spam provision noted above may also conflict with network neutrality, as it distinguishes content as having “no meaningful message” and opens the door for blocking it.

Access to the Internet (as set out in the 2011 Joint Declaration)

b. Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.

- A proposal by Russia would provide justification for cutting off international telecommunication services when they are used for “interfering in the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other States, or to divulge information of a sensitive nature.” It is not difficult to see how the very broad and vague language employed here could be used to cut off access to the internet and limit the right to freedom of expression under Article 19.
- Provisions noted above (section 3A) on international routing could facilitate chokepoints on internet traffic that could easily become points of control on the flow of information.

e. States are under a positive obligation to facilitate universal access to the Internet.

- The “sending party pays” pricing regime proposed by ETNO (see 1C) could harm the expansion of internet access in developing countries, as it would disincentivize investment in infrastructure in markets with small or poorer user bases. This could create a self-perpetuating cycle, further widening

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14 TD 62, Rev. 2 Article 9, Option 2, ADD 2 (pg. 191). This proposal does mention respecting “freedom of expression” and the Universal Declaration of Human Rights; however, the broad definition of spam under consideration in the ITRs could encourage government to take measures against content that does not fall within international standards, like child pornography.

15 TD 62, Rev. 2 Article 8.4, Option 2, ADD 2 (pg. 180-81)
the digital divide. Moreover, because the proposal would allow governments and ISPs to charge for access to specific websites, less content may reach developing countries if websites there lack the financial means to pay for content.

- Additionally, the sending party pays model could also make it more expensive for websites, companies, and entrepreneurs in the developing world to reach international audiences, further inhibiting growth.

For more information please contact Brett Solomon brett@accessnow.org or Deborah Brown deborah@accessnow.org; or visit www.AccessNow.org
APPENDIX

This appendix contains the actual proposed modified language for the ITR articles referenced in this brief.

Article 2.1
Proposed modified language (OPTION 1, MOD 1): “Telecommunication: Any transmission, emission, reception, or processing of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.”

Article 2.6
Proposed modified language (OPTION 2, MOD 1): “International route: A route for the transmission of traffic between technical facilities and installations located in different countries.”

Article 2.13
Proposed additional language (OPTION 3, ADD 3): “Spam: Information transmitted over telecommunication networks as text, sound, image, tangible data used in a man-machine interface bearing advertising nature or having no meaningful message, simultaneously or during a short period of time, to a large number of particular addressees without prior consent of the addressee (recipient) to receive this information or information of this nature.”

Article 2.18
Proposed additional language (OPTION 1, ADD 1): “Calling Party Identification (CPI): a supplementary service in which a series of digits, characters and symbols are conveyed transparently to the called party to identify uniquely the calling party originating the international call.”

Article 3.3
Proposed modified language (OPTION 4, MOD 3): “Operating Agencies shall determine by mutual agreement which international routes are to be used. A Member State has the right to know how its traffic is routed.”

Proposed modified language (OPTION 5, MOD 4): “Operating Agencies shall determine by mutual agreement which international routes are to be used. Pending agreement and provided that there is no direct route existing between the terminal operating agencies concerned, the origin operating agency has the choice to determine the routing of its outgoing telecommunication traffic, taking into account the interests of the relevant transit and destination operating agencies. Member States [can/shall have the right to] request information on the routes used by their operating agencies and may impose restrictions on routing.”

Proposed modified language (OPTION 6, MOD 5): “Member States/operating agencies shall have the right to know which international routes are used for carrying traffic.

Article 3.6
Proposed additional language (OPTION 7, ADD 7): “Pursuant to article 3.5, international calling party number delivery shall be provided in accordance with relevant ITU-T Recommendations. Member States may provide for data privacy by authorizing the masking of information other than the country code and the national destination code, but that masked information shall be made available to duly authorized law enforcement agencies.”

Article 8.4
Proposed additional language (OPTION 2, ADD 2): “Member States shall ensure unrestricted public access to international telecommunications services and the unrestricted use of international telecommunications, except in cases where international telecommunication services are used for the purpose of interfering in the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other States, or to divulge information of a sensitive nature.”

Article 8.8
Proposed additional language: “Member States shall ensure that operating agencies duly identify the subscriber when providing international telecommunication services, and shall ensure the appropriate processing, transmission and protection of identification information in international telecommunication networks.”

Article 9
Proposed additional language (OPTION 2, ADD 2): “Member States shall cooperate to strengthen security while enhancing the protection of personal information, privacy and data.

Member States shall cooperate with other stakeholders to develop necessary legislation for the investigation and prosecution of cybercrime.

Member States should cooperate to take actions to counter spam, including through consumer and business education; appropriate legislation, law-enforcement authorities and tools; the continued development of technical and self-regulatory measures; best practices; and international cooperation.

Member States shall take measures to ensure Internet stability and security, to fight cybercrime and to counter spam, while protecting and respecting the provisions for privacy and freedom of expression as contained in the relevant parts of the Universal Declaration of Human Rights.”

ETNO proposal
Proposed additional/modified language:
Article 2.11: IP interconnection: IP interconnection refers to technical and business solutions and rules to ensure the delivery of IP traffic through different networks.

Article 2.12: End to end quality of service delivery and best effort delivery:
End to End quality of service delivery refers to the delivery of PDU (Packet Data Unit) with predefined end-to-end performance objectives.

Best-effort delivery refers to delivery of a PDU without predefined performance targets.

Article 3.1: Members States shall ensure that Operating Agencies cooperate in the establishment, operation and maintenance of the international network to provide satisfactory quality of service. Member States shall facilitate the development of international IP interconnections providing both best effort delivery and end to end quality of service delivery.

Article 3.2: Operating Agencies shall endeavour to provide sufficient telecommunications facilities to meet requirements of and demand for international telecommunication services. For this purpose, and to ensure an adequate return on investment in high bandwidth infrastructures, operating agencies shall negotiate commercial agreements to achieve a sustainable system of fair compensation for telecommunications services and, where appropriate, respecting the principle of sending party network pays.

Article 4.4: Operating Agencies shall cooperate in the development of international IP interconnections providing both, best effort delivery and end to end quality of service delivery. Best effort delivery should continue to form the basis of international IP traffic exchange. Nothing shall preclude commercial agreements with differentiated quality of service delivery to develop.