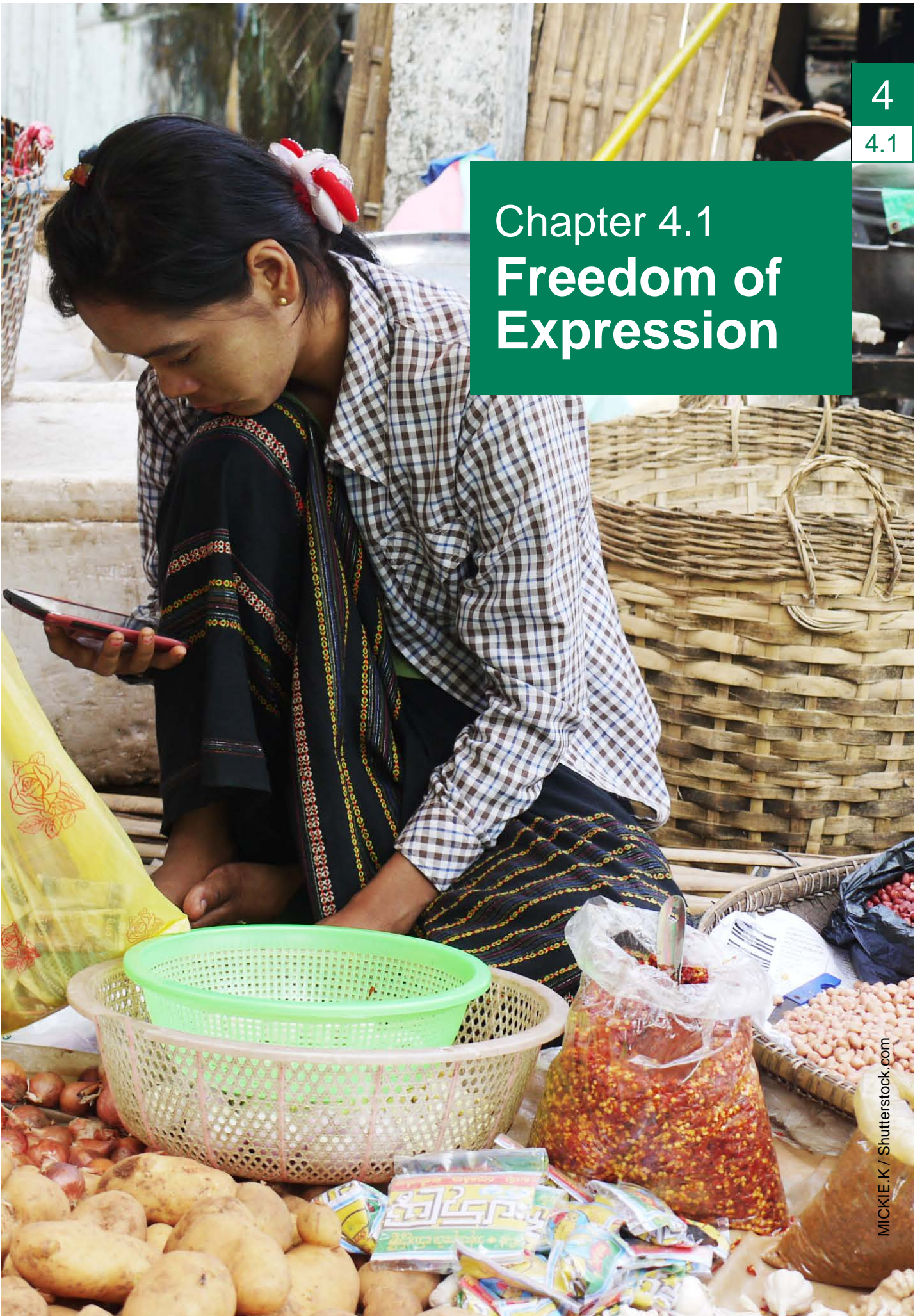


Chapter 4.1 Freedom of Expression



Chapter 4.1

Freedom of Expression

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A. Context

Freedom of Expression, Opinion and Information and the ICT Sector

Under international human rights law and standards, everyone has the right to hold opinions without interference and the right to freedom of expression, including the freedom to seek, receive and impart information. Technological developments and the growth of the ICT sector means the opportunities to express oneself have likewise grown exponentially. The expansion of the ICT sector has allowed individuals to communicate instantly and at a low cost. It has had a dramatic impact on journalism and the way in which we share and access information and ideas.

However the ICT sector can enable or impede the right to freedom of expression and access to information. For example, ICT companies may be asked by governments to illegitimately restrict online content or media broadcasts, or to hand over information on users and their communications. This censorship of content restricts freedom of expression and opinion. If users feel they are being watched, this can cause a 'chilling effect' on freedom of expression. There is growing concern from global civil society and some companies about this, accompanied by some corporate efforts to push back on Government requests for censorship. This can have positive implications for protecting the right to freedom of expression but also potential negative business consequences by risking formal or informal sanctions²¹⁸. Companies in parts of the ICT value chain play a direct role in facilitating or denying the right to free expression, through the choices they make to allow, block or take down content as outlined in their Terms of Service policies.²¹⁹

²¹⁸ See for example the Global Network Initiative and the Telcoms Sector Dialogue, and the UN Global Compact "[Human Rights and Business Dilemma Forum: Freedom of Expression, Speech and Opinion](#)" (last accessed August 2015).

²¹⁹ See for example, Council of European Union, "[EU Human Rights Guidelines on Freedom of Expression Online and Offline](#)" (2014).

Freedom of Expression and Opinion in Myanmar

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4.1

The opening of the ICT market in Myanmar and loosening restrictions on freedom of expression since the 2011 reforms has meant that people have enjoyed wider opportunities to express themselves, share information and communicate in ways that were previously denied. The choices and rules that companies and the Government make as the ICT sector expands will have significant impacts in future on the right to freedom of expression and access to information. Recognising that Myanmar is starting from one of the lowest penetration rates for mobile or Internet in the world, the Government put ambitious requirements on telecommunications operators to expand coverage²²⁰. In addition, the World Bank is financing pilot projects to implement localised ICT infrastructure in locations not covered by the commercial operators.²²¹

Since the reform process began in Myanmar during 2011, there have been signs of improvement in the rights to freedom of expression. This includes loosening restrictions in law and practice, on the media, and in the right to peaceful assembly and the ability to stage peaceful protests.²²² In August 2012 the Government lifted pre-publication censorship, under which the Government had previously required print media to be submitted for approval and censorship before publication. The authorities have also permitted the publication of independent daily newspapers and allowed exiled Myanmar media organisations to return to the country. Independent Myanmar media report regularly on criticism of the Government by civil society, protest demonstrations, and the authorities' crackdown on such demonstrations.

However, during 2014 journalists faced increased harassment and intimidation, and one journalist was shot dead when he reportedly tried to escape from military custody.²²³ Reporting on corruption or the military remains problematic, as shown by the arrests of Unity journalists in July 2014, some of whom were sentenced to years of hard labour for an article on an alleged military weapons factory.²²⁴ While the vast majority of those imprisoned solely for peaceful expression of their views have been released, including journalists, scores remain behind bars and others are at risk of arrest and imprisonment under a number of laws criminalising freedom of expression.²²⁵ Indeed, in February 2015

²²⁰ The government initially set a goal of 80 percent penetration rate by 2016, but adjusted this goal to 50 percent in a May press conference. See Jeremy Wagstaff, "[Mobile revolution in Myanmar is on the cards, but too slow for many](#)," Reuters (20 January 2013); Justin Heifetz, "['Beauty contest' for Myanmar's telecoms bid](#)," *Mizzima* (14 May 2013); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, "[Tenth Anniversary Joint Declaration: Ten Key Challenges To Freedom Of Expression In The Next Decade](#)" (2010) setting out concerns about differences in access to the Internet..

²²¹ World Bank "[Project Appraisal Document On a Proposed Credit in the Amount of SDR 20.60 Million \(\\$31.5 Million Equivalent\) to the Republic of the Union of Myanmar for a Telecommunications Sector Reform Project](#)" (January 2014).

²²² In January 2013 the President abolished Order No. 2/88 of 18 September 1988, which had banned gatherings of five people or more. See: The Republic of the Union of Myanmar President's Office, "[Order No. 3/2013](#)" (28 January 2013) and "[Order No 2/88](#)".

²²³ UN Information Centre, "[Statement of the Special Rapporteur on the Situation of Human Rights in Myanmar](#)" Yangon, (16 January 2015). The Committee to Protect Journalists (CPJ) has [designated](#) Burma as the 9th most censored country in the world.

²²⁴ See for example, The Irrawaddy, "[Burma Resorting to Police State Tactics' in Unity Trial: US Official](#)" (17 July 2014).

²²⁵ Amnesty International "[Stop Using Repressive Law against Peaceful Protesters](#)" (15 October 2014).

the UN High Commissioner for Human Rights noted that 10 journalists were imprisoned during 2014 “*under outdated defamation, trespassing and national security laws*”.²²⁶

The right to freedom of expression includes the right to seek, receive and impart information. There is currently no law on freedom of information in Myanmar, although civil society is advocating for such legislation.²²⁷ The Government is making preparations to join the Open Government Partnership, an international organisation that seeks strong commitments from participating governments to promote transparency, fight corruption, harness new technologies and increase participation of civil society to make the Government more open and accountable.²²⁸ In order to join, the Government must meet certain criteria; however, it reportedly scored very low in a 2014 assessment.²²⁹ Moreover a December 2014 Asia Foundation survey found very limited public knowledge about Government institutions and functions, and a low level of social trust.²³⁰

The Government imposed restrictions on the media during the November 2010 elections, which were widely believed to be neither free nor fair, although such restrictions were eased for the 2012 by-elections. Freedom of expression is thus especially important in the run-up to the General Elections scheduled to take place on November 8th 2015. Journalists and civil society will seek to inform the public about elections procedures, campaigning by political parties, and election results. Myanmar media is receiving training on election reporting and civil society working on electoral issues, and political parties have had several meetings with the Union Elections Commission on codes of conduct, voter registration and other election-related issues.²³¹ In addition, civil society groups are developing innovative ways to utilise new communication tools, including disseminating information about voter lists²³² and assisting with election monitoring.²³³ However, mobile communications have been used in other elections to incite violence (see Kenya case study, in [Chapter 3](#), Table 30).

Telecommunications and ICT policy and law in Myanmar is still in a nascent state and as a result, the Government has not yet addressed other areas that will have impacts on the freedom of expression, opinion and information such as intellectual property, defamation, net neutrality, competition²³⁴ and online anonymity.²³⁵ This means that, for the time being, individual ICT companies will manage these issues according to their own policies or Terms of Service. Of the wide range of actors in the ICT value chain in Myanmar, an increasing number are local start-ups and are likely to have little awareness of relevant

²²⁶ UN OHCHR “[Myanmar ‘needs urgently to get back on track’](#)” Seid (25 February 2015).

²²⁷ Eleven Media “[Rights Group Pushes for Freedom of Information Law](#)” (26 January 2015).

²²⁸ Mizzima “[Myanmar aims to join the Open Government Partnership](#)”, (12 November 2014). See also [Open Government Partnership](#)

²²⁹ Myanmar Times “[CSOs to give input on Open Government Partnership Bid](#)” (22 October 2014).

²³⁰ Asia Foundation “[Asia Foundation Releases Results of Nationwide Myanmar Public Opinion Survey](#)” (12 December 2014).

²³¹ New Light of Myanmar, “[Elections and responsibility of the media](#)” (7 March 2015) and Myanmar Times, “[UEC to meet civil society, parties](#)” (13 February 2015).

²³² Irrawaddy “[Electoral Education Underway as Batch of Voter Lists is Released](#)” (31 March 2015).

²³³ Irrawaddy “[Myanmar Civil Society Learns How To Harness ICT At USA ‘Tech Camp’](#)” (16 January 2014).

²³⁴ VDB Loi “[Myanmar’s New Competition Law: A Pitbull or a Paper Tiger?](#)” (8 March 2015).

²³⁵ For a longer explanation of many of these issues, see for example: Special Rapporteur on Freedom of Expression, InterAmerican Commission on Human Rights, “[Freedom of Expression and Internet](#)” (2013).

discussions, standards and concerns around human rights issues and the ICT sector and their potential impact on the freedom of expression.

Access to Information in Myanmar

There are a number of different dimensions to ‘access to information’ — the right to seek, receive and impart information, the availability of services in local languages and the actual availability of service (in terms of intentional shutdowns or restrictions of telecommunications services and the blocking, filtering or takedown of content). Article 19 has identified international best practices for right to information legislation (Table 35).

Table 35: ARTICLE 19’s Nine International Best Practices Principles on the Right to Information Legislation²³⁶

- **Maximum Disclosure:** Freedom of Information Legislation should be guided by the principle of maximum disclosure
- **Obligation to Publish:** Public bodies should be under an obligation to publish key information
- **Promotion of Open Government:** Public bodies must actively promote open government
- **Limited Scope of Obligations:** Exceptions should be clearly and narrowly drawn and subject to strict ‘harm’ and ‘public interest’ tests
- **Processes to Facilitate Access:** Requests for Information should be processed rapidly and fairly and an independent review of any refusals should be available
- **Costs:** Individuals should not be deterred from making requests for information by excessive costs
- **Open Meetings:** Meetings of public bodies should be open to the public
- **Disclosure Takes Precedence:** Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed
- **Protection for Whistle-blowers:** Individuals who release information on wrongdoing – whistle-blowers – must be protected

Right to Information/Freedom of Information

The Myanmar Framework for Economic and Social Reforms Policy Priorities for 2012-15 (FESR) contains a clear commitment to both the right to information and the freedom of information, highlighting the need to “*move as quickly as possible to define, legalise and enforce the right to information and to improve citizens’ access to information*” and to “*developing an institutional environment for free flow and access to information that empowers civil society*”.²³⁷ The FESR also states:

“GOM [the Government of Myanmar] intends that citizens are able to participate in the political process and to be well informed about policy decisions, which in turn will improve accountability. GOM has also emphasised cooperation with civil society, as a strong and active civil society is a critical counterpart to a more capable,

²³⁶ Article 19, “[The Public’s Right to Know](#).” Article 19, an international NGO focused on Article 19 of the UDHR on freedom of expression, has also published “[A Model Freedom of Information Law](#)”.

²³⁷ [Myanmar Framework for Economic and Social Reforms Policy Priorities for 2012-15](#) (FESR), para 114

responsive and accountable state as well as a stronger, more competitive and responsible private sector.”²³⁸

Despite these commitments to “*move as quickly as possible*”, there is currently no legislation guaranteeing right to information in Myanmar. The Asian Development Bank (ADB) e-Governance Master Plan emphasises the need for “*inclusive, integrated, and citizen-centric governance*”.²³⁹ Legislation guaranteeing a right to information would enhance this objective. Technology can also support citizen engagement and accelerate data collection through ‘crowdsourcing’, where the public submit information to a central platform which can help solve a particular social issue. For example, people can submit reports on local problems to the council through Fix My Street in the United Kingdom²⁴⁰ or report updates on water supply availability through Next Drop in India.²⁴¹

Preserving ethnic minority languages online

There are a wide range of languages spoken in Myanmar. There is concern that with the concentration of services in English and the predominant language Burmese, other languages will be increasingly marginalised in the online environment. Stakeholders from minority language groups may already be disadvantaged in relation to the physical accessibility of ICTs in their area, given that many of the ethnic minority groups live in the more remote areas of the country, further from the commercial and political capitals.

Denial of Access to Information – Restrictions, Blocking and Removing Content

Regulations restricting Internet usage in Myanmar can be traced back to January 2000 when the Government attempted to restrict the creation of webpages, sharing of Internet accounts, and posting of political content.²⁴² Research by the Open Network Initiative (ONI) indicates that the partial nationalisation of Internet service provider (ISP) Bagan Cybertech in 2004 was followed by further content censorship online, including the blocking of websites featuring content related to political opposition or human rights (including independent media websites), and the websites of email service providers.²⁴³ Other services have also been briefly blocked to try to protect State telecommunications revenue, including GoogleTalk and Gmail in 2006 and Skype in 2011.²⁴⁴

In 2012, ONI conducted a test of blocked URL’s on the ISP Yatanarpon Teleport. The results showed a drastic reduction in the amount of content filtered or blocked compared to previous testing in 2005. The categories of content blocked were: Pornography, content relating to alcohol and drugs, gambling sites, sex education, online dating sites and gay and lesbian content. Internet censorship circumvention tools were also blocked. A much smaller amount of content in the ‘Political’ category was blocked. Almost all of the

²³⁸ *Ibid.*

²³⁹ ADB/InfoSys, “[Republic of the Union of Myanmar: Design of e-Governance Master Plan and Review of Information and Communication Technology Capacity in Academic Institutions](#)” (July 2015), pg 35.

²⁴⁰ See: <https://www.fixmystreet.com/>

²⁴¹ See: <http://nextdrop.org/>

²⁴² BBC News Online “[Burma Clamps Down On The Web](#)” (20 January 2000).

²⁴³ Open Network Initiative, “[Internet Filtering in Burma in 2005: A Country Study](#)” (2005)

²⁴⁴ Irrawaddy “[Junta Blocks Google and Gmail](#)” (30 June 2006) and DVB, “[Internet Calls Banned As Junta Loses Out](#)” (20 March 2011).

websites of opposition political parties, critical political content, and independent news sites previously found to be blocked were found to be accessible during 2012 testing.²⁴⁵

More recently, as the ICT sector has developed and more international services are available, these services are beginning to track and report on requests from the Government of Myanmar. The social networking site Facebook noted in its Government Requests Report that, in the period July-December 2014, the company restricted access to 5 pieces of content reported by the President's Office based on sections 295(A), 298, 504, and 505 of the Myanmar Penal Code, which covers "*Acts or words which intentionally cause outrage or wound religious feelings*" and "*Statements or insults which intentionally provokes a breach of the peace or causes public mischief.*"²⁴⁶ (See [Chapter 4.2](#) on Hate Speech).

Network Shutdowns

Fulfillment of the right to access information also relies on the availability of telecommunications services, including mobile services and the Internet. Clause 77 of the *Telecommunications Law* grants MCIT the ability to "*temporarily suspend a telecommunication service, stop or prohibit any type of communication or use of telecommunication services*" when doing so would be "*for the benefit of the people*".²⁴⁷ The lack of a clear legal framework puts mobile operators, and Internet Service Providers (ISPs) at substantial risk of being ordered to shutdown networks or services without clear legal justification, impacting their responsibility to respect human rights such as freedom of expression.²⁴⁸

Network shutdowns are regularly used by governments worldwide to stifle free expression by cutting off the means of delivering a message.²⁴⁹ As more and more people become connected and rely on mobile and Internet services in their day-to-day lives, Government-ordered network and service disruption become increasingly disruptive and dangerous (see Table 36). Blocking of services during protests also impacts freedom of association, and often precedes further human rights violations.

Myanmar experienced a major Internet disconnection during the Saffron Revolution. In August 2007, protests grew throughout the country in a response to deteriorating economic conditions and political discontent. ICTs facilitated the flow of information from citizen journalists to media outlets around the world.²⁵⁰ In an attempt to prevent information reaching media outside of Myanmar, particularly regarding police brutality and

²⁴⁵ Open Network Initiative "[Update On information Controls in Burma](#) (23 October 2012).

²⁴⁶ Facebook "[Government Requests Report: Myanmar July 2014-December 2014](#)" (accessed Aug 2015).

²⁴⁷ *Myanmar Telecommunications Law*, Clause 77.

²⁴⁸ IHRB, "[Network Shutdowns in the DRC: ICT companies need clear rules](#)" (19 Feb 2015).

²⁴⁹ In 2013 and 2014 alone, Freedom House reported network disconnections, that were likely government-ordered, in Ethiopia, Iraq, Kazakhstan, Pakistan, Syria, Sudan, Uzbekistan, Yemen and Zimbabwe. See Freedom House, "[Freedom on the Net](#)" (2014). In Jan 2015, the government of the Democratic Republic of Congo ordered a near country-wide mobile network shutdown following protests over the President's unconstitutional decision to remain in power for a third term. In May 2015 in Burundi, following similar protests over the President's plan to seek another term, the government blocked access to Facebook, Twitter, Viber and WhatsApp. See IHRB, "[Network Shutdowns in the DRC: ICT companies need clear rules](#)" (19 Feb 2015).

²⁵⁰ For further analysis see: Berkman Centre for Internet and Society, "[The Role of the Internet in Burma's Saffron Revolution](#)" (28 September 2008).

the killing of protesters, the Government responded by shutting down Internet and mobile phone service. At the time Internet services provided by both MPT and Bagan Cybertech went down from September 29 to October 4, 2007. This was followed by a partial shutdown from 4-12 October during which access was restricted to late night hours between 22:00 and 04:00.²⁵¹

Table 36: Impacts of Government-Ordered Shutdowns or Service Disruptions

The impacts on human rights, the economy and national and personal security during network and service disruption can include:

- Restrictions on freedom of expression and access to information that may not be legal, necessary or proportionate.
- Injured people are unable to call emergency services, and emergency services are unable to communicate and locate people.
- People are unable to assure friends and relatives they are safe, causing panic.
- People are unable to call for help to be rescued from areas where protests are happening.
- Authorities are unable to disseminate important information to move people to safety, or to calm a concerned population.
- Human rights groups are unable to monitor situations effectively.
- Small businesses are unable to operate and livelihoods are affected. For example, businesses are unable to access data held in the cloud.
- Mobile banking transactions, relied on by millions of people, cannot take place.
- Transmission of health information on mobile phones also cannot take place.
- Students cannot access educational material.
- Doctors/ health workers are unable to access research or communicate in real time with each other.
- Other popular services carried out via mobile communications such as voting and birth registration are disrupted.
- Other services dependent on radio network may be disrupted e.g. cashpoints (ATM), public transport information.
- In national security emergencies, functioning communications are essential for an effective lawful interception system to help law enforcement locate and track people planning terrorist activity, subject to the process of law, court authorisation and sufficient oversight.
- Crimes cannot be reported to police via mobile phone.
- Hostages are unable to communicate with police.

More recently, Myanmar's Internet access went down for 1 hour and 19 minutes on 5 August 2013. Given its proximity to the anniversary of the 1988 uprising, there was speculation that the outage was intentional, though officially attributed to a damaged fibre optic cable near the SEA-ME-WE 3 submarine cable landing station in Pyapon.²⁵²

²⁵¹ Open Net Initiative "[Pulling the Plug: A Technical Review of the Internet Shutdown in Burma](#)" (2007).

²⁵² Irrawaddy "[Burma's Internet Delays Continue Ahead Of 88 Uprising Anniversary](#)" (5 August 2013).

Table 37: Key points for legislation on Network Shutdown to demonstrate a shutdown is necessary and proportionate

- Network shutdowns impacting the entire country should not be authorised.
- A shutdown must only be invoked if there is a real and imminent threat to national security or a national emergency, and a request must specify the reason for the shutdown.
- These situations must be prescribed by law, including which bodies or agencies are authorised to make a network shutdown request.
- A shutdown request must be approved or authorised by the highest level of the government.
- There must be a clear request process, with limited actors allowed to make the request to operators, and a designated person in the operator to receive the request.
- The shutdown request to the network operators must be in writing.
- The request must specify the duration and geographical reach of the shutdown, and demonstrating direct material necessity.
- Shutdowns should be limited in duration and geographical area.
- Where possible, the public must be informed of the shutdown, the duration, geography and services affected.
- Each shutdown must be logged/recorded, and a list published annually.
- The public must have access to emergency services.
- The legislation must be subject to review, including a review of each shutdown by an independent oversight body.²⁵³

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The impact of network shutdowns on freedom of expression is so severe that Special Rapporteurs on freedom of expression from the United Nations (UN), the Organisation of American States (OAS), the African Commission on Human and People's Rights and the Representative on freedom of the media from the Organisation of Security and Co-operation in Europe (OSCE), have all concluded in a Joint Declaration that cutting off access to the Internet can never be justified under human rights law, including on national security grounds:

“Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.”²⁵⁴

In a second Joint Declaration, they concluded that shutting down entire parts of communications systems (mobile and Internet) during times of conflict can never be justified under human rights law.

“...using communication ‘kill switches’ (i.e. shutting down entire parts of communications systems)... are measures that can never be justified under human rights law.”²⁵⁵

²⁵³ See IHRB, “Corporate Responses to Mobile Network Shutdowns. Case Study Telenor Pakistan” (forthcoming).

²⁵⁴ [Joint Declaration on Freedom of Expression and the Internet](#) (2011), Article 6b.

²⁵⁵ [Joint Declaration on Freedom of Expression and Responses to Conflict Situation](#) (2015) Article 4c

While these statements cover Internet shutdowns and network shutdowns in conflict situations, there is ambiguity as to the impact of mobile shutdowns in a Government proclaimed 'emergency'.

The Government of Myanmar has an opportunity for leadership in this area by committing to a 'no shutdown' policy, and only taking control of telecommunications networks in the most urgent of circumstances, for example a natural disaster of the scale of Cyclone Nargis that hit the country in 2008 where control of the network may be necessary to organise rescue operations. Table 37 identifies key points for legislation on network shutdown which could underpin such a 'no shutdown' commitment.

Anonymity Online

The issue of anonymity when communicating on the Internet is a contentious area that splits expert opinion. One view holds that people should be identifiable and therefore responsible for what they express, speak, or post on the Internet, as online anonymity can be abused in order to bully or 'troll' others and target and exploit children. In addition, online anonymity permits State officials to assume false identities in order to spy on minority groups, for example gay rights activists on social networking websites. Therefore, it is right that online service providers insist on users registering accounts with their real name and if the name is found to be fake, the account could be removed.

The other view holds that in many countries, those who express themselves openly face severe consequences if they are found out, and they have legitimate reasons to conceal their identity. Journalists, human rights defenders, trade union leaders, opposition politicians, dissidents, whistle-blowers, and other activists fall in this category. Using pseudonyms to protect identity is a practice that pre-dates the Internet. Journalists have long used assumed names when exposing injustice or speaking out against authoritarian regimes, a practice deemed necessary in order to protect freedom of expression. Human rights law does not require people to reveal their identities, and drawing from that, it is not necessary for Internet users to communicate only using their real name. Requiring people to register and provide their personal information to authorities can have significant consequences in certain societies and it can create a 'chilling effect' on freedom of expression.

The MCIT issued draft regulations on the registration of SIM cards, which could have had the same effect through requiring SIM card owners to register personal information. No final regulations appear to have been issued. (See [Chapter 4.3](#) on Privacy).

International Human Rights Law on Freedom of Expression

The Universal Declaration on Human Rights (UDHR) (Art. 19) and the International Covenant on Civil and Political Rights (ICCPR) (Art. 19) are the main international instruments that states commit to regarding the protection of freedom of expression.

Freedom of speech and expression carries with it special duties and responsibilities and is not absolute.²⁵⁶

Legitimate Restrictions on the Right to Freedom of Expression, Opinion and Information

Article 19(3) of the ICCPR provides that freedom of expression may be subject to certain restrictions which are: “a) *For respect of the rights or reputation of others; or b) For the protection of national security, or of public order (ordre public) or of public health or morals.*” Any restrictions must pass a three-part, cumulative test which should assess whether they:

- i. are provided for in national law which is clear and accessible to everyone (principle of legal certainty, predictability and transparency)
- ii. have a legitimate aim or purpose, i.e. one of the purposes set out in Article 19.3 (principle of legitimacy), and
- iii. are necessary and proportionate to the legitimate aim pursued, meaning that the restrictions must be the least restrictive means required and justifiable (principles of necessity and proportionality).

The Myanmar Legal Framework and its Current Application

2008 Constitution

The right of citizens “to express and publish freely their convictions and opinions” (Article 354 (a)) is guaranteed by the 2008 Constitution, but with significant restrictions. Article 354 guarantees the rights to freedom of expression, peaceful assembly, and association; however exercising such rights must not contravene “community peace and tranquillity”. These are very broadly and vaguely worded exceptions that could be (and have been) used to justify infringements to the guaranteed right that go well beyond the high bar imposed under international human rights law to justify restrictions on the freedom of expression.²⁵⁷ Moreover, the right to freedom of expression is only guaranteed for Myanmar citizens.

Laws Enacted Before 2011 and Still In Force

Many laws that greatly restrict freedom of expression and peaceful assembly have not been repealed and the authorities continue to use them to arrest and imprison people for peaceful activities. These include, but are not limited to:

- 1908 Unlawful Associations Law
- 1950 Emergency Provisions Act
- 1923 Official Secrets Act
- Various articles of the Penal Code, especially Article 505(b)²⁵⁸

Before the reform process began, the vaguely worded provisions of the *1950 Emergency Provisions Act*, particularly Article 5, were most frequently used to sentence people to long

²⁵⁶ See UN Human Rights Committee, “[General Comment 34: Article 19 - Freedoms of opinion and expression](#)” (11 September 2011).

²⁵⁷ Legal Background paper commissioned for IHRB.

²⁵⁸ For a discussion of these and other laws, see Amnesty International, “[Justice on Trial](#)” (July 2003).

terms of imprisonment solely for the peaceful expression of their views. Article 5(e) provides for a maximum sentence of seven years for spreading “*false news*”, which is not sufficiently defined as required under international human rights standards to provide sufficient certainty. Article 5(j) provides for the same sentence for disrupting “*the morality or behaviour*” or “*the security or the reconstruction of the stability of the union*”, also not sufficiently defined. International human rights standards require that all criminal laws are precise, so that people understand what conduct is prohibited, and can govern their conduct accordingly. Use of vague laws is open to abuse through criminalising conduct that is not understood as criminal before the event. Although the 1950 Emergency Provisions are currently used less frequently, they remain in force.

The *1908 Unlawful Associations Act* has also often been used in the past to imprison peaceful critics of the Government (see [Chapter 2](#) for details).

The *1923 Official Secrets Act* has been used to sentence peaceful critics of the Government, sometimes along with other laws criminalising the rights to freedom of expression and association. Article 3 provides for 3 to 14 years’ imprisonment “(1) *If any person for any purpose prejudicial to the safety or interests of the State...*” obtains or communicates information which might be useful to an enemy. “*The interests of the state*” is too broad and allows for the imprisonment of people with information that is not in fact a threat to the security of the State. Other provisions of the law provide for 2 years’ imprisonment for anyone who receives, possesses or passes on official information deemed to be secret (Section 5).²⁵⁹ In July 2014 five journalists from the weekly journal *Unity* were sentenced to 10 years, later reduced to 7 years, under the provisions of the *Official Secrets Act*, for a story on an alleged suspected military chemical weapons plant on seized land.²⁶⁰

Chapter XXI of the 1861 Penal Code, which derives from the British colonial era, provides for punishments of up to two years’ imprisonment and/or a fine for defamation. Chapter VII(B), 130(B) provides for punishments for libel against foreign powers.²⁶¹ In December 2013 a journalist from Eleven Media was sentenced to three months’ imprisonment on charges of trespass, abusive language, and defamation for reporting on a corruption case involving a local lawyer in Loikaw, Kayah State.²⁶² In March 2015 two journalists from the *Myanmar Post* were sentenced to two month’s imprisonment each on charges of defamation against a military MP in the Mon State Parliament.²⁶³

Section 505(b) of the Penal Code is currently one of the most commonly used provisions to arrest and sentence people, often along with other laws, for peacefully expressing their views. In October 2014 two activists from the community-based Movement for Democracy Current Force were sentenced to two years’ imprisonment under Section 505(b) in reference to a letter written about the need for an election of an interim government. Section 505(b) provides for imprisonment for anyone making, publishing or

²⁵⁹ Amnesty International “[Myanmar: Justice on Trial](#)” (July 2003) pg 28-33.

²⁶⁰ Human Rights Watch, “[World Report](#)” (2015).

²⁶¹ *Myanmar Penal Code 1861*

²⁶² Human Rights Watch “[Burma: Repression Marks Press Freedom Day](#)” (3 May 2014).

²⁶³ The Irrawaddy “[Journalists Handed 2-Month Prison Sentences on Defamation Charge](#)” (18 March 2015).

circulating information which may cause public fear or alarm, and which may incite people to commit offences “*against the State or against the public tranquillity*”.²⁶⁴

The *2004 Electronic Transactions Law* (the ETL) creates a range of offences for online content that are much broader than in the criminal code.²⁶⁵ In addition, the law does not provide safeguards for the right to freedom of expression. Under Article 33 of the ETL, it is a criminal offence to do any act or to receive, send or distribute any information detrimental to a wide range of broadly defined interests: the security of the state, the prevalence of law and order or community peace and tranquillity, national solidarity, the national economy or national culture that go far beyond permitted restrictions to the freedom of expression under international law. These same provisions are replicated in the *Computer Sciences Development Law*. See Chapter 2 for more details.

Laws Enacted Since the 2011 Reform Process

The *Media Law* and the *Printing and Publishing Law*, both of which apply to print and Internet publications, were passed in March 2014. The vague provisions of the *2014 Printing and Publishing Law* and broad powers of a Government Registrar to grant or revoke publishing licenses, led to fears of press self-censorship.²⁶⁶ However the *2014 Printing and Publishing Law* still represents a step forward compared to the repealed 1962 *Printers and Publishers Law*, which provided for wide censorship powers and imprisonment for operating without registration. Article 8 on content restrictions is broadly worded; for example, although the restriction on “*public order*” is a recognised legitimate objective under international human rights law to justify restrictions on freedom of expression, the law should be much more specific as to what types of statements are being prohibited.²⁶⁷

Articles 3 and 4 of the *2014 Media Law* guarantee respectively freedom from censorship and freedom to criticise the Government, but both must comply with the constitution (Article 3(a)), which itself has significant restrictions on freedom of expression. The *2014 Media Law* grants a media council, which is not independent from the Government, unrestricted control to regulate broadcast, print and Internet-based media, including on ethics.²⁶⁸ However these laws have not – yet – been applied to prosecute users of Internet services such as social networking.

²⁶⁴ Amnesty International “[Activist organization targeted again](#)” (6 November 2014).

²⁶⁵ Article 19, “[Background Paper on Freedom of Expression in Myanmar](#)” (2014), pg. 47.

²⁶⁶ The Irrawaddy, “[Burma Clampdown Gathers Pace as Legislation Passed](#)” (17 March 2014).

²⁶⁷ Article 19 “[Myanmar: Printing and Publishing Law, Legal Analysis](#)” (November 2014). See also PEN International, PEN Myanmar, PEN Norway, PEN American Center and MIDO “[Contribution to the 23rd session of the Working Group of the Universal Periodic Review. Submission on the Republic of the Union of Myanmar](#)” (23 March 2015).

²⁶⁸ Article 19 “[Myanmar: News Media Law, Legal Analysis](#)” (July 2014) and an [unofficial translation](#) of the *Media Law*.

B. Field Research Findings

Freedom of Expression

Human Rights Implicated: Freedom of expression and opinion

Field Assessment Findings

- Many interviewees felt that **reference to the impact of behaviour resulting specifically from ICTs is currently excluded from existing laws** and regulations impacting freedom of expression in Myanmar.
- Interviewees highlighted a **lack of guidelines** across public and private institutions on **how to use social media** appropriately.
- Most interviewees felt that **monks were in positions of particular prominence and power** regarding their influence on public opinion and the messages they convey. They felt monks' sermons were generally abided by without question by their followers.
- Some interviewees **questioned the effectiveness of some service provider's 'real names policies'** in Myanmar as often people open many social media or other online accounts under fake names.
- Many interviewees wanted to see **educational campaigns and programmes** introduced by the Government, on TV/media, and in Myanmar schools on the impacts of **dangerous speech and the need for respect and tolerance**.
- Many interviewees **did not report online speech and content they found offensive to site administrators** because they **did not know this was possible** and **because Internet connection was too slow**. (See [Chapter 4.2](#) Hate Speech)
- Although **filtering of online content** appears to have reduced, BlueCoat network equipment²⁶⁹ (used for filtering) was observed in one ISP's data centre. While this equipment was noted as legacy hardware pre-2011, it was unclear who had access to the equipment in the data centre. Any formal process around managing requests to block or filter content was unavailable, as was a mechanism to communicate with customers regarding impacts of such requests on them.

Freedom of Opinion

Human Rights Implicated: Freedom of expression and opinion

Field Assessment Findings

- Some **clear tensions** were observed by researchers **between traditional Myanmar culture and the introduction of more modern or global cultural trends via ICTs**.
- **Many interviewees felt that women were more vulnerable to impacts** on their 'dignities' from others' behaviours online and needed to be protected or limited from such exposure.
- Researchers also received **many reports of users believing all information published online was true** and not yet understanding how social media and other platforms worked.

²⁶⁹ See: CltizenLab, "[Behind Blue Coat: An update from Burma](#)" (29 November 2011).

Human Rights Implicated: Right to information

Field Assessment Findings

- Access to information has been a challenge in Myanmar for decades. **Many interviewees wanted the Myanmar Government and media to use ICTs to communicate to Myanmar people much more widely, particularly in rural regions**, and felt the introduction of the Internet and mobile technology would dramatically improve their ability to access information.
- Interviewees called for the establishment of **information centres** in rural areas to distribute information and act as knowledge resource hubs where people could seek information.

See also the Field Research Findings in [Chapter 4.2](#) on Hate Speech.

Myanmar Good Practice Examples:

- One of the international licensees is committed to developing 200 community information centres. The aim of these is to foster user adoption of mobile services and digital literacy across Myanmar, to connect to the outside world for rural communities that traditionally have not had access to connectivity or the masses of information available online and boost user adoption of mobile connectivity and Internet in rural areas and improve digital literacy through nationwide initiatives for schoolchildren.²⁷⁰
- One company has reported that its Myanmar operations are governed by a Code of Conduct and Code of Business Ethics, covering land, labour, health and safety, the environment, anti-discrimination, and privacy/freedom of expression. It conducted a human rights impact assessment in 2013, which identified key risks that will be reflected in its management systems.²⁷¹
- One company reported that it had no formal establishment, no manufacturing and no direct investment in Myanmar but does sell its products via its network of distributors. They initiated a human rights impact assessment prior to their market entry into Myanmar. It has a Global Human Rights Statement, applicable to Myanmar.²⁷²

C. Freedom of Expression: Recommendations for ICT Companies

- **Understand conflicts between national and international law:** Myanmar's laws on freedom of expression are not aligned with international laws and standards on freedom of expression. In addition, some clauses in the *Telecommunications Law* may allow censorship and surveillance (see Chapter 2). The World Bank has committed to carrying out a due diligence review of Myanmar's telecommunications laws as part of its Telecommunications Sector Reform project, but to date, none of the reviews have been made public.²⁷³ Recent Government practice has indicated that the

²⁷⁰ Telenor, "[Telenor opens doors of Community Information Centre](#)" (20 November 2014).

²⁷¹ Ericsson, "[Response by Ericsson: Myanmar Foreign Investment Tracking Project](#)", *Business & Human Rights Resource Centre* (last accessed September 2015).

²⁷² See further: Microsoft, "[Response by Microsoft: Myanmar Foreign Investment Tracking Project](#)", *Business & Human Rights Resource Centre* (last accessed September 2015).

²⁷³ M. Igoe, "[Is Myanmar ready for a telecommunications revolution?](#)" (6 May 2014).

Government at various levels, from local to national, continues to apply the laws and at times draconian practices against journalists, protestors and human rights defenders exercising their right to freedom of expression. These actions risk implicating companies in contributing to these violations when companies are requested to comply with Government requests to take down content, block access, or turn over information.

- **Publicly commit to respecting freedom of expression:** Given these concerns, and the gaps in other areas of law relevant to the sector, companies operating in the sector will need to develop their own policies and procedures to ensure that they are meeting their responsibility to respect human rights. In line with the UN Guiding Principles on Business and Human Rights, companies should make their policy commitment to respecting human rights publicly available.²⁷⁴ For some parts of the ICT value chain, the policy could provide more specific commitments on issues such as Government requests for data, censorship requests, illegal surveillance, or network shutdowns, including procedures for how to narrow requests that may be disproportionate or challenge requests not supported by law.²⁷⁵ Further internal procedures setting out how the company will deal with Government requests would be an appropriate precautionary measure to put in place in Myanmar.²⁷⁶
- **Take positions on key concerns:** Speaking up in public as an individual company to respond to concerns about censorship or imprisonment in violation of the freedom of expression may be sensitive in Myanmar. But companies might seek opportunities through other means, such as industry associations, embassies, in collaboration with civil society, to express their concerns and convey the impact that the lack of rule of law has on willingness to invest in the country and the risks posed to companies.²⁷⁷
- **Collaborate with and learn from other ICT companies:** Companies operating in the sector can look to multi-stakeholder initiatives such as the Global Network Initiative (GNI) and other sources of guidance²⁷⁸ for principles and guidance on dealing with challenges of being asked to comply with requests that violate human rights. They can also look to the example set by telecommunications operators in Myanmar that have publicly committed to pushing back on Government requests for surveillance until regulations are put in place. These commitments set important precedents for other companies and important signals to the Government on how requests that may violate the right to freedom of expression will be dealt with.
- **Build business partners' capability:** Many of the companies operating in the ICT value chain in Myanmar will be small companies, and many small local companies

²⁷⁴ Numerous companies operating in the ICT sector have already developed policy commitments on human rights and made those publicly available. See for example the ICT companies among this list: <http://business-humanrights.org/en/company-policy-statements-on-human-rights>

²⁷⁵ See: Human Rights Watch "[Reforming Telecommunications in Burma: Human Rights and Responsible Investment in Mobile and Internet](#)" (2013).

²⁷⁶ See: European Commission, "[ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights](#)" (2013), pg. 44-46, 59-60.

²⁷⁷ This is done in other markets for example, the Global Network Initiative has been particularly active in [commenting](#) on the need for reform by a range of governments to bring their laws and practices into line with international human rights standards.

²⁷⁸ The [GNI Principles on freedom of expression](#) state that: "*Participating companies will respect and protect the freedom of expression of their users by seeking to avoid or minimise the impact of government restrictions on freedom of expression, including restrictions on the information available to users and the opportunities for users to create and communicate ideas and information, regardless of frontiers or media of communication. Participating companies will respect and protect the freedom of expression rights of their users when confronted with government demands, laws and regulations to suppress freedom of expression, remove content or otherwise limit access to information and ideas in a manner inconsistent with internationally recognised laws and standards.*" See also, European Commission, "[ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights](#)" (2013).

may have had little exposure to discussions or concerns around freedom of expression and other human rights issues and their role and responsibilities. There is a clear need for further awareness raising and training that could be taken on by business partners, donors, and civil society. ICT companies may therefore find it necessary to put in place contractual requirements and follow up to ensure that their business partners are aligned with their human rights approach.

- **Prevent and mitigate impacts around the 2015 national elections:** Mobile operators and social media providers should consider experiences from other countries (see Table 30 case study on Kenya). They should consult relevant experts and other stakeholders, and devise appropriate responses to a range of pre and post-election scenarios to ensure that they are prepared to deal with unfolding events in a manner that best protects users.
- **Promote and preserve Myanmar languages online:** Companies may want to think creatively or collaboratively with other stakeholders (such as civil society or donors) about opportunities to facilitate access and use of minority languages. Companies should publish Terms of Service in local languages.
- **Understand what is being posted or discussed publicly in online company portals:** The wide range of languages in Myanmar has implications for those companies hosting content, such as social media pages, to be able to understand and decide upon whether content is consistent with the right to freedom of expression and in line with the company's terms of service. See also [Chapter 4.2](#) on Hate Speech.
- **Review anonymity policies:** Companies should think through the implications of including 'real names' policies, and whether these are effective in the context of Myanmar (see [Chapter 4.2](#) on Hate Speech). Companies should err on the side of allowing the use of pseudonyms particularly to individuals or groups who have a well-founded fear of possible prosecution. At the same time, companies may be required by law in some instances to reveal the identity of the user to the State (such as during an investigation into terrorism charges). In such a case, where appropriate, companies should inform the user that his or her identity has been compromised.
- **Provide and publish guidelines for employees and workers on the use of social media.** All companies should publish specific guidelines that educate staff on how to use social media and the Internet responsibly while at work.
- **Raise awareness** of how to use, why to use and the results of using social media platforms' 'content reporting' functions.
- **Promote public awareness of the link between ICT and human rights.** This can encourage more CSOs and media to understand and cover the issues.

Companies can also take steps to promote **access to information**:

- **Be transparent around ICT licenses, contracts and their Terms:** While the process to license the telecommunications operators was more transparent than previous bidding processes in Myanmar, the Government did not make the terms of the licenses public. Few governments do provide transparency around the terms of telecommunications operating licenses, but the pressure for contract transparency and information on tariffs, fees and proceeds around public service contracts will continue to grow. The International Finance Corporation (World Bank Group) "*encourages*" the disclosure of information around telecommunications projects it finances.²⁷⁹

²⁷⁹ IFC "[Policy on Environmental and Social Sustainability](#)" (2012), para 53: "*When IFC invests in projects involving the final delivery of essential services, such as the retail distribution of water, electricity, piped gas, and telecommunications, to the general public under monopoly conditions, IFC encourages the public disclosure of information relating to household tariffs and tariff adjustment mechanisms, service standards,*

- **Publicly report on Government requests for censorship:** Transparency enables governments and companies to demonstrate whether they are upholding key human rights principles and for other stakeholders to hold governments and companies accountable to such principles.²⁸⁰ A key development in company transparency in the ICT Sector has been the annual or bi-annual release by some companies of information relating to Government requests companies receive for content takedown, or requests for user data.²⁸¹ Publishing information on Government requests and how the company responded increases awareness among users of the scale and scope of Government requests, and increases transparency about corporate responses. The first transparency report was published by Google in 2010. To date, there is not a standardised method of publishing the information, and therefore each company transparency report differs slightly, making comparison difficult, but as more companies publish reports, there has been an effort to move beyond publishing mere numbers and add context on the laws governing censorship and surveillance, including areas where companies are prevented by law from disclosing information. Providing this additional context highlights the responsibilities of the Government and areas where disclosure and transparency can be improved.
- **Report according to the US State Department Requirements for US Companies:** The State Department requires all companies investing US\$500,000 or more in Myanmar to submit an annual report on their activities, covering areas including land, labour, environmental and other human rights. TPG Holdings, which through its jointly owned company Apollo Towers, is engaged in the construction and operation of telecommunications towers submitted a report in 2014.²⁸²
- See also [Chapter 4.4 on Surveillance](#).

D. Relevant International Standards and Guidance on Freedom of Expression

Relevant International Standards:

- Universal Declaration of Human Rights (Article 19)
- International Covenant on Civil and Political Rights (Article 19)
- Freedom Online Coalition, [Tallinn Agenda for Freedom Online](#) (2014)

Relevant Guidance:

- [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27 27th May 2011](#)
- UN Human Rights Council, [The Promotion, Protection and Enjoyment of Human Rights on the Internet](#), A/HRC/20/L.13 29th June 2012

investment obligations, and the form and extent of any ongoing government support. If IFC is financing the privatisation of such distribution services, IFC also encourages the public disclosure of concession fees or privatisation proceeds. Such disclosures may be made by the responsible government entity (such as the relevant regulatory authority) or by the client.”

²⁸⁰ Freedom Online Coalition, “[Draft Report Executive Summary](#)“ Working Group 3: Privacy and Transparency (May 2015).

²⁸¹ See, [Access Transparency Reporting Index](#), a record of transparency reports published by Internet companies and telecommunications companies.

²⁸² TPG Holdings, “[Re: Report on Responsible Investment in Myanmar](#)” Letter to the US Department of State (1 April 2014).