

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the rights to freedom of peaceful assembly and of association

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolutions 34/18 and 32/32.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning legislative amendments introducing the Over-The-Top tax on telecommunication companies, severely restricting the right to freedom of opinion and expression, as well as the rights to freedom of peaceful assembly and of association online in Uganda.

According to the information received:

In March 2018, a presidential directive prescribed taxes for social media to raise resources "to cope with the consequences" of social media users' "opinions, prejudices [and] insults." The directive proposed that up to UGX 400 billion (approximately USD 108 million) per year could be collected through the taxes.

On 18 May 2018, the Parliament of Uganda passed the Excise Duty Amendment Act 2018, which among others, provides that "A telecommunication service operator providing data used for accessing over the top services is liable to account and pay excise duty on the access to over the top services". Thus, over the top services, such as for example WhatsApp, Skype, Viber and Facebook, are subject to a tax duty of UGX 200 (approximately USD 0.05) per user per day of access.

Section 2 of the Excise Duty Amendment Act provides that the tax will apply to "the transmission or receipt of voice or messages over the internet protocol network and includes access to virtual private networks but does not include educational or research sites prescribed by the Minister by notice in the Gazette". The Uganda Revenue Authority (URA) has listed sites such as LinkedIn and dating sites such as Badoo and Tinder among those that would be accessed only upon payment. The government has not stated what constitutes educational or research sites.

As of 1 July 2018, telecommunication companies in Uganda blocked access to social media platforms for all users and required them to pay the Over-The-Top (OTT) tax.

The Uganda Communications Commission issued a public notice establishing that “all online data communication service providers, including online publishers, online news platforms, online radio and television operators are (...) advised to apply and obtain authorization” to offer communications services.

It has been alleged that the Government of Uganda did not conduct any public consultations before introducing the OTT tax

Before explaining our concerns with the legislative changes imposing OTT tax, we wish to remind your Excellency’s Government of the obligations under international human rights standards, including Article 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded by Uganda on 21 June 1995.

Article 19(1) establishes “the right to hold opinions without interference,” while Article 19(2) establishes the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Restrictions on the right to freedom of expression under Article 19(2) must be “provided by law,” and “necessary ... for respect of the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals.” The requirement of necessity is a logical extension of the principle that limitations on freedom of expression must be “*solely* for the purpose of” respect for the rights and freedoms of others and meeting “*just* requirements” under the UDHR (emphasis added).

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

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

² *Id.*, at ¶ 7.

³ *Id.*

Based on these standards, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated in his 2018 report to the Human Rights Council that States should repeal any law that unduly criminalizes or restricts online expression.⁴ States should enact “smart regulation, not heavy-handed viewpoint-based regulation,” focused on ensuring that content application services providers provide robust transparency and remediation that enables the public “to make choices about how and whether to engage in online forums.” In any event, “States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy. States should refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on [content application services providers], given their significant chilling effect on freedom of expression.”

The 2015 report to the General Assembly of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, also emphasized that the right to seek, receive and impart information of all kinds implies the public’s right to know information of public interest.⁵ As a result, any restriction on the confidentiality of sources “must be genuinely exceptional and subject to the highest standards, and implemented by judicial authorities only.”⁶ Furthermore, “State law should protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety.”⁷

We similarly wish to remind your Excellency’s Government of its obligations under Article 21 and 22 of ICCPR that guarantee, respectively, the rights to freedom of peaceful assembly and of association. We recall that, that, in accordance with the ICCPR and as similarly prescribed in the International Covenant on Economic, Social and Cultural Rights, ratified by Uganda on 21 January 1987, no restriction may be placed on the exercise of the rights to freedom of peaceful assembly and of association other than those that are prescribed by law and that are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

We further underline that Resolution 24/5 of the Human Rights Council Reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any

⁴ *Id.*, at ¶ 65.

⁵ General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/70/361, ¶ 58, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361.

⁶ *Id.*, at ¶ 62.

⁷ *Id.*, at ¶ 63.

restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.

Social media platforms represent the main channel through which the population of Uganda can freely express themselves, exchange opinions and ideas, assemble peacefully and associate freely get access to information. We are concerned that the tax disproportionately and negatively impacts the ability of users to gain affordable access to the internet, and thus unduly restricts their right to freedom of expression, their rights to freedom of assembly and of association. Particularly so, for low-income citizens, for whom purchasing a 1 GB of data per month will cost nearly 40% of their average monthly income.

Furthermore, the imposition of the tax has consequences on net neutrality, which requires that the Internet be maintained as an open platform on which network providers treat all content, applications and services equally, without discrimination. We are concerned that the tax effectively limits access to social media sites which are a primary entry point for many new users to the internet.

In light of the above mentioned observations, we urge a revision of the Excise Duty Amendment Act 2018 in consultation with civil society and stakeholders for the purpose of bringing the legal framework into line with Uganda's obligations under international human rights law. We stand ready to provide your Excellency's Government with technical assistance in this regard.

Finally, we would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteurs. Your Excellency's Government's reply will be made available on the same webpage, as well as in a report to the Human Rights Council for their consideration.

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

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

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Special Rapporteur on the rights to freedom of peaceful assembly and of association