**12th Informal ASEM Seminar on Human Rights "Human Rights and Information and Communication Technology"**
**27-29 June 2012**
**Seoul, Korea**

## INTRODUCTION

I am honored to speak before you today at a critical moment in history, when the path of information and communication technology and the path of human rights—two fields that seemed so distant from one another years ago—finally meet. Not only are ICT developments and human rights related, they are now intricately intertwined and our meeting here in Seoul attests to that fact.

ARTICLE 19 is an international human rights organization, which focus on the defense and promotion of freedom of expression and information world-wide, including in Asia and Europe.

- At this present moment, one-third of the world's population is online with China alone representing almost 25% of all internet users worldwide. [1]

- In terms of Facebook, India boasts the 2nd largest figure of users in the world with approximately 43,500,000 people on the social media network (2nd only to that of the US, where the social media giant originated). Indonesia is close behind India with just over 43 million users.[2]

- The world's top broadband economies are from Europe and Asia and the Pacific. Europe leads in broadband connectivity, with fixed- and mobile-broadband penetration reaching 26% and 54%, respectively.

- How remarkable is it that there are 5.9 billion mobile-cellular subscriptions worldwide? Increasingly, people in the least developed areas of the world are accessing and using internet through their mobile phone – Nigeria has a booming financial service economy based on mobile technology; farmers in Kenya access data on their mobile phone about market prices.

- While the Arab Spring was not an internet or twitter revolution, it was probably the first historical example of the incredibly crucial role that information technology can play in liberating the voices of people, spreading it around the world, and empowering others to take action. Ah, the Arab Spring – it exhilarated us, human rights activists, and made many, many others nervous, very nervous indeed that the bug could spread.

---

[1] ITU, The World in 2011: ICT Facts and Figures: http://www.itu.int/ITU-D/ict/facts/2011/material/ICTFactsFigures2011.pdf
[2] http://www.forbes.com/sites/limyunghui/2012/02/02/india-is-now-facebook-nation-no-2-behind-the-u-s/

So the Internet has transformed politics, society, religion, culture and tradition, and is increasingly becoming the medium of choice through which people work, socialize, get involved, associate, act, and express themselves globally.

These transformations have come with a range of problems and challenges for governments around the world, but also private and civil society actors. Internet knows little boundaries but of course exist in an international system dominated by nation-states and its corollary – national sovereignty. The co-existence is complicated.

There are still a large number of people around the world (indeed the majority) who are either **IT access poor**, **access threatened or access repressed** around the world.

- **Access poor:** According to the ITU, 65% of the world population does not access and use Internet. While the figure is down from 82% in 2006, it is still very high. There is only a 4% internet penetration in Africa, and only 1% broadband based.

- **Access Denied:** A large number of governments around the world are denying access to Internet at specific moments in time. For instance, Algeria, Burma, Egypt, Libya, Syria and Tunisia have shut down access to the Internet for everyone during periods when they needed to prevent information flows to get in and out. A number of countries have large number of highly trained experts carrying out covert hacking on dissenting sources of information[3].

  According to Freedom House latest Internet Freedom report, "In 12 of the 37 countries examined, the authorities consistently or temporarily imposed total bans on YouTube, Facebook, Twitter, or equivalent services."

  In a joint statement of May 2011, 4 international experts mandated by the UN, OAS, OSCE and AU have asserted that cutting off the Internet or parts of the Internet for whole populations or sections of the public can never be justified, including on national security or public order grounds.

  In its most extreme form, access denied also includes North Koreans who are completely isolated from the rest of the world. There, the government has put in place an internal intranet in order to remain isolated from the world, and the Iranian government has announced the development of a similar technology.

- **Access repressed:** Many people around the world are access repressed - These include all those who face jail and imprisonment, or worse, for using internet or communicating through social media.

[3] See Rebecca MacKinnon's piece in your reading list material for the week: the incredible development of micro-blogs coupled with censorship run by private sector (Fanfou, people's daily and sina.com)

> **On-line journalists, including bloggers and twitters** account for the largest number of imprisoned journalists around the world.
>
> According to press freedom organisations, the number of imprisoned online journalists has gone through several consecutive years of significant increases. For instance, in 2010, Sixty-nine journalists whose work appeared primarily online were jailed as of December 1, constituting nearly half of all those in jail.
>
> In Mexico, twitters and bloggers have been increasingly targeted by drugs cartels for providing information to the Mexican public, which the traditional Media was unwilling to communicate out of fear.
>
> So far in 2012, according to our colleagues from RSF, 12 on-line and citizen journalists have been killed.

The existence of billions of individuals and groups of people around the world who are unable to access to internet, prevented from doing so, threatened and repressed if they access it, testify to the fact that **censorship has largely moved on-line**. This includes the imposition of cyber-borders, meant to prevent the flow of ideas and information.

-----------------

As the excellent study by the rapporteurs of this conference testifies, the development of the Internet over the last decade is posing very difficult issues and challenges to governments around the world, and indeed to a range of civil society and private actors as well, regarding governance, regulation, permissible limits, etc.

There are no simple responses to these challenges and while the temptation may be great to resort to quick fix solutions, I hope this conference will highlight the need to think outside the box – to challenge one's pre-conceived ideas, to strengthen our understanding of this new technology and mediums of expression rather than investing energy into unduly restricting them out of fear of the unknown or an innate desire to control.

ICT runs the discovery journey into our century – and we are all on board.

Like you, I don't know where the journey is bringing us. I am not even sure I know how we will be traveling since the means of communication evolve so fast. (Who twitted 2 years ago?)

But in the remaining time that I have to speak before you, I would like to share what I think should be the possible ground rules to make this journey as useful and agreeable for everyone. Some markers to guide us back and forth as we travel.

**<u>The first such marker</u>** for this journey is fairly self evident, is about **the limits to free expression on line.** I think that we ought to address this issue right at the beginning of the journey and get it right too.

As voiced by the Four international experts mandated by the UN, OAS, AU and OSCE to deliver expert advice on freedom of expression, **international standards on freedom of expression applies to the Internet, as it does to all means of communication. This means that the traditional human rights paradigm applies to internet**.

It is clear that the notion of 'seeking, receiving and imparting information or ideas' also encompasses activities which few societies could tolerate, such as incitement to hatred or murder, or the sale of pornography to children.

While the right to freedom of expression is universally recognised as one of fundamental importance, it is therefore also accepted that the right is not absolute.

Certain important public and private interests may justify action by the authorities which interferes with or limits the exercise of the right.

A key question, then, is exactly when and under which circumstances international law permits states to impose such restrictions.

Under Article 19(3) of the International Covenant on Civil and Political Rights, the right to freedom of expression can be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In addition, and under article 20 of the ICCPR, freedom of expression must be restricted in situation of incitement to hatred.

International courts have also devised a valid and reasonable three part test to determine whether a restriction is justified:

- First, the restriction must have a clear legal basis;
- second, it must pursue a legitimate aim; and
- third, the restriction must be necessary for the protection or promotion of the legitimate aim.

To justify a measure, which interferes with free speech, a government must be acting in response to a pressing social need, not merely out of convenience.

Second, if there exists an alternative measure which would accomplish the same goal in a way is less intrusive to the right to free expression, the chosen measure is not in fact 'necessary'.

Third, the measure must impair the right as little as possible and, in particular, not restrict speech in a broad or untargeted way, or go beyond the zone of harmful speech to rule out legitimate speech.

In protecting national security, for example, it is not acceptable to ban all discussion about a country's military forces.

The problem is that very often, the authorities unduly seek to remove content on line, which is perfectly legitimate. Or in seeking to block access to unlawful content, they block access to entire websites rather than the particular content at issue.

- The special rapporteurs recommend that the mandatory blocking of a website should always be ordered by a court
- The Human Rights Committee recently confirmed in its General Comment no.34 on Freedom of Expression that such orders should always be limited in scope, i.e. targeted at particular web pages rather than an entire site.
- More specifically, the HRC stated that permissible restrictions should be content-specific and that generic bans on the operation of certain sites and systems are not compatible with international law.
- Similarly, the prohibition of a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government is not a permissible restriction under international law. Indeed, this is akin to censorship.

The **second marker** on this journey should be to **determine and agree how we are going to travel and work together.** After all, there are a number of different actors involved, which are not necessarily used to travel and work together.

I hope we will have time to think through how we want this multi-stakeholders approach to work out and what should be the ground rules. I think this is a fundamental aspect of the challenges confronting us at the moment.

**From my standpoint, I think some rules for this multi-stakeholder approach should be the following:**

**First, Online anonymity is an important component of freedom of expression but it is not an absolutist principle.**

On-line anonymity matters because it protects and allows individuals to freely express themselves without fear of reprisals.

ARTICLE 19 is in agreement with the UN Special Rapporteur when he wrote that "The right to privacy is essential for individuals to express themselves freely. Indeed, throughout history, people's willingness to engage in debate on controversial subjects in the public sphere has always been linked to possibilities for doing so anonymously."

On the other hand, in situation where anonymous on-line users are suspected of a crime, or are subjecting others to vicious harassment, anonymity should be lifted – but only through a legal process, allowing a judge to do so, as will be the case in requests being made in the "material world."

**Second, The role of the industry, primarily internet service providers, and the various platform providers, should not include law enforcement.**

As the law currently stands in a large number of countries, private sector companies, in particular internet service providers, search engine companies, and other intermediaries, are put in the position where they are required to remove on-line content upon notice or face liability ('notice and takedown').

For instance, News website administrator Chiranuch Premchaiporn was charged under the Computer Crimes Act of 2007 for failing to quickly remove 10 anonymous and allegedly defamatory comments posted to her website. Please bear in mind that she did remove the content when prompted by the authorities, but it just was not fast enough. She was found guilty based on one of the comments, and while her eight-month prison sentence is suspended, the court did uphold her charge. Her conviction is also in breach of international standards for the protection of freedom of expression.

In fact, no one should be liable for content produced by others when providing technical services, such as providing access, searching for, or transmission or caching of information. This is the same rule that applied to phone companies by the way. Liability should only be incurred if the intermediary has specifically intervened in the content that is published online

But there is plenty evidence around the world of Internet Service Providers and other intermediaries removing material that is potentially legal in order to avoid liability.

Does this matter? We think it does. A great deal in fact.

ISPs have no legitimacy playing the role of the censors and doing so in such a way. The privatization of the rule of law and of law enforcement is an immensely problematic area of law, which cannot and should not be enacted and put in place without proper consultation with all actors concerned, including the users or the companies themselves,

Of course, there are arguments behind the current notice-and-takedown mechanism given the sheer volume of takedown requests. Google's transparency report shows that there were over 1.9 million copyright removal requests made to the search engine in the past month alone.[4]

[4] http://www.google.com/transparencyreport/removals/copyright/

However, expediency is not a legitimate argument to justify government's abuse of the rule of law and due process. Furthermore, blocking and filtering measures constitute a serious interference with freedom of expression.

So what can we do instead?

**On this ICT journey, we cannot put internet companies in the position of making decisions as to the legality of particular types of content, which they are not best suited – and often reluctant - to make.**

ARTICLE 19 recommends an hybrid system with ISP and other intermediaries acting following a due process which will offer some legal certainty. At best, this due process could be a court order. The Special Rapporteurs have also recommended that internet service providers and other intermediaries should only be required to take down content following a court order. Short of that, we should think of judicial or quasi-judicial mechanisms, which would allow for a proper and legitimate process regarding both control and protection of on-line freedom of expression.

As we are pursuing our journey, a key question we ought to ask ourselves is who is travelling with us. This is my last marker.

We ought to remember that in the space of a decade, the Internet has become ubiquitous in our lives. Not only do we use it to access information that we are interested in, but it has also become increasingly necessary in finding a job, working, studying, and selling and purchasing goods. It has become a basic part of everyday life.

ARTICLE 19 believes that access to the Internet is a human right and that States have a positive obligation to promote universal access to the Internet.

Approximately 70% of individuals under the age of 25 (1.9 billion people) are not online yet. Also ICT services remain more affordable and available in high-income economies than in low-income economies.

In 2010, the cost of ICT services in developed countries averaged at 1.5% of gross national income per capita, as compared to 17% of gross national income per capita in developing countries.

Furthermore, there is a significant divide in the level of Internet bandwidth available per Internet user – with an Internet user in Europe having approximately 45 times more bandwidth available than that of an Internet user from Africa.[5]

So surely **the sixth marker** in this journey ought to be that there is a universal right to internet, that internet is both an enabler of rights, and a right in and by itself. The right to

[5] Footnote 1, Disparities between regions in terms of available Internet bandwidth per Internet user remain, with on average almost 90'000 bit/s of bandwidth per user in Europe, compared with 2'000 bit/s per user in Africa.

freedom of expression may transcend any particular technology but that does not mean that the particular technology is unimportant.

So the sixth marker on our journey is that we should do our very best to ensure that we take as many people as possible with us – no one should be left behind because they were late or did not run fast enough or had a bad start – Surely, this is the one journey which everyone should take.