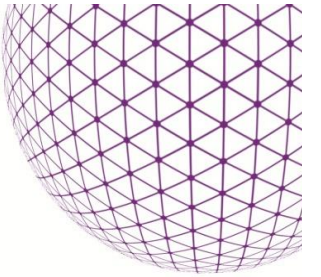

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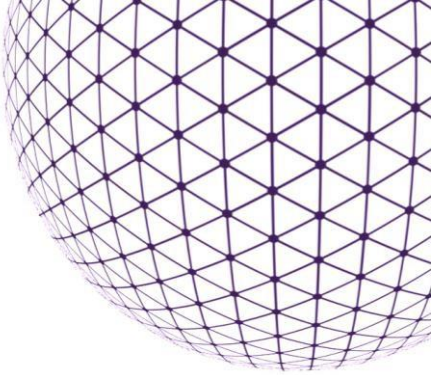
Drafting a Positive Agenda: Human Rights and the Internet Infrastructure



Drafting a Positive Agenda: Human Rights and the Internet Infrastructure

I. Background

The internet presents a new challenge in thinking about the protection and promotion of human rights. It is a transformative communication technology that enables peer to peer generation and exchange of content, and an enhanced degree of social organisation. It has been used to great effect by human rights activists around the world but it has also exposed many to a greater degree of surveillance and control. It is striking that until 2011, the international human rights movement was almost silent on how human rights should apply online. The absence of any serious consideration of the internet by the traditional human rights bodies such as the UN led to many speculative ideas, that the internet required creating a new set of rights and even a new human rights system. Internet activists often stood apart from the mainstream human rights movement.

In 2011 a definitive statement was made by the UN Special Rapporteur for Freedom of Expression in presenting a report to the UN Human Rights Council[1]. This report underscored the way that the internet underpins the right to freedom of opinion and expression and a range of other human rights. Highlighting the ways in which governments are censoring information online, the report also flagged up inadequate protection of the right to privacy and data protection online. Finally the report addressed two crucial development issues, access to content and access to the physical and technical infrastructure necessary to access the internet. This detailed report, compiled after extensive consultations, built upon several civil society initiatives such as the Association of Progressive Communication Internet Rights Charter[2], or the Internet Governance Forum Internet Rights and Principles Coalition's Charter[3]. As a result of this work there is now a broad consensus that the human rights system that applies offline should apply online. However, understanding the human rights environment online means understanding the technical design of the internet and how it is shaped by commercial forces as well as looking at the kinds of content it carries and the controls that apply to such content.

Technical

Historically, the human rights movement has never paid attention to specific technologies that lie behind particular modes of communication. The type of news camera employed, or newsprint utilised was deemed of no great human rights interest. But from the early days of the internet, thinkers such as Laurence Lessig argued that software code, design, and technological standards can effectively regulate behaviour online, that they form a kind of architecture that, along with regulation, markets and social norms, functions as a kind of "law"[4]. Human rights actors have to consider whether specific technological features have consequences for human rights. This is not always easy to decide as users respond to the technological choices available to them, without understanding how the technology (for example the Apple "ecology") limits their choices. To a user such constraints may appear as a function of the technology rather than as a choice made by engineers and companies. The "law" as Lessig defines it, is invisible to us. As John Naughton has said:

[1] http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf
[2] http://www.apc.org/en/system/files/APC_charter_EN_0.pdf
[3] http://internetrightsandprinciples.org/
[4] http://harvardmagazine.com/2000/01/code-is-law-html

"our societies have become frighteningly dependent on a system that almost nobody understands, and that nobody – except for techie types – thinks about very much. It has become the electronic plumbing of our world, with the difference that we pay far more attention to our actual plumbing than we do to its virtual counterpart."[5]

For example if an Internet Protocol (IP) generates IP addresses by using a network interface card, then every access point on a network can be individually traced and identified, giving repressive governments enormous power to monitor and track individuals without the user even being conscious this is happening. So taking a human rights approach to the overall architecture of the internet, it is evident that it is more difficult for states to control behaviour in networks that are decentralized and open rather than those which have a small number of choke points[6]. Hence the importance of having multiple independently operated international links and gateways in each country with multiple Internet exchange points (IXPs). For the same reason, having a "kill" switch allowing the internet to be shut down by executive decision would clearly be inimical to human rights. Human rights considerations also need to be taken into account in the engineering of the net itself to enable encryption, authentication, and anonymity technology for human rights users. Technology companies could see how they can embed "human rights defaults" into their technology by designing it in ways that make it harder for states to violate international human rights[7].

Commercial

The commercial environment also matters a great deal for human rights. Though often regarded as a public space, the internet is, in fact, predominantly built and owned by the private sector. It is a series of shopping malls rather than streets. Its dynamic elements – the innovation and enterprise associated with the evolution of new business models, and the phenomenal speed of development (from 20 million to 2billion users in twenty years) are a consequence of a two broad approaches: an absence of central control or design (a fixed design could never anticipate the evolution of the infrastructure and would therefore be a limit on development) and the design feature that does not allow networks to select the content it carries (known as net neutrality). It is a "dumb" system that simply delivers digital information from one side of the network to the other. As Tim Berners-Lee has argued, this allowed an extraordinary explosion of creativity – anyone can plug into the network, develop an idea or application and launch it with virtually no entry cost[8].

In time of course, a world of small entrepreneurs and engineers gave way to one where large companies operate on an altogether different scale, the world of Facebook, Google, Amazon, Microsoft and Apple. And while governments are still struggling to control the internet through protracted international negotiations, these behemoth companies are making more progress than governments at imposing their own types of control, creating "walled gardens" of internet ecosystems that isolate users from the wider possibilities of the internet, locking people into their own products for commercial gain. It illustrates the warnings of observers such as Timothy Wu[9] who have pointed out that all the previous communications industries of the 20th century

[5] http://www.guardian.co.uk/technology/2013/jan/13/internet-needs-to-get-rebuilders-in
[6] For a vivid illustration of this in Iran see http://gallery.mailchimp.com/7fdb14e291091d23007369520/files/IIIP01.pdf
[7] Unpublished paper *Towards an International Law of the Internet* Molly K Land New York Law School
[8] "The 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" http://www.telegraph.co.uk/technology/internet/8003908/Tim-Berners-Lee-defends-net-neutrality.html
[9] *The Master Switch* Timothy Wu Doubleday 2010

– the telephone, radio, film and television, started as open, subversive, creative environments and ended dominated by a handful of giant monopolies.

To maintain the original, open collaborative shape of the internet that did so much to make it grow it is important to have commercial policies that avoid monopoly and the restrictions upon rights that this inevitably brings. This will involve measures that, for example, encourage infrastructure to be owned and controlled by multiple non-state actors and at least in part, where feasible, by citizens themselves. This would be a significant step in ensuring a continuing open and competitive market. At the infrastructure level it is important to have liberalised fixed line, mobile telephony and internet provider markets, as well as non-state national domain name management by non-state bodies, and multi-stakeholder IP address management. All of this is an important inoculation against dominance by governments or individual monopolies, which from a human rights perspective is crucial.

At the same time the companies who build the technology of the internet and help develop standards can obviously influence the development of human rights in a significant and positive way. Some companies have shown a willingness to engage in a discussion about human rights. Many are adopting policies influenced by the work of John Ruggie who has set out a voluntary scheme to ensure companies respect human rights. The human rights challenges facing telecommunications companies which require a national presence (such as Vodafone in Egypt) are very different to those providing global services such as Google, which in turn are different from open source software companies such as Red Hat. Nevertheless all can, in their own way, support human rights in the technologies and standards they develop.

Policy

The classic approach to implementing global policy – such as adherence to human rights - is to find an established international forum – generally the United Nations or one of its agencies and concentrate decision making in that one place. Many people aspire to create one such centre where internet policy is made, be it the UN, the International Telecommunications Union or another international body. But human rights activists in the internet field have tended to oppose such a move. Such a body could only be made up of governments – a single decision making body would require the legitimacy that states provide and this would inevitably marginalise the participation of civil society and companies that has characterised consensus based internet policy making to date. Past experience in the internet governance process at the UN has shown that states are, at the end of the day, motivated by a "realpolitik" sense of their own interests and by lobbying from special interests, and might produce at best an internet resembling global cable television and at worse an international version of old-style state broadcasting.

Human rights activists are seeking to hold off demands for coordinated state intervention as long as possible so as to allow decentralized, networked governance forms to become more rooted, especially in the developing world, and for a global polity to form around the internet. That global polity could cohere around normative frameworks that could be based on human rights values. The basis for these normative frameworks can be found in the various principles documents that have already been drawn up by different government, business and civil society forums (examples would include OECD Recommendations, Council of Europe Principles, the civil society Rights and Principles Coalition Charter). Such framing can form the basis for national and regional regulation and any relevant international law. They provide opportunities to work with progressive governments in the global north and south, business and civil society to promote these norms (and ensure that when appropriate they form the basis of national regulation and policy). This is the way that slavery was

abolished in the nineteenth century and the way freedom of the seas was guaranteed in the same period. These freedoms were won by a combination of unilateral, bi-lateral and multilateral initiatives, backed and reinforced by civil society campaigns that underlined the inhumanity of the trade alongside private sector exposure of its inefficiency and human waste. It took time, and was messy and complex, but over generations it fundamentally changed the values of human society.

Of course this requires developing appropriate policy norms building upon the progress already made. In an open, consensus based environment such as the internet, norms are vital. If we understand norms to be standards of behaviour then the presence of human rights actors in the internet policy space is crucial to develop and promote norms. The "norm life cycle" has been analysed as comprising three stages[10]; norm emergence as a result of the actions of norm entrepreneurs, moving to a norm cascade once the tipping point has been reached, followed by norm internalization when the norm becomes an accepted part of behaviour. New norms require not just entrepreneurs however, but organisational platforms on which to operate. For the human rights movement, it is therefore vital to nurture these norm entrepreneurs and find ways of supporting organisational platforms that support these entrepreneurs.

Inevitably this also raises the question of internet governance and how policy decisions are made. Currently, the internet is governed through an open, decentralised, multi-stakeholder regime. This model has allowed the internet to flourish and become a powerful tool for free expression. Many believe that if internet is to continue benefitting its end users, the openness and inclusiveness facilitated by this regime should be preserved. This poses a particular challenge to traditional human rights thinking in that there is no overarching rules based system governing the internet, so nothing to anchor human rights standards. And there is no support for establishing such a rules based system for governing the internet from the fear that the majority of governments would use such a system to stifle rights and democracy.

However, the current open governance regime has its flaws and a growing number of actors are expressing legitimate concerns with the status quo. Many governments and civil society groups find it difficult and increasingly costly to participate in the large number of international conferences and meetings covering a wide range of diverse and often very technical issues. Others, predominantly in the global south, find that the current regime does not lend itself to a constructive discussion about the future of the internet or the existing imbalances in the distribution of its benefits and feel the environment is dominated by the US and its commercial interests.

This debate is intensifying and a number of countries and businesses are advocating increased regulation and control over the internet. There is growing concern that these attempts could, if successful, change the internet's fundamental nature and hinder its empowering potential. So far, these proposals have been resisted by those advocating internet openness and freedom. However, a single narrative based on human rights principles has yet to emerge and a long-term positive agenda addressing legitimate concerns about the current regime will have to be developed if proposals that would work to their detriment are to be effectively counter-balanced.

Any positive agenda for internet freedom will need to address the issues raised by developing nations as well as being in line with the human rights values and be negotiated through a multi-stakeholder process. A long-term objective would be to ensure that the internet continues to be a global, interconnected

[10] *International Norm Dynamic and Political Change* Finnemore and Sikkink, International Organisation journal 1998

information commons governed in a dispersed and participatory manner by its users.

II The geo-political challenge

One of the main dangers to the current open internet is the potential political alignment between the more repressive countries – such as Russia, China and Iran – and the emergent democratic economies – such as India, Brazil and South Africa, in favour of government regulation of the internet, (perhaps supported by some civil society groups in the south). Concerns that make these actors sympathetic to reforms towards greater regulation are likely to intensify and should be taken seriously.

While it is possible to block such attempts in the short run, in the long term, the only viable political strategy to move the discussion forward is to find a positive agenda, and appropriate forum or forums, through which "northern" democracies can align with global south democracies against calls for greater regulation and control. Engaging with the developing countries on issues which are not addressed in the current international forums is an essential part of this strategy. Addressing access, equity and affordability will be crucial if we are to win support for open multi- stakeholder governance where governments, civil society and business have an equal seat at the table.

One overarching narrative for aligning these geo-political interests is to promote the idea of a human rights-based infrastructure for the internet. This would build on previous to draft principles for the internet in line with the human rights agenda, including through the OECD Internet Policymaking Principles, the Council of Europe Internet Governance Declaration, and the various civil society initiatives. Human rights principles have wide recognition and are long established in the international system, unlike vague concepts such as "internet freedom". There is a strong global human rights movement that could mobilise behind such a goal.

The challenge of this approach is that a human rights-based internet would not simply be shaped by conventional policy making – it would have technical, commercial and regulatory aspects as set out above - and would need to involve engineers, companies, civil societies and governments in a functional dialogue. What might this mean in practice? A suggested framework for discussion is set out below. Some of these provisions will be difficult to achieve and requires a great deal of civil society collaboration, intense government diplomacy and serious commitments from companies. But aiming for such a framework at least establishes a clear direction of travel.

III. A human rights framework for internet infrastructure

In recent years, many efforts to draft human rights-based principles for the internet have emerged, including, but not limited to, the OECD Internet Policymaking Principles, the Council of Europe Internet Governance Declaration, and the Internet Rights and Principles Coalition Charter. These efforts have provided a significant contribution to normative thinking about the internet. However, they have been criticised for lack of detail and clarity on how human rights principles apply to the internet in practice, and the kind of technical infrastructure that would be desirable from the human rights perspective. The following principles adapted from a recent EU policy paper by Ben Wagner[11] drawing on these efforts and sketch out in more detail a set of technical, commercial and policy-related conditions for a human rights-based internet infrastructure.

[11] http://tiny.cc/ebw7jw

It assumes that human rights protection will require specific technical features, a distinct commercial environment and both legal and normative steps at the level of policy.

a. Technical

- Technical support to defend human rights sites against DDOS and other firms of attack;
- Permanent stable access to emergency services via all appropriate communications networks and channels;
- Multiple, independently operated international links and gateways per country;
- Multiple Internet exchange points (IXPs) per country;
- Community and mesh networks providing local decentralized communications;
- Redundant, competing communications networks employing diverse technological infrastructures;
- Lack of a technical kill-switch which could turn off the internet at device or network level in accordance with international human rights standards;
- Access to and support of privacy protections, and encryption, authentication, and anonymity technology for Internet users.

b. Commercial

- Internet infrastructure owned and controlled by multiple non-state actors and at least in part, where feasible, by citizens themselves;
- Public-private solutions to infrastructure investment for less economically viable, remote and rural areas in order to ensure access to the poor and marginalised;
- Non-state national domain name management;
- Multi-stakeholder IP address management;
- Appropriate liberalisation of fixed line & mobile telephony markets;
- Appropriate liberalisation of internet provider market;
- Adherence to Network Neutrality principles.

c. Policy-related

- Promote international human rights law as the normative framework for any internet governance discussions;
- Support multi-stakeholder governance of key internet resources;
- Ensure full democratic oversight over any communications surveillance;
- Provide rule of law, due process guarantees and judicial oversight for any interventions on users' communication and sharing of any information gathered as a result of such interventions;
- Promote anti-monopoly regulation preventing of technological and economic concentration in communications devices and infrastructure, to ensure an absence of single points of control;
- Foster regulatory approaches that foster affordability and access for the poorer members of communities;
- Support internet users in properly assessing, managing, mitigating and making informed decisions on communications & ICT-related risks;
- Guaranteed citizens access to communication networks with providing personally identifiable information.

IV. Next steps

One possible intervention would be a process for discussing and consulting upon a version of the above draft *human rights infrastructure* among global civil society groups, through global networks and project based collaborations. This would help us prioritise issues and interventions in the most suitable and cost effective manner. In addition, it would provide a framework for addressing a wide array of internet-related issues that are otherwise addressed in isolation, including current "hot" issues such as cyber-security, rethinking the Millennium Development goals, and how to tailoring aid programmes to promote human rights internet policy.

It is also necessary to build up a cohort of human rights policy "entrepreneurs" and organisational platforms. We should also foster effective regional and global networks as platforms to build and sustain human rights norms and values. This cohort needs to be geographically representative and legitimate. It will require supporting and resourcing human rights actors in the global south as well as the north.

Developing a positive agenda is also an opportunity for the civil society to be proactive internationally and work towards the medium-term aim to counter-balance the push for greater regulation and control of the internet. To this end, reaching out to developing countries on issues of their concern should be a key element of the strategy to design and promote a positive agenda. From the beginning, simultaneously to facilitating a discussion at the national level, we should work to involve developing and key swing-country governments and other relevant stakeholders in this discussion. This would be an opportunity to collaboratively identify and define legitimate concerns with the current system and potential solutions that would not harm the empowering nature of the Internet. It would also strengthen and legitimise the narrative internationally.

The notion of human rights based infrastructure should also lie at the heart of any proposed changes to internet governance – it should be the goal around which the realization of a constitutional moment[12] for the internet should be formulated. As the next three years are likely to be crucial in the history of the internet such work is both timely and necessary.

[12] The Consent of the Networked Rebecca MacKinnon Basic Books 2012