## BLOCKING OF CYBER-ENABLED COMMUNICATIONS BY STATES: RAMIFICATIONS FOR THE FREEDOM OF COMMUNICATION

## OR THE "KILL SWITCH" PROBLEM

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#### FINANCIAL TIMES

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Spain politics + Add to myFT

Catalonia's referendum battle shifts to cyber space

In other voting stations, police were simply blocking internet access completely, say organisers.

#### **SECURITY**

Spain's internet censorship during Catalonian referendum was completely unjustified

ELECTRONIC FRONTIER FOUNDATION OCTOBER 2, 2017 8:31 PM

distributed filesystem, this was a tiny proportion of the information that was blocked. Closer to home, on the day of the referendum itself, the Internet was shut down at polling places in an effort to prevent votes from being transmitted to returning officers.

## Ethiopia turns off internet nationwide as students sit exams

The country has closed its digital borders to prevent leaks during tests after papers were posted online by activists last year



## Ethiopia: Third Internet shutdown follows imprisonment of two human rights activists

ARTICLE 19 7 June 2017

This statement was originally published on article19.org on 6 June 2017.

ARTICLE 19 condemns the ongoing internet shutdown in Ethiopia that has paralyzed access to information and communication across the country since 30 May 2017. This latest shutdown is broader than previous ones as it prevents both private and government actors from accessing essential information on the internet. The Ethiopian government has announced that the shutdown will continue until 8 June.

The shutdown followed the imprisonment of two prominent human rights activists for online expression. On 25 May, Yonatan Tesfaye was sentenced to six years and three months in prison for inciting anti-government protests in nine Facebook posts. The day before his colleague **Getachew Shiferaw had been sentenced** to one year and six months in prison for inciting violence through a private message he sent to colleagues using the Facebook messenger app.



**U.S. Passports** 

**International Travel** 

U.S. Visas

Intercountry Adoption

#### **Ethiopia Travel Warning**

**Travel Warning**August 25, 2017

**Ethiopia Travel Warning** 

The Department of State warns U.S. citizens of the risks of travel to Ethiopia due to the potential for civil unrest and arbitrary detention. There continue to be reports of unrest, particularly in the Gondar region and Bahir Dar in Amhara State, and parts of Oromia State. This replaces the Travel Warning of June 13, 2017.

The Government of Ethiopia has demonstrated its ability and willingness to restrict or shut down internet, cellular data, and phone services, impeding the U.S. Embassy's ability to communicate with U.S. citizens in Ethiopia and limiting the Embassy's ability to provide consular services. Additionally, the Government of Ethiopia does not inform the U.S. Embassy of detentions or arrests of U.S. citizens in Ethiopia.

Avoid demonstrations and large gatherings, continuously assess your surroundings, and evaluate your personal level of safety. Be aware that the government may use force and live fire in response to demonstrations, and that even gatherings intended to be peaceful can be met with a violent response or turn violent without warning. U.S. citizens in Ethiopia should monitor their security situation and have contingency plans in place in case you need to depart suddenly.

Given the unpredictable security situation, U.S. citizens in Ethiopia should have alternate communication plans in place, and let family and friends know that communication may be

"The government of Ethiopia has demonstrated its ability and willingness to restrict or shut down internet, cellular data, and phone services, impeding the U.S. Embassy's ability to communicate with U.S. citizens in Ethiopia and limiting the Embassy's ability to provide consular services."

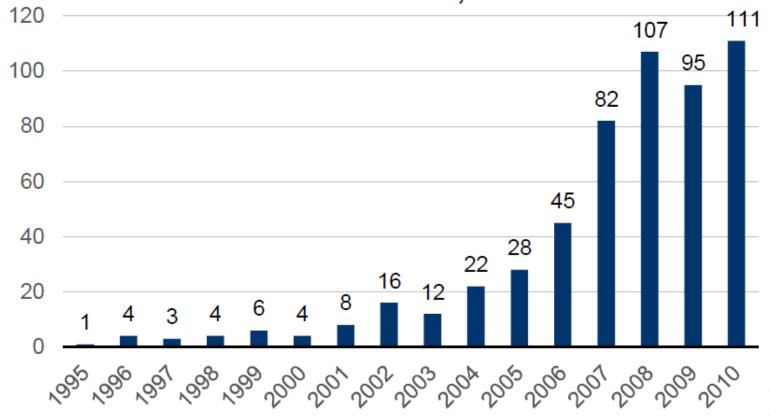
## A "HOUSTON" MOMENT

 More and more, governments are using their authority to block communications through cyberspace

Often in a manner that is unilateral and non-transparent

January 2011 – Egypt's Tahrir Square protests

Figure 1: Number of Government Interferences with Digital Networks, 1995-2010

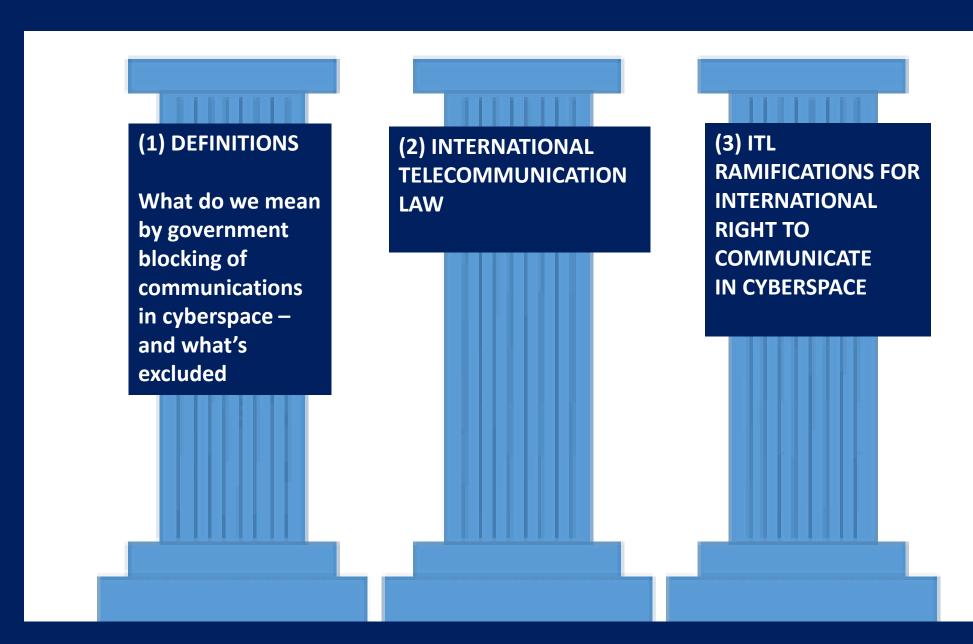


Number of gov't interferences continues to rise: #KeepitOn, Brookings Institution - \$2.4 billion

2011 Egypt's Tahrir Square - \$90 million

BROOKINGS

Source: Philip Howard, Sheetal Agarwal, and Muzammil Hussain, "The Dictators' Digital Dilemma: When Do States Disconnect Their Digital Networks?" Brookings Issues in Technology Innovation, October, 2011



# (1) DEFINITIONS: WHAT DO WE MEAN WHEN WE REFER TO THE BLOCKING OF CYBER-ENABLED COMMUNICATIONS BY STATES — AND WHAT'S EXCLUDED

### THE ISSUE IS NOT ONLY INTERNET SHUTDOWNS

 Any intentional disruption by a state to communications through cyberspace.

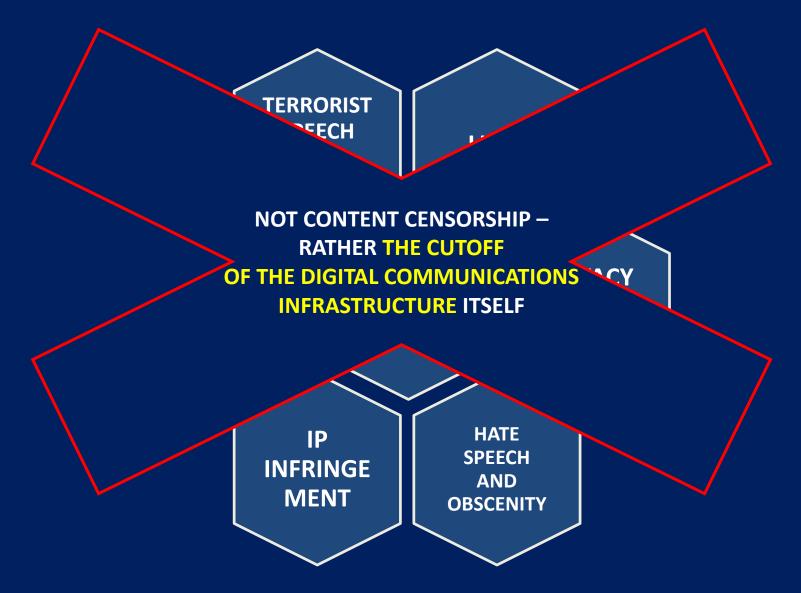
- Internet
- GPS
- cellphone communications
- regular phone or fax lines
- satellite imagery "shutter control"

telecommunication – any transmission, emission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems

-- ITU Constitution § 1012

Technology-neutral

## DISTINCT FROM THE SUBSTANTIVE ANALYSIS OF FREEDOM OF EXPRESSION TO ADDRESS ANOTHER ASPECT OF THE USE OF KILL SWITCHES BY GOVERNMENTS



## (2) INTERNATIONAL TELECOMMUNICATION LAW



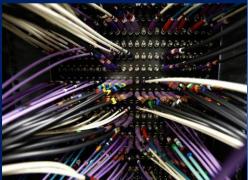
 Longstanding treaty regime (1865), 1<sup>st</sup> IGO, UN Specialized Agency, 193 MS

 ITL - the provision of communications globally and the operation of infrastructure to ensure that these communications are seamless











## **PURPOSES (ART. 1)**

 to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunication services, increasing their usefulness and making them, so far as possible, generally available to the public;

## **CONVENTION TÉLÉGRAPHIQUE INTERNATIONALE DE PARIS (1865)**

The HCPs undertake to establish dedicated wires to the international telegraphic service, in sufficient number to ensure rapid transmission of messages. These wires shall be established in the best conditions possible.

#### ARTICLE PREMIER.

Les Hautes Parties contractantes s'engagent à affecter au service télégraphique international des fils spéciaux, en nombre suffisant pour assurer une rapide transmission des dépèches.

Ces fils seront établis dans les meilleures conditions que la pratique du service aura fait connaître.

#### ARTICLE 38

#### Establishment, Operation and Protection of Telecommunication Channels and Installations

- 1 Member States shall take such steps as may be necessary to ensure the establishment, under the best technical conditions, of the channels and installations necessary to carry on the rapid and uninterrupted exchange of international telecommunications.
- 2 So far as possible, these channels and installations is be operated by the methods and procedures which practical operating experience has shown to be the best. They must be maintained in proper operating condition and kept abreast of scientific and technical progress.
- 3 Member States shall safeguard these channels and installations within their jurisdiction.

3 DISTINCT OBLIGATIONS OF CONDUCT (NOT RESULT, SO SUBJECT TO FEASIBILITY):

- TO ENSURE ESTABLISHMENT OF INFRASTRUCTURE
  - TO MAINTAIN
  - TO SAFEGUARD

#### ARTICLE 34

#### Stoppage of Telecommunications

- Member States reserve the right to stop, in accordance with their national law, the transmission of any private telegram which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency, provided that they immediately notify the office of origin of the stoppage of any such telegram or any part thereof, except when such notification may appear dangerous to the security of the State.
- 2 Member States also reserve the right to cut off, in accordance with their national law, any other private telecommunications which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency.

ALIGNS WITH ICCPR
19(3)(B)LIMITATIONS PROVIDED BY
LAW AND NECESSARY FOR
THE PROTECTION OF
NATIONAL SECURITY,
PUBLIC ORDER,
PUBLIC HEALTH,
OR MORALS.

#### **Suspension of Services**

Each Member State reserves the right to suspend the international telecommunication service, either generally or only for certain relations and/or for certain kinds of correspondence, outgoing, incoming or in transit, provided that it immediately notifies such action to each of the other Member States through the Secretary-General.

THERE'S A SOVEREIGN RIGHT TO
SUSPEND SERVICES – BUT THE
STATE MUST SO NOTIFY
IMMEDIATELY ON THE
INTERNATIONAL PLANE



## STATE PRACTICE OF PUBLIC NOTIFICATION TO ITU OF SUSPENSION/ STOPPAGE OF -

- TELEGRAM SERVICES
- VOICE OVER INTERNET
- COLLECT CALLS
- CALLBACK
- TEXTING

Emirats arabes unis

United Arab Emirates

Emiratos Árabes Unidos

Collect calls to mobile numbers are not accepted

The telecommunication service with Israel is suspended

- TYPES OF COMMUNICATIONS TO SHIPS IN PORT
- CERTAIN COUNTRIES

#### Service Restrictions

See URL: www.itu.int/pub/T-SP-SR.1-2012

#### Sao Tome and Principe (country code +239)

Communication of 12.IX.2013:

The Autoridade Geral de Regulação (AGER), São Tomé, announces that according to the Law no.3/2004 of 2 July and Decree – Law no./2009 which regulates the provision of Audiotext services, AGER is responsible for monitoring, compliance monitoring and peace Audiotext service obligations provided with access codes assigned as well as compliance with other requirements.

In the inspections conducted, it was found that the services provided are not coincident with the nature and content required.

For this reason, the Board of Directors of the Regulatory Authority in exercise of its power, decided to temporarily suspend any provision of such services within and outside the country with effect from September 30, 2013.

#### Contact:

Mr Orlando de Assunção Fernandes Chairman of the Board of Directors Autoridade Geral de Regulação (AGER)

LONGSTANDING
OBLIGATION OF STATE
TRANSPARENCY
REGARDING CUTOFF OF
COMMUNICATIONS

**NEPAL, November 2017** 



Notification of unilateral suspension of selected international mobile phone communications

## (3) RAMIFICATIONS FOR THE INTERNATIONAL RIGHT TO COMMUNICATE

- ITL establishes a state obligation outside of human rights law that stipulates an internationallytransparent reporting requirement for suspension or stoppage of communications, including cyberenabled
- Applicable without prejudice to the question of
  - whether a right to communicate has been established by treaty or custom
  - whether government has met the permitted limitations criteria in ICCPR 19(3)

- There's a view that although the ITL regime of the ITU is longstanding and robust
  - expressed prior to the current realities of cyberspace cannot reasonably hold (David Fidler, 2015)
  - Even if the intent holds new modes of notification needed

### IN CONCLUSION: A MIDDLE GROUND

As Professor Schmitt has written recently regarding the grey zones
of the international law of cyberspace: "Legal ambiguity hobbles
responses" on the part of states in cyberspace.

Here's an opportunity for reducing some of that ambiguity.

- If the problem we're trying to solve is how to reduce the cavalier use by states of kill switches, in order to promote the enforcement of the freedom of expression in cyberspace
  - The ITL regime contains clear norms that have the potential to contribute to the transparency of state activity
  - There are decades of state practice to which no significant objections are evident.
  - The use of kill switches for internet and other communications should also be subject to this transparency requirement.

### **FURTHER ISSUES / QUESTIONS**

THE ROLE OF PRIVATE SECTOR ACTORS

A BROADER
EXAMINATION OF THE
RELEVANCE OF STATE
PRACTICE UNDER ITL
TO CURRENT
CYBERLAW ISSUES

