International Journal of Communication 5 (2011), Feature 1186–1194 1932–8036/2011FEA1186

The Arab Spring
The Role of ICTs

Politics Through Social Networks and Politics by Government Blocking: Do We Need New Rules?

ROLF H. WEBER[1]
University of Zurich

In order to combat the recent call of the (mainly) younger generation for democratization in many countries—in North Africa, especially—governments blocked Internet access by direct or indirect measures to shut down the free flow of information. Such political attempts raise the legal question of under what circumstances such governmental intervention would be justified. Therefore, the issue of shared responsibilities of states to preserve the Internet, both infrastructure and cross-border traffic, as a means to safeguard freedom of expression and access to information, regardless of frontiers, must be tackled.

Introduction

Recent developments in Arab lands, particularly in the North African countries of Tunisia, Egypt and Libya, have shown that new communication channels (mobile phones, social networks) have facilitated the "organization" of civil society by allowing a timely exchange of opinions and ideas. However, modern information and communication technologies (ICT) also enable governments to apply them to their benefits. In particular, governments did not refrain from interfering in the free flow of information when political considerations seemed to call for such measures. These recent attempts have been partly successful in shutting down the Internet. Where Internet access is controlled by a state-owned monopoly, this interference can be easily executed. But even in case of a limited number of Internet service providers, the governmental order might be successful. In Egypt, almost all Internet users draw on the services of five providers; for the authorities, it was relatively simple to "compel" such a limited number of Internet services providers to switch off their computers, including subsidiaries of foreign telecommunications operators. Even providers such as London-based Vodaphone complied with the request, arguing in public that their business otherwise could be endangered in Egypt.

The shutting down of the Internet is obviously a far-reaching intervention into the free flow of information. Freedom of expression is guaranteed in practically all international instruments dealing with

[1] The author thanks Elvana Thaci of the Council of Europe, Strasbourg, for her valuable comments.

human rights, particularly in Article 19 of the Universal Declaration of Human Rights of the United Nations (1948). Generally, human rights are not "limitless"; limitations are possible. However, such limitations need to be based on a public interest test and must be proportionate. Restricting the free flow of information can be focused on a particular national population, which has been the case in Egypt, but blocking measures could also interfere with cross-border Internet traffic in general.

The striking point in the discussion about blocking the Internet is the fact that so far international accords contain no specific rules dealing with the question of under what circumstances such governmental intervention into the free flow of information would be justified. A year ago, the Council of Europe (CoE) took up the issue of a shared responsibility of states to preserve the Internet, both infrastructure and cross-border traffic, as a means to safeguard freedom of expression and access to information, regardless of frontiers. In that context, an expert group has been appointed to look at the feasibility of legal instruments that would address these issues. An interim report was published in December 2010 (CoE Advisory Group Interim Report). Based on its findings, subsequent efforts will look into the possibility of working to curb governmental restrictions on the free flow of cross-border information.

Universality of the Internet

The Internet has developed into a global space for communication. Internet and mobile phone penetration is increasing, not only in Western and Northern countries, but also in less-developed countries; in particular, mobile Internet services have become important in countries that lack a good IT infrastructure (Weber, 2010b).

Through the Internet, the principle of the free flow of information has entered a new dimension. It is generally accepted that the free flow of information is essential to democracy, freedom, and economic growth. The Organization for Economic Cooperation and Development, in its Seoul Declaration on the Future of the Internet Economy of 2008, committed the signatory states to "foster creativity in the development, use and application of the Internet, through policies that, inter alia, maintain an open environment that supports the free flow of information, research, innovation, entrepreneurship, and business transformation." The cause has now been taken up for discussion by the G-20.

The universality of the Internet contrasts with the territoriality principle of state jurisdiction. Furthermore, the centuries-old role of sovereignty might have to be reassessed (Weber, 2010a).

Rights and Duties of States

Principle of Shared Use of Resources

Obviously, traditional borders do not exist in cyberspace. If a country is intervening into the free flow of information through the Internet, other countries could be harmed, since the intervention concerns a common resource. Consequently, the question must be addressed whether states have a shared responsibility for ensuring fundamental rights at the international level, in particular the free flow of

information, and to ensure fair and equitable allocation of resources. This question is not completely new in international law; in many other societal areas encompassing aspects of resource allocation, the establishment of an equitable management system is vital. This is true in North Africa, for example, particularly regarding water allocation. Therefore, inspiration can be drawn from international law relating to the fair and equitable use of certain common resources (Weber, 2010a):

1. The Declaration on Principles Guiding Relations Between Participating States, based on the Helsinki Final Act of 1975 and developed under the auspices of the later established Organization for Security and Cooperation in Europe (OSCE) obliges the states to "recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice, and well-being necessary to ensure the development of friendly relations and cooperation" among all states (OSCE, 1975).

2. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Treaty) states that "all activities on the moon, including its explorations and use, shall be carried out in accordance with international law, in particular the Charter of the United Nations, and taking into account the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations" (Art. 2) (United Nations, 1979).

3. The United Nations Convention on the Law on the Non-navigational Uses of International Watercourses of 1997 obliges the member states to use watercourses in an equitable and reasonable manner in their respective territories (Art. 5, para. 1, 2) (United Nations, 1997).

4. The Kyoto Protocol to the United Nations Framework Convention on Climate Change of 1992 refers to the importance of appropriate burden-sharing among developed countries (Art. 11, para. 2[b]) (United Nations, 1998).

5. The Convention on the Transboundary Effects of Industrial Accidents of 1992 describes its scope of application as preventing, preparing for, and responding to industrial accidents by appropriate measures (Art. 2) in order to "protect human beings and the environment against industrial accidents by preventing such accidents as far as possible, by reducing their frequency and severity, and by mitigating their effects" (Art. 3.1) (UNECE, 1992).

6. The International Law Commission's Draft Convention "Responsibility of States for Internationally Wrongful Acts" refers to the promotion of universal respect leading to a reasonable and equitable behavior in cross-border relations (International Law Commission, 2001a). In particular, this document contains provisions related to international wrongful acts of governmental bodies.

7. The Cybercrime Convention of the Council of Europe of 2001 (CETS No. 185) includes general principles relating to mutual assistance and measures for common protection against cyber-

attacks. The provisions partly try to achieve a minimum substantive harmonization of criminal provisions and introduce specific procedural standards enabling states to combat cybercrime.

The above overview of existing international treaties dealing with the management of scarce resources shows that the notion of equitable and reasonable use of critical resources is crucial. Only when resources are allocated in accordance with legally and socially justified principles, a common acceptance of the allocation can be accepted in civil society. The principle of fair and equitable use of resources could become part of an international *ordre public* based on a normative understanding of its contents, representing the common interest of the entire society (Weber/Weber, 2009). So far, legal instruments in the field of Internet governance are missing; however, the described principles could be considered to be customary law, allowing the U.N. to alert member countries to comply with them.

Principles of Prevention

Apart from the duty to avoid misuse of common resources, states should also take all reasonable measures to prevent, manage, and respond to significant transboundary disruption of and interference with the stability, robustness, resilience, and openness of the Internet. Again, this principle is not completely new but can be found in other international legal instruments (CoE Advisory Group Interim Report):

1. International Law Commission's Draft Articles on Prevention of Transboundary Harm for Hazardous Activities, adopted in 2001 (Article 3): "The state of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof" (International Law Commission, 2001b).

2. Declaration of the United Nations Conference on Human Environment (Stockholm, 1972): Principle 21 affirms the responsibility of states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction (United Nations, 1972).

3. The Rio Declaration on Environment and Development of 1992 states in Principle 2 that "states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction" (United Nations, 1992).

4. Furthermore, the principle of prevention has been often adopted in international treaty law concerning the protection of the environment. Examples include Article 194 of the United Nations Convention on the Law of the Sea (1833 United Nations Treaties Series (UNTS) 3); Article 1 of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1046 UNTS); Article 2 of the Vienna Convention for the Protection of the Ozone Layer (1513 UNTS 293); Article 2, para. 1 of the Convention on Environmental Impact Assessment in a

Transboundary Context (1989 UNTS 309). Examples concerning international watercourses include Article 2, para. 1 of the already mentioned Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1936 UNTS 269). The principle of prevention also addresses nuclear accidents, for example, in Article 2 of the Convention on Long-Range Transboundary Air Pollution (1302 UNTS 217).

The principle of prevention goes back to the Roman principle of *"Sic utere tuo ut alienum non laedas,"* translating loosely as "One should use his own property in such a manner as not to injure that of another" (CoE Advisory Group Interim Report). This principle has since become part of customary law. The International Court of Justice (ICJ) and arbitration tribunals have applied the prevention principle several times over the last 70 years, the first time in the Trail Smelter Arbitration of 1938 (United States v. Canada; UNRIAA, Vol. XII [Sales No. 1949.V.2], p. 1905), and thereafter mainly in the Corfu Channel Case of 1949 (United Kingdom v. Albania; ICJ Reports 1949, pp. 4, 23), and later in the Lake Lanoux Arbitration of 1957 (France v. Spain; UNRIAA, Vol. XII [Sales No. 63.V.3], p. 281), and the Nicaragua Case of 1986 (Nicaragua v. United States; ICJ Reports 392/1984). In the latter case, the ICJ confirmed that a state should not knowingly allow its territory to be used contrary to the rights of other states, that a state should take all necessary measures to prevent transboundary damage, and that a state is obliged to conduct its affairs "without outside interference."

In the project of the Council of Europe, the Advisory Group is proposing a specific prevention principle, as outlined above, obliging states to prevent, monitor and respond to significant transboundary disruption of or interference with the stability, robustness, resilience, and openness of the Internet (CoE Advisory Group Interim Report). The commitment to prevention should encompass all policies and measures adopted by states to deal with situations that involve a risk of causing significant transboundary interference. Thereby, the required degree of care should be proportional to the degree of risk involved or consequences incurred. More concretely, reference can be made to the well-known principle of due diligence in private law, which has become a generally accepted standard and involves using all appropriate measures to prevent and minimize foreseeable significant harm. As long as specific legal instruments are missing in efforts to protect the free flow of information, the principles described above should be accepted and at least morally enforced as an expression of customary law.

Responsibilities of States

Rights and duties in a legal order call for "consequences" in the form of responsibility and liability. The principle of fair and equitable allocation of resources, as well as the principle that states should refrain from influencing the transnational flow of information, requires the development of a concept of adequate responsibility, as in other cases of noncompliance with duties. Consequently, states should engage in dialogue and cooperate for the development of international law relating to the responsibility and liability for damage assessment and compensation, as well as the settlement of related disputes. Such a principle is inspired by and could be modelled after the United Nations Convention on the Law of the Sea of 1982, which states in Article 235:

> With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds. (United Nations, 1982)

Correspondingly, the Vienna Convention on Civil Liability for Nuclear Damage places the liability for a nuclear installation on the operator at first instance; however, the state is under a (limited) duty to ensure that claims against the operator are satisfied through the availability of funds and the necessary security (Article XIII) (Vienna Convention, 1963). Furthermore, Article 3 of the Draft Articles on State Responsibility, as elaborated by the International Law Commission, says that a wrongful act of a state can be seen in conduct consisting of an action or an omission attributable to the state under international law, and such conduct constitutes a breach of an international obligation (International Law Commission, 2001a). According to this legal instrument, the presence of conduct (action or omission) attributable to a state under international law, and the fact that such conduct constitutes a breach of international obligations, are essential principles of international law (CoE Advisory Group Interim Report).

A similar legal approach would also be justified in respect to state interference with the free flow of information: The principles that have been developed mainly in connection with protection of the environment and obliging states to apply preventive mitigation measures in order to avoid "retroactive" liability are suitable in the context of access to information, since its denial causes harm to civil society. In international law, the concept has even become broader and can hold states responsible for the actions or omissions of private entities. The classical "negative" perception of fundamental rights and freedoms is complemented by positive obligations. In general,

> . . . The states duty to protect against non-state abuses is part of the international human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations. (United Nations, 2007)

Indeed, as experience shows, the ordering of Internet blocking has its consequences: On May 28, 2011, the now ousted Egyptian president Mubarak and two ministers under his government are being held responsible for the Internet blocking and have been fined approximately 540 million Egyptian pounds (US$90 million). The liability was based on causing an economic damage, not on violating human rights. Notwithstanding this fact, Internet blocking (in North Africa) had severe consequences for the responsible persons for the first time. On this note, further developments do not seem to be excluded.

Outlook

The main theme at the January 2011 World Economic Forum in Davos, Switzerland, was "Shared Norms for the New Reality." The notion of shared norms encompasses the right of members of civil society to communicate with each other on the basis of fundamental rights put in place more than 50 years ago by the United Nations. The scope of that Human Rights Declaration of 1948 is universal.

The blocking of Internet access in many countries (particularly during the recent upheaval in the North African region) must be considered in this perspective as a step backward in the evolution of free and democratic societies. Apparently, the mere fact of existence of an international human rights law framework has not been good enough to prevent governments from blocking or filtering Internet communication or forcing Internet service providers to shut down access.

Thus the question to be explored is whether it is time to develop concrete international legal instruments that would lay down clear guidelines to states as to what measures are unacceptable regarding the free flow of information. The Council of Europe has initiated such an ambitious project and is working toward the drafting of a legal instrument. This attempt is increasingly supported by political leaders advocating for an open Internet and for an international standard of behavior in cyberspace. The same theme is to be discussed in the context of a potential OECD framework.

◇◇◇

Prof. Dr. Rolf H. Weber is chair professor for international business law at the University of Zurich and visiting professor at the University of Hong Kong. He also is a practicing attorney in Switzerland and a legal adviser to many international organizations, including the Council of Europe in the field of cross-border Internet traffic.

References

Council of Europe. (CoE Advisory Group Interim Report). (2010). *International and multi-stakeholder co-operation on cross-border Internet.* Interim report of the Ad-hoc Advisory Group on Cross-border Internet to the Steering Committee on the Media and New Communication Services incorporating analysis of proposals for international and multi-stakeholder cooperation on cross-border Internet. Retrieved from http://www.coe.int/t/dghl/standardsetting/media-dataprotection/conf-internet-freedom/MC-S-CI%20Interim%20Report.pdf

International Law Commission. (2001a). *Responsibility of states for internationally wrongful acts* (draft articles). Doc. A/Res/56/83 (2001). Retrieved from http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

International Law Commission. (2001b). *Prevention of transboundary harm from hazardous activities* (draft articles), U.N. Doc. A/56/10 Supp. No. 10 (2001). Retrieved from http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf

OSCE. (1975). *Declaration on principles guiding relations between participating states.* Conference on Security and Co-operation in Europe Final Act. Helsinki. Retrieved from http://www.osce.org/mc/39501

OSCE. (2008, June 18). *The Seoul declaration on the future of the Internet economy.* Retrieved from http://www.oecd.org/dataoecd/49/28/40839436.pdf

United Nations. (1972). *Declaration of the United Nations Conference on the human environment.* Retrieved from http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503

United Nations. (1979). *Agreement governing the activities of states on the moon and other celestial bodies.* Doc. A/Res/34/68. Retrieved from http://www.oosa.unvienna.org/oosa/SpaceLaw/moon.html

United Nations. (1982). *United Nations. Convention on the Law of the Sea,* Montego Bay, December 10, 1982. Retrieved from http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

United Nations. (1992). *Rio declaration on environment and development.* Retrieved from http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en

United Nations. (1997). *Convention on the Law of the Non-navigational Uses of International Watercourses.* Doc. A/Res/51/229. Retrieved from http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

United Nations. (1998). *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. Retrieved from http://unfccc.int/resource/docs/convkp/kpeng.pdf

United Nations. (2007, February 19). *Report of the special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises.* Doc. A/HRC/4/35. Retrieved from http://www2.ohchr.org/english/bodies/hrcouncil/4session/reports.htm

United Nations Economic Commission for Europe (UNECE). (1992). *Convention on the Transboundary Effects of Industrial Accidents.* Retrieved from http://www.unece.org/env/documents/2006/teia/Convention%20E%20no%20annex%20I.pdf

Vienna Convention on Civil Liability for Nuclear Damage. (1963, May 21). Retrieved from http://www.iaea.org/Publications/Documents/Infcircs/1996/inf500.shtml

Weber, R. H. (2010a). New sovereignty concepts in the age of Internet. *Journal of Internet Law*, Vol. 8, 12–20.

Weber, R. H. (2010b). Mobile applications for inclusive growth and sustainable development. *Telecom Regulatory Authority of India*, 87–93.

Weber, R. H., & Weber, R. (2009). International ordre public for terrorism-related Internet content? *Humboldt Forum Recht*, Vol. 4, 52–73.