

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

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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; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, pursuant to Human Rights Council resolutions 43/4, 41/12, 42/16 and 41/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **several provisions of the "Electronic and Postal Communications (online content) Regulations, 2020 (Cap 306)" published on 17 July 2020, which could undermine the rights to freedom of opinion and expression, freedom of peaceful assembly and of association, the right to privacy and the right to health.**

In this connection, we offer the following comments on the Regulations whose provisions could be used to restrict speech in a manner that may be inconsistent with what is permissible under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Tanzania on 11 June 1976. We are also providing comments on the broad application of the Regulations, which could affect anyone who is using the Internet. We also provide observations regarding the obligations imposed on service providers. We note that this new legislation was adopted at a time of a global pandemic and of general elections where, the enjoyment of freedom of opinion and expression, including the right to receive information, is particularly important for the realisation of several other civil, cultural, economic, political and social rights.

1. Prohibited Content under the 2020 Regulations

Before providing detailed comments on this new legislation, we would like to highlight the provisions of Article 19 of the ICCPR which protect the right of everyone to freedom of opinion without interference and the right of everyone to freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, through any media of communication. According to Article 19 (3) of the ICCPR, restrictions on the right to freedom of expression must be "expressly prescribed by law" and necessary "for respect of the rights or reputations of others" or for "the protection of national security or of public order, or of public health or morals". In this context, we also wish to recall that the Human Rights Council has

previously affirmed that “the rights that individuals enjoy offline must also be protected online” (A/HRC/RES/20/8).

The State has a legitimate interest and responsibility to protect against speeches that meet the threshold of Article 19 (3) and Article 20 of the ICCPR. However, regulating content is a complex endeavour, which must be considered carefully not to erode public freedoms and human rights. As noted above, international human rights law provides a clear limited framework for these restrictions.

First, restrictions must be provided by law and be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. In this regard, although the Regulations require that online content service providers should “take into account trends and cultural sensitivities of the general public”, we underscore that this vaguely-worded objective does not constitute a legitimate ground to restrict expression under international law. Under the ICCPR Article 19 (3) requirement of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34).

Second, restrictions may be imposed only on the grounds set out in the above-mentioned paragraph 3 of Article 19 ICCPR. According to the Regulations, content relating to the “planning, organizing, promoting or calling for demonstrations, marches or the like which may lead to public disorder” is prohibited. The Regulations also prohibit “content that causes annoyance [...]; content against the State and public order including content that aims to or publishes information, news, statements or rumors for the purpose of ridicule, abuse or harming the reputation, prestige or status of the United Republic [...]; or content that portrays violence, whether physical, verbal or psychological, that can upset, alarm and offend viewers and cause undue fear among the audience or encourage imitation”. The Regulations also explicitly prohibit “content with information with regards to the outbreak of a deadly or contagious diseases in the country or elsewhere without the approval of the respective authorities.” The Regulations also prohibit content related to “nudity” or “homosexuality”.

We would like to underscore that none of these grounds are listed as a legitimate interest in the ICCPR. We are seriously concerned that restrictions related to the planning, organizing or promoting of demonstrations and those related to content that causes “annoyance” or is “against the State and public order”, which if not further defined, could result in violation of individuals’ freedom of opinion and expression and freedom to assemble. In a report to the Human Rights Council¹, the Special Rapporteur on the rights to freedom of peaceful assembly and of association called on States to repeal, or refrain from introducing, laws that unduly restrict or undermine the rights to freedom of peaceful assembly and of association, including anti-protest laws.

With regard to restrictions to health information, we recall that the right to health, protected by Article 12 of the International Covenant on Economic, Social and

¹ <https://undocs.org/A/HRC/41/41>

Cultural Rights, acceded to by Tanzania on 11 June 1976, includes the right to seek, receive and impart information and ideas concerning health issues. States are under the obligation to refrain from, inter alia, censoring, withholding or intentionally misrepresenting health-related information. In its Statement on the COVID-19 pandemic of April 2020, the Committee on Economic, Social and Cultural Rights stressed that “accurate and accessible information about the pandemic is essential both to reduce the risk of transmission of the virus and to protect the population against dangerous disinformation.” It called upon States to, inter alia, urgently adopt targeted measures to protect and mitigate the impact of the pandemic on groups in vulnerable situations, including ensuring affordable and equitable access to Internet services by all for educational purposes.

Concerning content related to “nudity” or “homosexuality”, we are concerned that this provision may hamper individuals’ right to seek, impart and receive health information, including information related to sexual and reproductive health. In a statement on online gender-based abuse released in 2017, the Special Rapporteur on freedom of opinion and expression and the Special Rapporteur on violence against women warned against “vaguely formulated laws and regulations that prohibit nudity or obscenity could have a significant and chilling effect on critical discussions about sexuality, gender and reproductive health. Discriminatory enforcement of terms of service on social media and other platforms could also disproportionately affect women and other users”.² In addition, the former United Nations High Commissioner for Human Rights warned that restrictions on information on sexual orientation can have a deleterious impact on public health efforts (A/HRC/19/41, para. 65). Also, the High Commissioner recommended that States review and repeal discriminatory provisions in domestic legislation that have a disproportionate impact on the exercise of the right to freedom of expression by lesbian, gay, bisexual and trans persons and others advocating for their rights (A/HRC/29/23, paras. 18 and 79 (b)).

Third, under ICCPR Article 19 (3), restrictions must conform to the strict tests of necessity and proportionality. The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons”.

The above mentioned prohibitions could have severe implications for the general public, for investigative journalists exposing issues such as corruption and for human rights defenders who report on human rights violations and contribute to make the government accountable. The explicit prohibition of content regarding deadly or contagious diseases both in the country and elsewhere without relevant approval may well prevent journalists and health professionals from freely reporting on the coronavirus pandemic limiting access to important information for public health putting the rights to life and health at stake. Recently, the Special Rapporteur on the right to health (A/75/163) highlighted that “effective health system responses – in policy and law – at all times, including in a global pandemic, require access to information for all people.” He underlined that the effective containment of COVID-19, not just in the absence of a vaccine but even after a vaccine is available, depends on accurate and appropriate public health information being available and relevant to all.

² <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21317>

In light of the above-mentioned concerns, we would recommend the authorities to amend these provisions with a view to strictly and narrowly defining the online content that is to be considered unlawful, in line with international human rights law.

2. Scope of the 2020 Regulations

The Regulations adopt a broad application covering both providers and users of the internet, namely online content service providers, internet service providers, application service licensees, online content users and any other related online content (Section 2).

Such an overbroad definition potentially covers any individual who is using the internet.

Section 4 of the Regulations requires any person who provide online content services, as defined above, to “obtain a licence from the [Tanzania Communications Regulatory Authority]”. The Regulations provide for four categories of online content that will be subject to licences: news and current affairs; entertainment content; education and religious content; and mainstream broadcasting. When such a licence is granted, the relevant authority if it deems that the terms upon which it was granted have been violated or breached, can suspend or revoke the licence (Section 5). Those who contravene the provisions of these Regulations may be liable to a fine of not less than five million shillings (about USD \$ 2,150) or imprisonment to a term of 12 months or both.

We are seriously concerned that the Government direct authority to deliver and suspend a licence for all persons providing online content services could lead to arbitrary implementation. As such, it does not appear to satisfy the necessity or proportionality criteria under ICCPR Article 19 (3). In 2011, the Special Rapporteur on freedom of opinion and expression, together with regional mechanisms on freedom of expression, issued a joint statement, in which was highlighted that “measures which limit access to the Internet, such as imposing registration or other requirements on service providers, are not legitimate unless they conform to the test for restrictions on freedom of expression under international law”.³ In the same vein, we are also worried that the high fines raise serious proportionality concerns and could lead to self-censorship. As a result, we would advise that the requirement of a licence be removed from the Regulations.

3. Responsibilities of service providers

Under Section 9, the Regulations introduce new provisions to ensure that prohibited content is removed immediately upon being ordered by the Tanzania Communications Regulatory Authority. The previous Act had given the provider 12 hours to remove prohibited content.

³ <https://www.osce.org/files/f/documents/5/5/99558.pdf> page 69

We are seriously concerned at the lack of judicial oversight with respect to content removal. While private companies have responsibilities under the UN Guiding Principles on business and human rights, we underscore that any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or unwarranted influences in a manner that is neither arbitrary nor discriminatory (A/HRC/38/35, para. 66).

Concerning the short timeframe to remove content, the Special Rapporteur on freedom of opinion and expression already had the opportunity to raise concerns that the obligations placed upon private companies to regulate and take down content at short notice may adversely affect freedom of expression (A/HRC/38/35, paras 16 and 17). The short deadlines, coupled with the afore-mentioned severe penalties, could lead service providers to over-regulate expression, as a precaution to avoid penalties. We are concerned that such preclusive measures may not only encourage self-censorship, but it is also likely to interfere with the right to seek, receive and impart information of all kinds on the internet.

Under section 13, the Regulations provide that all computers used for public internet access at Internet cafés be assigned static public IP addresses. Internet cafés are also requested to keep a proper service user register and to ensure every person using internet service is registered upon showing a recognized identity card.

We are seriously concerned that the requirements to monitor and collect information on communication in Internet cafés breach individuals' right to privacy, as protected by Article 17 of the ICCPR and Article 8 of the African Declaration on Internet Rights and Freedoms, which recognises that: "Everyone has the right to privacy online, including the right to the protection of personal data concerning him or her. Everyone has the right to communicate anonymously on the Internet, and to use appropriate technology to ensure secure, private and anonymous communication". We caution that this provision, coupled with other part of this legislation, could result in the criminalisation of online speech, even in private messaging, breaching the very core foundations of democratic principles and tenets of the right to privacy.

In light of these observations, we invite Your Excellency's Government to continue our dialogue in order to provide responses to the points made above and to the concerns raised in this communication. We also encourage the Government to take all necessary steps to carry out a detailed examination of our observations, including in consultation with relevant stakeholders, and to revise all parts that are not in line with international human rights law. We stand ready to provide any technical assistance that Your Excellency's Government may need in this regard.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Irene Khan

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

Clement Nyaletsossi Voule

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

Tlaleng Mofokeng

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Victor Madrigal-Borloz

Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity