GLOBAL INFORMATION SOCIETY WATCH 2011

INTERNET RIGHTS AND DEMOCRATISATION
Focus on freedom of expression and association online

Conceptualising accountability and recourse

Joy Liddicoat
Association for Progressive Communications (APC)
www.apc.org

Introduction

The modern foundations of international human rights rest on the Universal Declaration of Human Rights (UDHR) and the Charter of the United Nations (UN).[1] The UDHR affirmed human rights are universal, inalienable and interconnected. The human rights framework recognises both the right of states to govern and the duty of states to respect, protect and promote human rights. The global transformation of human rights from moral or philosophical imperatives into a framework of rights that are legally recognised between nations continued into the 21st century, but this basic framework has been reaffirmed by UN member states and remains the foundation of human rights today.[2] The internet has been used to create new spaces in which human rights can be exercised and new spaces in which rights violations can take place. This report looks at human rights concepts, the internet and accountability mechanisms for internet-related human rights violations.[3]

The human rights framework

The UDHR is not legally binding but has a powerful moral force among UN member states. Binding standards have been developed, including the International Covenant on Civil and Political Rights (ICCPR)[4] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[5] Together with the UDHR, these two standards have become known as the International Bill of Human Rights.[6] Other international human rights standards followed, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[7]

Accountability and remedies

When the UDHR was being negotiated, litigation was not seen as the appropriate way to seek remedies or accountability between nations (nor was there an international court system). New forums were established, including the Security Council, the Human Rights Committee and, more recently, the Human Rights Council. Accountability to these forums was primarily by way of periodic reporting. Once a state had ratified a treaty (such as the ICCPR) it agreed to periodically report on implementation, but ratification was also permitted with reservations. Some treaties adopted complaint procedures for individual complaints (which are known as optional protocols), but states are not obliged to submit to these. Each treaty has different standards for accountability. For example, states are obliged to implement economic, cultural and social rights as resources allow, through a system known as "progressive realisation". Civil and political rights, on the other hand, must be implemented immediately and some, such as freedom from torture, can never be suspended or limited, even in emergency situations.

The premise underlying these forms of accountability is that states, as equal members of the international community of nations, will subject their conduct to the scrutiny of other states. In doing so states also agree to abide by recommendations or take into account observations made about matters within their own borders. States therefore agree to be publicly accountable for their human rights performance. This was a major transformation in the international community of states.

---

1   The United Nations officially came into existence after ratification of the Charter on 24 October 1945.

2   The 1993 Vienna World Conference on Human Rights reaffirmed that human rights are indivisible and interrelated and that no right is superior to another. UN General Assembly (1993) *Vienna Declaration and Programme of Action*, Article 5. www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en

3   "Accountability mechanisms" range from international mechanisms, to litigation, to community action and lawful forms of protest.

4   The ICCPR includes rights related to the right to vote, freedom of expression, freedom of association, and the rights to a fair trial and due process.

5   The ICESCR includes rights related to the right to health, the right to education, the right to an adequate standard of living, and the right to social security.

---

6   Office of the High Commissioner for Human Rights (1996) *Fact Sheet No. 2 (Rev. 1) The International Bill of Human Rights*, United Nations, Geneva. www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf

7   Others include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (UNCROC), and the Convention on the Rights of Persons with Disabilities (CRPD).

In practice, the effectiveness of these accountability mechanisms varies widely. Some treaty body processes[8] are seen as very ineffective: the reporting processes are cumbersome, lengthy and time consuming for states and civil society groups alike. Some states simply do not file their periodic reports. For these and other reasons the treaty body processes are currently being reviewed.[9] Other mechanisms, such as the Universal Periodic Review, are seen as much more effective.

This variability has implications for civil society groups, which must strategise carefully about the use of different or multiple mechanisms depending on a number of factors, including the issue, and whether the context is national or local. Multiple mechanisms might be used at the same time, over time, or not at all, depending on the particular issues and context.

The human rights framework also has limitations. As a forum of governments the UN is necessarily infused with politics. Agreed human rights standards are, generally, the product of the best possible political consensus. The result is often a minimum standard: the lowest common denominator of agreement. The international human rights system is still evolving, with the UN's mandate under constant scrutiny, and its utility questioned in the face of the modern horrors of human rights violations. In addition, the framework itself is not static. The UN system is evolving with new processes such as the Universal Periodic Review providing new opportunities for scrutiny and leadership. While changes may be positive, these take time to implement, requiring civil society organisations (CSOs) to develop or enhance capacity to engage and use them effectively while also trying to advance their issues and concerns.

Yet the UN – and the Human Rights Council in particular – remains the central global human rights forum. Opportunities for recourse against states, as ways to hold them accountable for human rights violations, must be considered taking into account both strengths and limitations of the international human rights framework. And today there are more processes for state accountability for human rights violations than have ever existed. These include:

- Scrutiny by treaty bodies
- Complaints to UN bodies under optional protocols

- Engagement with special procedures of the UN (for example, the Special Rapporteurs on Freedom of Opinion and Expression, Freedom of Association and Human Rights Defenders)
- State peer review in the Universal Periodic Review process
- Formal complaints to regional mechanisms, for example, the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court on Human and People's Rights
- Complaints to or investigations by ombudspersons or national human rights institutions
- Litigation (where national constitutions allow for this or where international standards have been incorporated into domestic law).

As human rights violations in relation to the internet increase,[10] questions arise about accountability and remedies. The implications for internet-related human rights violations cannot be considered without first looking at the internet-related forums in the UN.

Human rights and the internet at the UN

Despite the centrality of human rights to the creation of the UN, the World Summit on the Information Society (WSIS),[11] the WSIS Geneva Declaration of Principles[12] and the Internet Governance Forum (IGF),[13] discussions about accountability for human rights violations remain limited. Tensions have emerged given the openness of the internet, which has been both a factor in its success and a point of political contention in debates about internet governance.[14] Early adopters of the internet and information and communications technologies (ICTs) reached for rights as a way to navigate these tensions by articulating their freedom to use and create online spaces, to assert their rights to communicate and share information, and to resist state or government interference with rights to privacy.[15] The simple application of existing human rights standards was the

---

8   Treaty body processes refers to the various mechanisms for oversight of implementation of treaties; for example, the Committee for the Elimination of All Forms of Discrimination Against Women oversees the CEDAW convention and the Human Rights Committee oversees the ICCPR.

9   www2.ohchr.org/english/bodies/HRTD/index.htm

---

10   La Rue, F. (2011) *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 26 April, A/HRC/17/27, p. 8-15.

11   World Summit on the Information Society, United Nations and International Telecommunication Union (2005) WSIS Outcome Documents. www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=2316l0

12   Article 19 of the UDHR is cited in paragraph 4 of the Geneva Declaration of Principles (2003).

13   www.intgovforum.org

14   Cavalli, O. (2010) Openness: Protecting Internet Freedoms, in Drake, W. J. (ed) *Internet Governance: Creating Opportunities for All*, United Nations, New York, p. 15.

15   One of the more famous examples was John Perry Barlow's Declaration of the Independence of Cyberspace (February 1996). projects.eff.org/~barlow/Declaration-Final.html

starting point for civil society groups and, building on the work of the People's Communication Charter, the Association for Progressive Communications (APC) developed the first Internet Rights Charter in 2001-2002 (subsequently updated in 2006).[16] In 2010, the Dynamic Coalition on Internet Rights and Principles released a Charter of Internet Rights and Principles and, in 2011, a more condensed set of ten principles.[17]

But further elaboration and clear explanation of how existing human rights standards apply seemed necessary. New charters and statements of principles have emerged in regional bodies (such as the Council of Europe) and nationally (for example, in Estonia and Finland).[18] It is not yet clear if a new "Super Charter" will emerge or if a new model national law will be developed.

The internet-related aspects of freedom of expression and freedom of association have received some scrutiny in UN human rights mechanisms. The 2011 annual report of the Special Rapporteur on Freedom of Opinion and Expression[19] was the first time the Human Rights Council had considered a report specifically focused on human rights and the internet. In 2010, the Human Rights Committee began a review of General Comment 34 (a key document which the Committee uses to interpret Article 19 of the ICCPR) and released its preliminary report in May 2011.[20] The new general comment includes specific reference to "electronic and internet-based modes of expression".[21] This will strengthen the mechanisms for recourse and reporting internet-related violations of freedom of expression under Article 19 by requiring states to include these in their reports. The final revised comment was released in June 2011 and should be available for use in periodic reporting and other accountability mechanisms by early 2012.

These various initiatives are welcome, but more work needs to be done to ensure the internet is a cross-cutting issue within all treaty bodies and human rights mechanisms. The topic of human rights, the internet and accountability mechanisms remains complex for a variety of reasons, including:

- The complexity of the internet ecosystem (for example, no single point of governance and network operation, diverse standard-setting systems, the role of internet intermediaries and platform providers, and so on) and the various connection points of that ecosystem with the human rights ecosystem (or lack of connection points).

- While there may be a single international human rights standard (for example, on freedom of expression) there is no single way and no single correct way to give effect to that standard.

- The diverse ways that human rights issues arise; for example, from privacy and surveillance, to the ICT production line (conflict minerals, the rights of workers), to content filtering, content blocking and harassment, arrest and detention of online human rights activists.

- Human rights violations may involve multiple and intersecting rights across different treaties and affect groups differently (such as women, sexual and gender minorities, people with disabilities, or racial and cultural minorities).

- The application of human rights standards to the fast-changing forms of connectivity (mobile is outpacing other forms of connectivity, for instance).[22]

- The nebulous legal environments of many countries, including absence of the rule of law (or ineffective legal systems), lack of legislation and constitutional protections or, conversely, over-regulation and extensive direct or indirect censorship.[23]

- The diverse human rights situations in diverse countries, especially within and between developed and developing countries.

- The actual and perceived limitations of human rights remedies where the state violates human rights or where non-state actors can act with impunity.

- The frequent need to obtain remedy or recourse quickly and the slow and cumbersome nature of most legal processes.

16 www.apc.org/en/node/5677

17 www.internetrightsandprinciples.org

18 In relation to Estonia, see Woodard, C. (2003) Estonia, where being wired is a human right, *Christian Science Monitor*, 1 July. In relation to Finland, see Ministry of Transport and Communications (2009) *732/2009, Decree of the Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service*. www.finlex.fi/en/laki/kaannokset/2009/en20090732

19 La Rue (2011) op. cit.

20 Human Rights Committee (2011) *Draft General Comment No. 34 (upon completion of the first reading by the Human Rights Council*, 3 May, CCPR/C/GC/34/CRP.6.

21 Ibid., para 11.

22 See, for example, Southwood, R. (2011) *Policy and regulatory issues in the mobile internet*, APC. www.apc.org/en/node/12433; Horner, L. (2011) *A human rights approach to the mobile internet*, APC. www.apc.org/en/node/12431; and Comninos, A. (2011) *Twitter revolutions and cyber-crackdowns: User-generated content and social networking in the Arab Spring and beyond*, APC. www.apc.org/en/node/12432

23 For example, in relation to Turkey, see Johnson, G. (2011) *Censorship Threatens Turkey's Accession to EU*, unpublished research paper.

- The cost of litigation and the lack of access to this remedy for many individuals and groups.

- The geopolitics and how these play out in various forums.

- The multiple and sometimes conflicting mechanisms for remedy within countries (for example, in relation to content censorship, the intersections of defamation law, constitutional protections where these exist, and criminal or civil legislation for different types of material).

What future for accountability mechanisms?

Given these complexities it is perhaps no surprise that those discussing internet rights charters and principles have steered away from creating new accountability mechanisms – none appear to contain new complaints procedures. The question is, can the existing human rights framework provide adequate accountability mechanisms for internet-related human rights violations?

The answer is unclear. A mixed picture emerges from current practice. Some CSOs have been active in the Universal Periodic Review process.[24] Regional human rights mechanisms (such as the European Court of Human Rights) are receiving increasing numbers of complaints[25] together with strategic interventions in litigation by CSOs.[26] But no complaints have been received by the African Special Rapporteur on Freedom of Expression in relation to freedom of expression and the internet.[27] There have been few complaints to national human rights institutions, possibly because these have not yet adequately considered how to deal with internet-related complaints.[28] Civil litigation remains a primary way to gain recourse in many countries.[29]

More research is needed to develop a better global picture of the use of these various mechanisms and monitor change. For example, some mechanisms may be best suited to certain types of complaints and offer different remedies. Capacity building also may be needed to support civil society advocacy and strengthen the mechanisms to ensure

judicial and other officers adequately understand internet-related human rights issues.

New avenues for global recourse and accountability mechanisms are emerging. The Special Rapporteur on Freedom of Expression has emphasised the need for effective remedies, including rights of appeal.[30] In addition, he noted that the internet has created more avenues for use of traditional remedies including the right of reply, publishing corrections and issuing public apologies.[31] In one defamation case, for example, the settlement agreement included the defendant apologising 100 times, every half hour over three days, to more than 4,200 followers of his Twitter account.[32]

A rights-based approach to the internet and human rights

The rights-based approach, or human rights approach as it is also known, was developed as a practical way to implement human rights standards. The rights-based approach was first articulated in the UN in 2002, when the Office of the UN High Commissioner for Human Rights convened an ad hoc expert committee on biotechnology. The committee noted this was a new and emerging area of human rights, with no specific human rights standards. To overcome this difficulty the committee decided to rely on a "rights-based approach" for its task, indicating that such an approach should:[33]

- Emphasise the *participation* of individuals in decision making

- Introduce *accountability* for actions and decisions, which can allow individuals to complain about decisions affecting them adversely

- Seek *non-discrimination* of all individuals through the equal application of rights and obligations to all individuals

- *Empower* individuals by allowing them to use rights as a leverage for action and legitimise their voice in decision making

- Link decision making at every level to the *agreed human rights norms* at the international level as set out in the various human rights covenants and treaties.

24 Universal Periodic Review (UPR), Thailand: Joint CSO Submission to the Office of the High Commissioner for Human Rights (March 2010), endorsed in whole or in part by 92 Thai organisations.

25 For a summary of recent European Court of Human Rights cases in relation to the internet and human rights see the European Court of Human Rights "New Technologies Fact Sheet" (May 2011).

26 For example, the Electronic Frontier Foundation and Privacy International.

27 Advocate Pansy Tsakula, personal communication to APC, 2011.

28 See, for example, New Zealand Human Rights Commission (2010) *Roundtable on Human Rights and the Internet.* www.hrc.co.nz

29 Kelly, S. and Cook, S. (eds) (2011) *Freedom on the Net 2011: A global assessment of the internet and digital media*, Freedom House, Washington.

30 La Rue (2011) op. cit., para 47.

31 Ibid., para 27.

32 www.thejournal.ie/malaysian-man-apologises-via-100-tweets-in-defamation-settlement-147842-Jun2011

33 High Commissioner for Human Rights (2002) *Report of the High Commissioner's Expert Group on Human Rights and Biotechnology: Conclusions*, OHCHR, Geneva, para 21.

This approach has been extended into a wide range of areas, particulary those where no specific human rights standards seem to apply. The approach is increasingly being used to critique internet regulations on access to the internet, privacy, filtering[34] and the mobile internet.[35] The UN Special Representative on Business and Human Rights has also drawn on the rights-based approach to consider liability of transnational corporations for human rights violations. The resulting framework highlights the need for access to effective remedies, both judicial and non-judicial.[36]

There is scope to use this approach in other areas, for example, with the mandates of various UN forums that focus on the internet. The recent appointment of a Special Rapporteur on Freedom of Association provides an opportunity to explore such an approach taking account of modern human rights movements, the use of the internet and ICTs to mobilise, and the special situation of human rights defenders seeking to improve democratic participation. New forms of accountability may yet emerge, as well as new remedies that relate specifically to the internet.

Conclusion

There are more opportunities at global levels for recourse for human rights violations than ever before. Yet these appear largely underutilised in relation to the internet and human rights. Diverse and complex factors interact to create this situation and it is difficult for CSOs to develop effective strategies. At the same time, new human rights standards and mechanisms are emerging in relation to freedom of expression and freedom of association, creating new opportunities for recourse. Taking a rights-based approach to the internet and human rights may provide a way to negotiate these complex issues, to build broad consensus on the application of human rights standards, and provide greater access to, and measurement of, accountability mechanisms. ■

---

34 Access (2011) To Regulate or Not to Regulate, Is That the Question? A Roadmap to Smart Regulation of the Internet, discussion paper released ahead of the OECD High-Level Meeting on the Internet Economy on 28-29 June 2011. www.accessnow.org/policy-activism/docs

35 See footnote 22.

36 Ruggie, J. (2011) *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March, A/HRC/17/31, para. 26-31.

In the year of the Arab uprisings **GLOBAL INFORMATION SOCIETY WATCH 2011** investigates how governments and internet and mobile phone companies are trying to restrict freedom online – and how citizens are responding to this using the very same technologies.

Everyone is familiar with the stories of Egypt and Tunisia. **GISWATCH** authors tell these and other lesser-known stories from more than 60 countries. Stories about:

PRISON CONDITIONS IN ARGENTINA Prisoners are using the internet to protest living conditions and demand respect for their rights.

TORTURE IN INDONESIA The torture of two West Papuan farmers was recorded on a mobile phone and leaked to the internet. The video spread to well-known human rights sites sparking public outrage and a formal investigation by the authorities.

THE TSUNAMI IN JAPAN Citizens used social media to share actionable information during the devastating tsunami, and in the aftermath online discussions contradicted misleading reports coming from state authorities.

GISWATCH also includes thematic reports and an introduction from Frank La Rue, UN special rapporteur.

GISWATCH 2011 is the fifth in a series of yearly reports that critically cover the state of the information society from the perspectives of civil society organisations across the world.

GISWATCH is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

GLOBAL INFORMATION SOCIETY WATCH
2011 Report
www.GISWatch.org