

# Internet Shutdowns and the Corporate Responsibility to Respect Human Rights

An analysis of the responsibility of Internet Service Providers under the  
UN Guiding Principles on Business and Human Rights

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# 1 Introduction

In 2011, a wave of protests spread across the Middle East and North Africa. During the massive uprising known as the Arab Spring, the Internet played a key role in mobilising youth to demand justice.<sup>1</sup> A demonstrator in Cairo stated that they used “Facebook to schedule the protests, Twitter to coordinate and YouTube to tell the world”.<sup>2</sup> As the riots were spreading fast across the region, former Egyptian President Mubarak ordered the four major Internet Service Providers (ISPs) in the Egypt to shut down the Internet to disrupt the communication among protesters.<sup>3</sup> The four ISPs, Link Egypt, Vodafone/Raya, Telecom Egypt and Etisalat Misr complied with the order, and shut down the Internet for five days.<sup>4</sup> Since then, Internet shutdowns have increasingly been employed as a strategic tool by governments to quell protests and silence protesters. Taking place in a diverse range of countries, Internet shutdowns are now a global phenomenon referred to as the “new normal” in many countries.<sup>5</sup>

The longest Internet shutdown documented so far in history is currently taking place in Myanmar. In June 2019, the Myanmar Ministry of Transport and Communication (MoTC) ordered ISPs to “temporarily” suspend Internet access in several townships in Rakhine State and Chin State.<sup>6</sup> The shutdown is still ongoing and impacts approximately one million people<sup>7</sup> in a region characterised by armed conflict and human rights violations. Fighting between the Burmese military Tatmadaw, and the Rakhine-based armed group Arakan Army, has escalat-

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<sup>1</sup> Regeringskansliet ‘Enhancing Internet freedom and human rights through responsible business practices’ (Government Offices of Sweden 2012) <<https://www.government.se/49b751/contentassets/e454e4c8e503424280cddf988bd36118/enhancing-Internet-freedom-and-human-rights-through-responsible-business-practices>> accessed 17 November 2020

<sup>2</sup> Regeringskansliet (n 1)

<sup>3</sup> Christopher Williams, ‘How Egypt shut down the Internet’ *The Telegraph* (28 January 2011) <<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8288163/How-Egypt-shut-down-the-internet.html>> accessed 17 December 2020

<sup>4</sup> Charles Arthur, ‘Egypt cuts off internet access’ *The Guardian* (28 January 2011) <<https://www.theguardian.com/technology/2011/jan/28/egypt-cuts-off-internet-access>> accessed 17 December 2020

<sup>5</sup> Access Now, ‘The state of Internet shutdowns around the world – The 2018 #KeepItOn report’ (Access Now 2019) p. 3 <<https://www.accessnow.org/cms/assets/uploads/2019/07/KeepItOn-2018-Report.pdf>> accessed 17 November 2020 (Access Now 2018 Report); Internet Society, ‘Policy Brief’ (updated December 2019) <<https://www.internetsociety.org/policybriefs/Internet-shutdowns>> accessed 17 November 2020 (Internet Society Policy Brief); Human Rights Watch, ‘Shutting Down the Internet to Shut Up Critics’ (HRW 2020) <<https://www.hrw.org/world-report/2020/country-chapters/global-5>> accessed 17 November 2020 (HRW)

<sup>6</sup> Telenor Group, ‘Network shutdown in Myanmar, 21 June 2019’ (Telenor Group, 21 June 2019) <<https://www.telenor.com/network-shutdown-in-myanmar-21-june-2019/>> accessed 30 January 2021; Telenor Group, ‘Press releases: Continued network restrictions in Myanmar’ (Telenor Group, 31 December 2020) <<https://www.telenor.com/network-restrictions-in-myanmar-1-august-2020/>> accessed 15 January 2021

<sup>7</sup> Independent International Fact-Finding Mission on Myanmar, ‘Report to the 42<sup>nd</sup> session of the Human Rights Council’ (HRC 2019) A/HRC/42/CRP.5 (FFM Report 2019) para 471

ed since the start of 2019 and is severely affecting the region.<sup>8</sup> The Tatmadaw is notorious for its brutal military operations, indiscriminatory attacks, burning of villages and violations of the right to life.<sup>9</sup> Additionally, the region hosts most of the Rohingya Muslims in the country, who are disproportionately affected by the shutdown and remains a target for government attacks and ethnic cleansing campaigns.<sup>10</sup> The Burmese government has a history of shutting down the Internet to prevent information about human rights violations from spreading.<sup>11</sup>

Authorities are increasingly using shutdowns as a tool to control the information landscape and the ability of citizens to mobilise.<sup>12</sup> As Chapter 2 demonstrates, access to the Internet is a horizontal catalyst to fulfil a range of human rights. With particular reference to the shutdown in Myanmar, this thesis will look closer into the responsibility of the ISPs for the human rights impacts related to the implementation of a shutdown. This is an intricate and underexamined issue within the emerging field of business and human rights.

## 1.1 Shutdowns and the Role of Internet Service Providers

Internet shutdowns can be described as “an intentional disruption of Internet-based communications, making them inaccessible or unavailable for a specific population, location, or type of access”.<sup>13</sup> The shutdown can happen at a national level, with a blanket shutdown affecting users across the whole country, or on a local or subnational level, where mobile broadband or fixed Internet in a region, town or other limited area, is cut off.<sup>14</sup> Internet shutdowns differ from application level shutdowns and content censorship or blocking, where the Internet remains available, but access to selected applications or information is not.<sup>15</sup> Often, the Internet shutdown order is justified by the government based on security purposes, safeguarding government authority, reducing public dissidence, combating “fake news” or

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<sup>8</sup> FFM Report 2019 (n 7) para 10-16; Amnesty International ‘Myanmar: End internet shutdown in Rakhine, Chin States’ (Public Statement 25 June 2019) ASA 16/0604/2019 <<https://reliefweb.int/sites/reliefweb.int/files/resources/ASA1606042019ENGLISH.PDF> on 12 November 2020> accessed 20 December 2020; Anthony Ware and Costas Laoutides, *Myanmar's 'Rohinya' Conflict* (Hurst 2018)

<sup>9</sup> FFM Report 2019 (n 7) para 12

<sup>10</sup> FFM Report 2019 (n 7) para 2-9

<sup>11</sup> Anita R. Gohdes, ‘Pulling the Plug: Network Disruptions and Violence in Civil Conflict’ (2015) 52(3) *Journal of Peace Research*, 352; Myanmar Centre for Responsible Business, Institute for Human Rights and Business and the Danish Institute for Human Rights, ‘Myanmar ICT Sector-Wide Impact Assessment’ (MCRB September 2015) 128 <<https://www.myanmar-responsiblebusiness.org/pdf/SWIA/ICT/complete.pdf>> accessed 30 January 2021

<sup>12</sup> Dionne Searcey and Francois Essomba, ‘African Nations Increasingly Silence Internet to Stem Protests’ *The New York Times* (10 February 2017) <<https://www.nytimes.com/2017/02/10/world/africa/african-nationsincreasingly-silence-Internet-to-stem-protests.html>> accessed 17 November 2020

<sup>13</sup> Internet Society, ‘Internet Society Position on Internet Shutdowns’ (17 December 2019)

<<https://www.Internetsociety.org/resources/doc/2019/Internet-society-position-on-Internet-shutdowns/>> accessed 17 November 2020 (Internet Society Position on Internet Shutdowns)

<sup>14</sup> Internet Society Policy Brief (n 5)

<sup>15</sup> Internet Society Position on Internet Shutdowns (n 13)

fighting terrorism.<sup>16</sup> These reasons may arguably, in certain circumstances, be legitimate justifications for disrupting communication. However, the cited reasons only rarely correspond with what human rights organisations claim must be the true motivation.<sup>17</sup> This thesis will refer to Internet shutdowns as instances where a government has ordered an ISP to restrict access to the Internet for a population completely, or by severely decreasing the Internet browsing speed with similar effects.<sup>18</sup>

An Internet shutdown has wide-ranging human rights impacts. It can inhibit the exercise of human rights, such as the right to health, education and freedom of expression and access to information. It may also constitute a targeted form of digital repression that disproportionately affects marginalised communities and violates the right to equality and freedom from discrimination.<sup>19</sup> In many cases, Internet shutdowns have also enabled or contributed to concealing violence and human rights violations perpetrated by governments or other actors.<sup>20</sup> In the decade following the Arab Spring, Internet shutdowns have gained increased attention on the international level. For instance, several Special Rapporteurs on Freedom of Expression have issued Joint Declarations on Freedom of Expression and the Internet. These clearly state that cutting off access to the Internet, for whole populations or segments of the public, can never be justified under international human rights law (IHRL).<sup>21</sup>

While the responsibility for ordering a shutdown rests with the government, the orders are carried out by ISPs.<sup>22</sup> This thesis refers to an ISP as a company that provides internet

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<sup>16</sup> Ryan Shandler and Daphna Canetti, 'A Reality of Vulnerability and Dependence: Internet Access as a Human Right' (2019) 52(1) Israel Law Review 77, 79 and 86; Access Now 2018 Report (n 5)

<sup>17</sup> Access Now 2018 Report (n 5)

<sup>18</sup> In Myanmar, the government has made 2G available to the affected areas, but the UN Special Rapporteur on the situation of human rights in Myanmar report that residents are still unable to access mobile Internet: UN Special Rapporteur Thomas H Andrews, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (1 September 2020) UN Doc A/75/335, para 26

<sup>19</sup> Jan Rydzak, 'Disconnected: A Human Rights-Based Approach to Network Disruptions' (Global Network Initiative 2018) 13 <<https://globalnetworkinitiative.org/wp-content/uploads/2018/06/Disconnected-Report-Network-Disruptions.pdf>> accessed 22 December 2020 (Rydzak report)

<sup>20</sup> Rydzak report (n 19) 13; Access now, 'How Internet shutdowns are threatening 2020 elections, and what you can do about it' (Access Now 15 October 2020) <<https://www.accessnow.org/Internet-shutdowns-2020-elections-journalists-and-the-media-are-unable-to-report>> accessed 22 December 2020; Gohdes (n 11); Yanghee Lee, Cecilia Jimenez-Damary, David Kaye and Fernand de Varennes, 'UN experts concerned at a surge in civilian casualties in northwest Myanmar after Internet shutdown' (OHCHR 18 February 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25572&LangID=E>> accessed 22 December 2020; Yanghee Lee, 'Myanmar: UN expert 'fears for civilians' after Internet shutdown' (OHCHR 24 June 2019) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24733&LangID=E>> accessed 22 December 2020

<sup>21</sup> Frank La Rue, Dunja Mijatovic, Cataline B. Marino and Faith P Tlakula, 'Joint declaration on freedom of expression and the Internet' (OSCE 1 June 2011) para 6b <<https://www.osce.org/files/f/documents/e/9/78309.pdf>> accessed 22 December 2020; Office of the High Commissioner for Human Rights, 'Joint Declaration on Freedom of Expression and Responses to Conflict Situations' (OHCHR 4 May 2015) para 6c <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E>> accessed 22 December 2020

<sup>22</sup> Colette G. St-Onge, 'Internet shutdowns: Bad for human rights, bad for business' (Business and Human Rights Resource Centre 21 Sept 2016) <<https://www.business-humanrights.org/en/blog/Internet-shutdowns-bad-for-human-rights-bad-for-business/>> accessed 17 November 2020;

connections and services to individuals and organisations, both mobile broadband and fixed line broadband. An ISP operates on a licence issued by the host government. Increasingly, developing countries include licencing provisions that can require an ISP to shut down the Internet in times of crisis.<sup>23</sup> When governments order the shutdown of the Internet, ISPs usually justify their actions based on compliance with clauses in the licencing agreement and local laws, and the possibility of losing their licence if they do not comply with such orders.<sup>24</sup>

## 1.2 Research Question

In 2011, the same year that the first widely documented Internet shutdown was taking place in Egypt, the United Nations adopted the Guiding Principles on Business and Human Rights (UNGPs). During the decade that followed, the UNGPs developed into the “global authoritative standard” setting out the steps enterprises need to take to uphold their human rights responsibility.<sup>25</sup> However, a report by the UN Working Group on Business and Human Rights from 2018 revealed that the majority of companies fail to meet the requirements set out in the UNGPs.<sup>26</sup> This thesis will investigate the responsibilities of ISPs for human rights impacts of an Internet shutdown through answering the following research question:

*How can an Internet Service Provider operate in line with its responsibility to respect human rights under the UN Guiding Principles when ordered to shut down the Internet?*

To answer this, the thesis will firstly consider the human rights impacts of Internet shutdowns, and place these within the relevant framework of international law. Further, the paper will discuss whether there is an independent right to Internet access. Subsequently, the UNGPs will be examined and the responsibilities they entail for ISPs will be assessed. The UNGPs recognise that corporations may face conflicting requirements when placed in a domestic context where local laws or authorities demand the undertaking of activities that may adversely impact human rights. This is a particularly pressing issue for ISPs, who operate on a

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<sup>23</sup> Bennett Freeman, ‘Shared Space under Pressure: Business support for civic freedoms and human rights defenders. Guidance for Companies’ (Business and Human Rights Resource Centre and International Service for Human Rights 2018) P. 73 <<https://media.business-humanrights.org/media/documents/3e0f36fc20b47da5465a230beeb34e5ee084f30c.pdf>> accessed 17 November 2020

<sup>24</sup> HRW (n 5)

<sup>25</sup> UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, describes the Guiding Principles as “the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights” in Z Ra’ad Al Hussein, ‘Ethical Pursuit of Prosperity’, The Law Society Gazette (23 March 2015) <<https://www.lawgazette.co.uk/commentary-and-opinion/ethical-pursuit-of-prosperity/5047796.article>> accessed 20 December 2020

<sup>26</sup> Working Group on Business and Human Rights, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (UN General Assembly 16 July 2018) UN Doc A/73/163, para. 25

licence issued by the government. As such, the thesis will focus particularly on the dilemmas faced by ISPs when interpreting and implementing the UNGPs.

### **1.3 Scope and Limitations**

The scope of this thesis is limited to Internet shutdowns, and the focus is solely on Internet shutdowns or severe decreases in Internet browsing speed. The issue of Internet shutdowns is closely connected to a larger debate on surveillance and other forms of product functionality in ICT software and hardware that can be exploited by governments. As the purpose of this thesis is to examine the human rights impacts of an Internet shutdown and the responsibilities of ISPs in this regard, this thesis will not look at application level shutdowns, content censorship, blocking or surveillance through ISPs. Furthermore, it will not address the global Internet infrastructure and the possible disruption and damage an Internet shutdown can cause to the integrity of the global infrastructure of the Internet.

The thesis focuses on the international framework for human rights responsibilities of corporations, limited to the human rights impact on the affected users. As such, any discussion of domestic criminal or civil liability, or international criminal liability, is left out. The thesis will place emphasis on the dilemmas for ISPs when navigating their responsibility to respect human rights. These dilemmas will relate to requirements from their host state that conflict with their responsibility under the UNGPs. Therefore, this thesis does not contain a discussion on the potentially conflicting interests of corporations, namely maximising shareholder value while respecting human rights.

### **1.4 Methodology**

This thesis is the result of desk-based research and policy analysis.<sup>27</sup> The framework employed is the UNGPs and IHRL. These sources of law are analysed with reference to scholarly work such as journal articles and books on the emerging topic of business and human rights. In order to add empirical evidence on how Internet shutdowns have been ordered and implemented, and allow for practical analysis of the UNGPs in relation to this, the thesis also relies widely on reports and assessments compiled by international organisations, as well as media coverage. There is vast scholarly literature on the human rights impacts of Internet shutdowns. However, very little of this has to date focused on the dilemma surrounding the

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<sup>27</sup> As proposed by Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63(1) *Journal of Legal Education* 65



responsibility of ISPs for these impacts. This thesis attempts to connect the academic work on Internet shutdowns, with the activities and guidelines by non-governmental organisations (NGOs), to examine how ISPs can operate in line with UNGPs when faced with shutdown orders.

To strengthen the practical analysis of the UNGPs for ISPs, the thesis will also refer to the ISP, Telenor, and the long-lasting shutdown that has been implemented in Myanmar. This case is chosen as it demonstrates the complex operating contexts for ISPs, and because of Telenor's emphasis on transparency and operating in line with the UNGPs. Telenor Myanmar is a wholly owned subsidiary of the Norwegian state-owned company, Telenor Group.<sup>28</sup> The company launched its operations in Myanmar in 2014, after being awarded a licence by the Burmese government.<sup>29</sup> Since 21 June 2019, Telenor has been implementing a shutdown in several townships in Northern Rakhine, and has been ordered to extend the restrictions on 3G and 4G until 31 March 2021.<sup>30</sup> The Fact-Finding Mission on Myanmar concluded in its 2019 report that the Internet shutdown in Myanmar is disproportionate and not compatible with IHRL.<sup>31</sup> As such, this case sheds light on how a company can emphasise respect for human rights and the UNGPs, while still implementing an Internet shutdown. The added value of including this case is to illustrate the dilemmas faced by ISPs that seek to implement the UNGPs when receiving Internet shutdown orders.

After their unanimous adoption by the UN Human Rights Council (HRC) in 2011,<sup>32</sup> the UNGPs quickly became the global standard of practice expected by states and businesses with regard to business and human rights.<sup>33</sup> The Principles are not legally binding and were not meant to create new international legal obligations,<sup>34</sup> but to clarify and expand on the already

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<sup>28</sup> The Norwegian State owns 53.97% of the shares in the Telenor Group: Regjeringen.no, 'Hva staten eier' (Regjeringen.no 2 July 2020) <<https://www.regjeringen.no/no/tema/naringsliv/statlig-eierskap/selskaper---ny/id2604524/?expand=factbox2607470>> accessed 2 January 2021

<sup>29</sup> Telenor Myanmar, 'About' (2020) <<https://www.telenor.com.mm/my/about>> accessed 30 November 2020; Telenor, 'Telenor issues response to complain' (OECD Watch 17 February 2020) <[https://complaints.oecdwatch.org/cases/Case\\_562](https://complaints.oecdwatch.org/cases/Case_562)> accessed 20 November 2020

<sup>30</sup> On 1 September 2019, it was reported that Ministry of Transport and Communications lifted the internet ban in Maungdaw, Buthidaung, Rathedaung and Myebon Townships in Rakhine and Paletwa Township in Chin State, but only 2G was reinstated, see UN Special Rapporteur Thomas H Andrews (n 18) para 26

<sup>31</sup> FFM Report 2019 (n 7) para 467-468

<sup>32</sup> UNHRC Res 17/4 'Human rights and transnational corporations and other business enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4

<sup>33</sup> Office of the High Commissioner on Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (OHCHR 2012) 1 (UNGP Interpretive Guide)

<sup>34</sup> UNGA, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31, para 14 (UNGPs are found in the Annex, which is henceforth referred to as UNGP) (UNGA Report); UNGP General Principles

existing norms and practice, and indicate where the system should be improved.<sup>35</sup> The UNGPs are based on the “Protect, Respect and Remedy” framework developed by UN Secretary General’s Special Representative on Business and Human Rights, John Ruggie, in 2008. These elements form the three pillars of the UNGPs. Pillar I contains principles concerning the state’s “duty to protect” human rights, and outlines what states should do to comply with their existing international legal obligations.<sup>36</sup> Pillar II contains principles about business enterprises’ “responsibility to respect” all internationally recognised human rights.<sup>37</sup> Pillar III contains principles aiming to enable “access to remedy” for victims of negative human rights impacts.<sup>38</sup> For the purposes of assessing ISP responsibilities, this thesis will focus on Pillar II of the UNGPs, and analyse how the “responsibility to respect” can be operationalised by ISPs when ordered by authorities to shut down the Internet.

The analysis will be guided by sectoral initiatives aimed at assisting the interpretation and implementation of the UNGPs in the ICT sector. The Telecommunication Industry Dialogue (TID) was an initiative by a group of telecommunications operators and vendors to address freedom of expression and privacy rights, who collaborated to adopt the TID Guiding Principles on Freedom of Expression and Privacy (TID Principles).<sup>39</sup> The TID is now incorporated into the Global Network Initiative (GNI), but the TID Principles remains an independent document that still sheds light on the interpretation of the responsibilities of ISPs. The GNI is a multi-stakeholder platform consisting of ICT companies, human rights organisations, academics and investors. The GNI has developed the GNI Principles and Implementation Guidelines,<sup>40</sup> aiming to take root as a global standard on ICT companies’ responsibility for human rights in light of the UNGPs.<sup>41</sup> In addition to undertaking policy initiatives on Internet shutdowns,<sup>42</sup> the GNI also carry out biannual independent assessments of their mem-

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<sup>35</sup> UNGA Report (n 34) para 14

<sup>36</sup> UNGP 1 to 10

<sup>37</sup> UNGP 11 to 24

<sup>38</sup> UNGP 25 to 31

<sup>39</sup> Telecommunication Industry Dialogue, ‘Telecommunications Industry Dialogue on Freedom of Expression and Privacy: Guiding Principles’ (Telecommunication Industry Dialogue 6 March 2013) <[http://www.telecomindustrydialogue.org/wp-content/uploads/Telecoms\\_Industry\\_Dialogue\\_Principles\\_Version\\_1\\_-\\_ENGLISH.pdf](http://www.telecomindustrydialogue.org/wp-content/uploads/Telecoms_Industry_Dialogue_Principles_Version_1_-_ENGLISH.pdf)> accessed 20 November 2020 (henceforth referred to as TID Principles); Telecommunications Industry Dialogue, ‘About’ (archive website 2016) <<http://www.telecomindustrydialogue.org/about/>> accessed 20 November 2020

<sup>40</sup> Global Network Initiative, ‘The GNI Principles on Freedom of Expression and Privacy’ (GNI 2017) <<https://globalnetworkinitiative.org/wp-content/uploads/2018/04/GNI-Principles-on-Freedom-of-Expression-and-Privacy.pdf>> accessed 20 November 2020 (Henceforth referred to as GNI Principles); Global Network Initiative, ‘Implementation Guidelines for the Principles on Freedom of Expression and Privacy’ (GNI 2017) <<https://globalnetworkinitiative.org/wp-content/uploads/2018/08/Implementation-Guidelines-for-the-GNI-Principles.pdf>> accessed 20 November 2020 (henceforth referred to GNI Implementation Guidelines)

<sup>41</sup> GNI Principles (n 40), Preamble

<sup>42</sup> Freeman (n 23) 99

bers' progress in implementing the GNI Principles, including their responses to Internet shutdown orders.<sup>43</sup> The European Commission has also developed the ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights (hereafter referred to as the EC Guide), with specific regards to human rights due diligence.<sup>44</sup> Together with reports from the Institute for Human Rights and Business, all the above-mentioned instruments and documentation will be utilised to assist the interpretation of the UNGPs for establishing the human rights responsibility of ISPs in the context of Internet shutdowns.

## 1.1 Structure

As the focus of the thesis is the human rights responsibility of ISPs in relation to Internet shutdowns, Chapter 2 establishes which human rights are impacted by a shutdown. In line with sectoral guidelines on the UNGPs and ICT, the chapter focuses specifically on the right to freedom of expression and access to information, as well as the lawful restrictions to these rights. The chapter also discusses whether there exists an independent right to access the Internet.

Chapter 3 outlines the corporate “responsibility to respect” human rights as presented in the UNGPs. It focuses on the main elements of creating a human rights policy and undertaking human rights due diligence. It highlights the dilemmas that the responsibility poses for ISPs when faced with an Internet shutdown order, specifically relating to conflicting requirements from the UNGPs and domestic law or government orders.

Chapter 4 attempts to navigate these dilemmas and connect the UNGPs and theory on business and human rights to explore how ISPs can tackle the dilemmas. It contains a discussion on whether ISPs can justify a breach of their responsibility to respect human rights based on compliance with domestic laws. It discusses whether an Internet shutdown can be in line with IHRL and proposes measures the ISPs can take to implement a shutdown order within that framework.

Chapter 5 concludes that the UNGPs does not provide sufficient guidance to ISPs when faced with the conflicting requirements they often meet when providing Internet in states with

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<sup>43</sup> Global Network Initiative, ‘About’ (GNI 2021) <<https://globalnetworkinitiative.org/about-gni/>> accessed 20 November 2020

<sup>44</sup>European Commission, ‘ICT sector guide on implementing the UN guiding principles on business and human rights’ (Publications Office of the European Union 2014) (henceforth referred to as EC Guide)

weak human rights institutions. The chapter holds that a stronger framework is necessary to provide clear guidance on how ISPs can operate in line with their responsibility and makes recommendations for future research.

## 2 Human Rights Impacts of Internet Shutdowns

Internet shutdowns have wide-ranging human rights impacts. Shutdowns may conceal violence and severe human rights violations perpetrated by governments or other actors.<sup>45</sup> By disrupting the free flow of information, shutdowns exacerbate any existing tensions in a state and increase the likelihood of violent protests.<sup>46</sup> Additionally, when the Internet is inaccessible, students may not be able to access teaching materials or attend classes, impacting on the right to education.<sup>47</sup> Those in need of health care may be unable to get consistent access to the healthcare system and first responders may be prevented from effectively coordinating and communicating their efforts, potentially hampering life-saving medical treatment and assistance to displaced populations,<sup>48</sup> impacting on the right to health.<sup>49</sup> As seen in Myanmar, Internet shutdowns can disproportionately affect specific segments of populations, impacting on the right to equality and freedom from discrimination.<sup>50</sup> As the Arab Spring demonstrated, the Internet is central in organising and planning collective action, and shutdowns also impact the right to freedom of assembly and association.<sup>51</sup> Access to the Internet may thus be described as a horizontal catalyst to fulfil a range of human rights.

Whether IHRL provides a right to access the Internet is a debated question. One of the most explicit attempts to ground a human rights theory of Internet access was offered by Michael Best in 2004. He argued that “a symmetric information right to some extent requires the Internet, and thus access to the Internet itself has become a human right”.<sup>52</sup> Others have made the argument that the existing right to freedom of expression is sufficiently broad to capture the rise of the Internet as a source of expression, communication and information. The following sections will outline the right to freedom of expression and access to information in IHRL and examine whether there is an independent right to Internet access. Lastly, the chapter will address lawful restrictions to the right to freedom of expression under IHRL, to provide a

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<sup>45</sup> Rydzak report (n 19) 13; Access now, ‘How Internet shutdowns are threatening 2020 elections, and what you can do about it’ (n 20)

<sup>46</sup> Jan Rydzak, ‘Of Blackouts and Bandhs: The Strategy and Structure of Disconnected Protest in India’ (Working Paper, 7 February 2019) <<https://ssrn.com/abstract=3330413>> accessed 17 November 2020

<sup>47</sup> See e.g. Universal Declaration of Human Rights, Article 26; International Covenant on Economic, Social and Cultural Rights, Article 13; Convention on the Rights of the Child, Article 28

<sup>48</sup> Internet Society Position on Internet Shutdowns (n 13); HRW (n 5) Amnesty (n 8)

<sup>49</sup> See e.g. UDHR Article 25

<sup>50</sup> Rydzak report (n 19); See e.g. UDHR Article 7; ICCPR Article 26

<sup>51</sup> See e.g. ICCPR Article 22; UDHR Article 20

<sup>52</sup> Michael L Best, ‘Can the Internet Be a Human Right?’ (2004) 4 Human Rights & Human Welfare 23

foundation for the ensuing discussion in Chapter 3 and 4 on whether an Internet shutdown can be implemented in line with IHRL.

## **2.1 Freedom of Expression and Access to Information**

One of the more direct impacts of Internet shutdowns concern the right to freedom of expression and access to information. Studies have been undertaken to analyse how access to the Internet may impact the realisation of these rights. Shandler (2018) found that Internet access significantly impacted the realisation of freedom of expression, association and access to information.<sup>53</sup> In fact, Internet access was stated to be the sole variable to significantly predict success in the exercise of these rights.<sup>54</sup> This study provides a foundation for the following discussion on freedom of expression and the Internet, which constitutes a central feature of this thesis.

The right to freedom of expression and access to Information is contained in IHRL and codified in the International Covenant on Civil and Political Rights (ICCPR) and provided for in the Universal Declaration of Human Rights (UDHR). Article 19 (2) of the ICCPR establishes that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.<sup>55</sup> Article 19 of the UDHR sets forth that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.<sup>56</sup> Based on the premises stipulated by these rights, a corollary question is whether IHRL thus gives rise to a right to the Internet.

### **2.1.1 An Existing Right to the Internet?**

In 2011, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, wrote in his report that Article 19 of the ICCPR were drafted to include and accommodate “future technological developments through

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<sup>53</sup> Ryan Shandler, ‘Measuring the Political and Social Implications of Government-Initiated Cyber Shutdowns’ (2018) 8th USENIX Workshop on Free and Open Communications on the Internet (FOCI ’18)

<sup>54</sup> Shandler and Canetti (n 16) 82

<sup>55</sup> ICCPR Article 19 (3)

<sup>56</sup> UDHR Article 19

which individuals can exercise their freedom of expression”.<sup>57</sup> Therefore, the IHRL framework remains equally applicable to “new communication technologies such as the Internet”, and that cutting off users from Internet access entirely is disproportionate and thus a violation of article 19 of the ICCPR.<sup>58</sup>

The UN Human Rights Committee has echoed this, claiming that Article 19 (2) protects all forms of expression and the means of their dissemination, including all forms of Internet-based modes of expression.<sup>59</sup> Likewise, the legislative history of the ICCPR may thus show an intent to recognise a right with broad application.<sup>60</sup> During the drafting phase of the ICCPR, the word ‘seek’ was preferred over the word ‘gather’, to protect ‘active steps to produce and study information’ and minimise constraints to the protection of communications.<sup>61</sup> Similarly, the relevant clause of the UDHR could be widely interpreted to include a right to Internet access. The ambiguous phrasing of “regardless of frontiers” exists in both the UDHR and the ICCPR, and can be understood to indicate that the clause should apply to any medium facilitating the distribution of ideas and information,<sup>62</sup> and that the right is extraterritorial.<sup>63</sup> Additionally, some suggest that the right to Internet access is more auxiliary in nature.

### 2.1.2 An Auxiliary Right to the Internet?

Another interpretation is that the right to Internet access is a derived or auxiliary right, which “serves to protect some primary right”.<sup>64</sup> An auxiliary right is born out of its connection with a primary right, but it maintains the same protection and limitations as the primary human right that it serves.<sup>65</sup> As such, auxiliary rights recognise the modern manifestations of particular rights, to ensure that the right is protected, but also the relevant activity of exercising that right.<sup>66</sup> In light of this, as the ability to freely express ourselves and seek information

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<sup>57</sup> UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (16 May 2011) UN Doc A/HRC/17/27 (La Rue Report) para 21; see also Jason M Tenenbaum, ‘Is There a Protected Right to Access the Internet?’ (6 June 2014) Blog of the International Journal of Constitutional Law <<http://www.iconnectblog.com/2014/06/is-there-a-protected-right-to-access-the-internet>> accessed 17 November 2020

<sup>58</sup> La Rue Report (n 57) para 21 and 78

<sup>59</sup> UN Human Rights Committee, ‘General Comment no. 24, Article 19, Freedoms of Opinion and Expression’ (12 September 2011) UN Doc CCPR/C/GC/34 (CCPR GC 34) para 12

<sup>60</sup> Molly Land, ‘Toward an International Law of the Internet’ (2013) 54 Harvard International Law Journal 393; Shandler and Canetti (n 16) 92; Tenenbaum (n 57)

<sup>61</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1993) 343

<sup>62</sup> Shandler and Canetti (n 16) 92

<sup>63</sup> Land (n 60)

<sup>64</sup> Simon Rice, ‘The Right of Access to Law’ in Andreas von Arnald, Kerstin von der Decken and Mart Susi (eds) *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 461-562

<sup>65</sup> Shandler and Canetti (n 16) 94

<sup>66</sup> Kate Mathiesen, ‘The human right to Internet access: A philosophical defense’ (2012) 18 International Review of Information Ethics 9

has become so dependent on access to the Internet, a right to the Internet may have become a right auxiliary to that of freedom of expression and the right to access information. Similarly, the right to Internet access could also be auxiliary to the right to freedom of association, education, employment, health and more. As demonstrated above, the Internet is central to the realisation of the attached rights, which could be sufficient to activate a claim of auxiliary righthood.<sup>67</sup> Seeing the right to Internet access as an auxiliary right offers both concrete protection of human rights, and flexibility as technological platforms and modes of communication develop.<sup>68</sup>

### 2.1.3 A Customary Right to the Internet?

Another approach to the Internet as a right, is to see the rising domestic and institutional support as pointing towards the creation of a customary law rule. Customary international law is shaped through *opinio juris* and state practice.<sup>69</sup> As mentioned in the Introduction and Section 2.2.1, several UN mechanisms have claimed that the Internet is an indispensable tool for realising human rights. Former UN Special Rapporteur Frank La Rue called on states to “ensure that Internet access is maintained at all times, including during times of political unrest”.<sup>70</sup> Since June 2012, the UN HRC has regularly adopted resolutions focusing on human rights on the Internet. For instance, HRC resolution 20/8 on The promotion, protection and enjoyment of human rights on the Internet, affirms that “the same rights that people have offline must also be protected online”<sup>71</sup> and calls upon all states to “promote and facilitate access to the Internet”.<sup>72</sup> HRC resolutions have also included unequivocal condemnation of “measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law” and called on all states to “refrain from and cease such measures”.<sup>73</sup>

On the national level, several countries have passed legislation on the topic, emphasising the importance of Internet access. In 2009, the Constitutional Court of France concluded

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<sup>67</sup> Shandler and Canetti (n 16) 94

<sup>68</sup> Shandler and Canetti (n 16) 96

<sup>69</sup> Anthea E Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95(4) *The American Journal of International Law* 757

<sup>70</sup> La Rue Report (n 57) para 79

<sup>71</sup> UNHCR Res 20/8 ‘The promotion, protection and enjoyment of human rights on the Internet’ (16 July 2012) UN Doc A/HRC/RES/20/8, para 1

<sup>72</sup> UNHCR Res 20/8 (n 71)

<sup>73</sup> UNHRC Res 32/13, ‘The promotion, protection and enjoyment of human rights on the Internet’ (27 June 2016) UN Doc A/HRC/32/13; UNHRC res 20/8 (n 71); UNHRC Res 26/13 ‘The promotion, protection and enjoyment of human rights on the Internet’ (14 July 2014) UN Doc A/HRC/26/13



that freedom of expression must include freedom to access online networks.<sup>74</sup> In the UK, the Court of Appeal recognised that the Internet is an ‘essential part of everyday living’ to which access can only be limited under specific circumstances.<sup>75</sup> In Greece, a constitutional amendment inserted a clause stating that the facilitation of access to electronically transmitted information is an obligation of the State.<sup>76</sup> In Finland, the government has declared that high-speed broadband Internet is a legally enforceable right.<sup>77</sup> In Costa Rica, the Supreme Court ruled that it is a fundamental right to access ICT, and in particular, a right to access the Internet.<sup>78</sup> Even though the statements and judgments may not meet the legal criteria for proving a customary right to access the Internet, the increasing number of legislative, legal, constitutional and international proposals concerning Internet rights may ultimately lead to that result.

## 2.2 Lawful Restrictions to Human Rights

As the exercise of these rights carry special duties and responsibilities,<sup>79</sup> the ICCPR opens for certain lawful restrictions to these rights by States. In other words, they are not absolute rights, such as the prohibition on torture and other cruel, inhuman or degrading treatment. Still, restrictions must not confer unfettered discretion on those charged with their execution.<sup>80</sup> Restrictions must comply with the principles of legality, necessity and proportionality.<sup>81</sup> According to ICCPR Article 19 (3), restrictions must be provided for by law.<sup>82</sup> This entails that restrictions must not only be formally enacted as law; they should also “be made accessible to the public” and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”.<sup>83</sup> Second, they must be necessary for the “respect of the rights or the reputations of others” or “for the protection of national security or of public order, or of public health or morals”.<sup>84</sup> Finally, restrictions must be proportionate to achieve a

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<sup>74</sup> France Constitutional Council, Decision no. 2009-580 (10 June 2009)

<sup>75</sup> R v Smith & Others [2011] EWCA Crim 1772

<sup>76</sup> Greek Constitution, article 5 A (2)

<sup>77</sup> Decree no. 732/2009 of the Finnish Ministry of Transport and Communications on the Minimum Rate of a Functional Internet Access as a Universal Service (14 October 2009); Bobbie Johnson, ‘Finland Makes Broadband Access a Legal Right’ *The Guardian* (14 October 2009) <<https://www.theguardian.com/technology/2009/oct/14/finland-broadband>> accessed 22 December 2020

<sup>78</sup> Costa Rica Sala Constitucional, Expediente 09-013141-0007-CO (30 July 2010)

<sup>79</sup> ICCPR 19(3)

<sup>80</sup> CCPR GC 34 (n 59) para 25; Office of the High Commissioner of Human Rights, ‘Freedom of Expression and Elections in the Digital Age, Report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ (2019) Research Paper 1/2019, 3 <<https://www.ohchr.org/Documents/Issues/Opinion/ElectionsReportDigitalAge.pdf>> accessed 17 November 2020 (Freedom of Expression in the Digital Age)

<sup>81</sup> Giovanni De Gregorio and Nicole Stremmlau, ‘Internet Shutdowns and the Limits of Law’ (2020) Gale Literature Resource Center 4224 <<https://go-gale-com.ezproxy.uio.no/ps/i.do?p=LitRC&u=oslo&id=GALE%7CA635453960&v=2.1&it=r>> accessed 17 November 2020

<sup>82</sup> ICCPR 19(3)

<sup>83</sup> CCPR GC 34 (n 59) para 25

<sup>84</sup> ICCPR 19(3)

legitimate government objective.<sup>85</sup> In particular, restrictions must “target a specific objective and not unduly intrude upon the rights of targeted persons”, and must be “the least intrusive instrument among those which might achieve the desired result”.<sup>86</sup> These conditions must be met for a restriction to accord with IHRL.<sup>87</sup>

The adaptability of IHRL, coupled with our growing dependency on the Internet, offers some protection of our access to the Internet. Even though the interpretation of the ICCPR and UDHR does not activate an individual right to Internet access *per se*, one can argue that the effect would in principle be the same.<sup>88</sup> The remaining question is perhaps not whether Internet access is a right, but under what framework the right manifests.<sup>89</sup> This thesis suggest that any right to access the Internet should be found through the interpretation of the ICCPR and UDHR. As such, any restrictions to this right are subject to the requirements outlined in these legal instruments.

On this basis, the following chapters examines in detail the corporate responsibility to respect human rights under the UNGPs, with reference to freedom of expression and access to information. The discussion on lawful restrictions to these rights is particularly relevant when assessing whether an Internet shutdown can be implemented in line with ISPs’ responsibilities under the UNGPs and the wider IHRL framework.

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<sup>85</sup> Freedom of Expression in the Digital Age (n 80) 3

<sup>86</sup> ICCPR GC 34 (n 59) para 34

<sup>87</sup> See e.g. ICCPR 19(3); ICCPR GC 34 (n 59) paras. 21-36

<sup>88</sup> Land (n 60)

<sup>89</sup> Shandler and Canetti (n 16) 95

### 3 The Responsibility to Respect Human Rights

Pillar II of the UNGPs outlines the corporate responsibility to respect human rights, which is the focus of this thesis. Upon the inception of the UNGPs, the responsibility to respect was an innovative normative construction, connecting the global expectation to enterprises directly to the human rights framework,<sup>90</sup> while maintaining the differentiation from the states' duties. The principles should be understood as a “coherent whole” and should be “read in terms of their objective” of enhancing standards and practices to achieve tangible results.<sup>91</sup> As the aim with the UNGPs was to establish a global standard regulating all business enterprises, the Principles are formulated in abstract terms and thus the concrete methods for implementation of the Principles will inevitably vary.<sup>92</sup> The responsibility to respect applies to “all business entities”<sup>93</sup> and refers to “all internationally recognised human rights”,<sup>94</sup> with a particular emphasis on those rights at heightened risk in the particular context.<sup>95</sup> Hence, the UNGPs provide flexibility to the enterprises in terms of focusing on those rights that are relevant to their operations and specific context.<sup>96</sup> ISPs that operate in a domestic legal environment where there is a risk that the government will order a shutdown of the Internet in violation of IHRL, must therefore focus on the rights impacted by their operations under such conditions.

The UNGPs hold that the corporate responsibility to respect human rights should be operationalised through a human rights policy,<sup>97</sup> which is implemented through human rights due diligence (HRDD) processes.<sup>98</sup> The main element of the UNGPs is the responsibility of businesses to undertake HRDD processes. HRDD should include taking action to identify, assess, mitigate, prevent, avoid, cease or remediate negative impacts on rights arising from company activities.<sup>99</sup> These measures should be implemented to ensure that the corporation

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<sup>90</sup> UNGP 11 Commentary

<sup>91</sup> UNGP General Principles

<sup>92</sup> UNGA Report (n 34) para 15

<sup>93</sup> UNGP General Principles; UNGP 14

<sup>94</sup> UNGP 12

<sup>95</sup> UNGP 12 Commentary

<sup>96</sup> Larry Cata Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (2015) 38 *Fordham Int'l LJ* 457, 494

<sup>97</sup> Telenor Group, 'Human Rights' (Telenor Group) <<https://www.telenor.com/sustainability/responsible-business/human-rights/>> accessed 20 November 2020

<sup>98</sup> Mark Taylor, 'Human right due diligence in theory and practice' in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business* (Ed Elgar 2020), 88

<sup>99</sup> Taylor (n 98) 88

respects all internationally recognised human rights, “over and above” national laws.<sup>100</sup> Several international NGOs, initiatives and institutions have sought to assist the interpretation of the UNGPs with sector-specific guidance on the ICT sector, including the TID, the GNI and the European Commission. These guidelines and principles will be used to inform the below analysis of the corporate responsibility to respect.

This chapter will examine the main principles for the corporate responsibility to respect human rights and analyse these in light of ISP operations and Internet shutdowns. To illustrate the practical implementation of the UNGPs for ISPs and Internet shutdowns, the chapter will make specific reference to Telenor operations in Myanmar, which has maintained local Internet shutdowns despite evidence of human rights violations, while still placing a strong emphasis on human rights and the UNGPs.<sup>101</sup> The chapter will highlight the dilemmas ISPs are faced with when ordered to shut down the Internet. This will lay the foundation for the following chapter, which will discuss how these dilemmas can be navigated and explore to what extent, and under which conditions, an ISP can implement an Internet shutdown while still operating in line with the responsibility to respect human rights.

### **3.1 Respecting Human Rights**

The core element of the UNGPs set out that businesses should respect all internationally recognised human rights.<sup>102</sup> This includes, at a minimum, the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work’.<sup>103</sup> ‘Respect’ is defined as to “avoid infringing on the human rights of others” and to “address adverse human rights impacts with which they are involved”.<sup>104</sup> This includes impacts that are directly linked to their operations, including by their business relationships, “even if they have not contributed to those impacts”.<sup>105</sup> This responsibility exists independently of state actions or obligations.<sup>106</sup> As set out above, the UNGPs holds that business entities should respect human rights

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<sup>100</sup> UNGP 11 Commentary; Amnesty (n 8)

<sup>101</sup> Telenor Group, ‘Annual Report 2019’ (Telenor Group 2020) 48 <<https://www.telenor.com/wp-content/uploads/2020/03/2201011-Annual-Report-2019-Q-a97d1b270234873cebe5901dfe14e8c2-1.pdf>> accessed 20 November 2020; Telenor Group, ‘Human Rights Policy: Respect’ (Telenor Group) <<https://www.telenor.com/sustainability/responsible-business/human-rights/respect>> accessed 20 November 2020

<sup>102</sup> UNGP 12 Commentary; 18 Commentary

<sup>103</sup> UNGP Principle 11

<sup>104</sup> UNGP 11; UNGP 13

<sup>105</sup> UNGP 13

<sup>106</sup> UNGP 11 Commentary

“over and above compliance with national laws”.<sup>107</sup> Still, the responsibility to respect human rights should not “undermine States’ abilities to meet their own human rights obligations”, including by actions that might weaken the integrity of judicial processes.<sup>108</sup>

From the outset, this poses an intricate dilemma for many ISPs. Several countries have laws that allow for the suspension of Internet access, or for the government of the state to take control of communication technologies. For example, in Myanmar, Section 77 of the Law on Telecommunications allows for government suspension of telecommunication services in the event of an “emergency situation”.<sup>109</sup> However, the law does not define what qualifies as an emergency situation<sup>110</sup> and it provides no guidance as to who has the authority to declare an emergency situation.<sup>111</sup> As the ISPs operate on licences awarded by the governments, it can prove a difficult task to refuse such an order, when the order itself is consistent with domestic laws of the host country. Furthermore, the companies’ responsibility should not undermine states’ abilities to meet their own obligations. Often, shutdown orders are justified by the state with reference to national security. This may be indirectly linked to their obligation to protect the human rights of their citizens, and in certain cases the ISP’s decision to refuse to comply with a shutdown order may undermine the state’s ability to uphold their own human rights obligations. In relation to Internet shutdowns, it can be difficult for companies to respect human rights, while at the same time remaining in compliance with national laws.

When business enterprises are faced with conflicting requirements, the UNGPs state that businesses should seek to respect internationally recognised human rights to the greatest extent possible in the circumstances, and be able to demonstrate their efforts in this regard.<sup>112</sup> Where it is necessary to prioritize actions to address human rights impacts, businesses should seek to “prevent and mitigate those that are most severe or where delayed response would make them irremediable”.<sup>113</sup> The direct effect of an Internet shutdown is the violation of the

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<sup>107</sup> UNGP 11 Commentary

<sup>108</sup> UNGP 11 Commentary

<sup>109</sup> Myanmar Telecommunications Law of 2013, Section 77

<sup>110</sup> International Commission of Jurists, ‘Myanmar: Year-long Internet shutdown must be brought to an end’ (ICJ 20 June 2020) <<https://www.icj.org/myanmar-year-long-internet-shutdown-must-be-brought-to-an-end/#:~:text=Section%2077%20of%20the%20Telecommunications%20Law%20authorizes%20the%20MOTC,control%20the%20Telecommunications%20Service%20and>> accessed 23 January 2021

<sup>111</sup> FFM Report 2019 (n 7) para 469; Telenor Group, ‘Authority Requests for Access to Electronic Communication – legal overview’ (Telenor Group 2017) 66 <[https://www.telenor.com/wp-content/uploads/2015/05/Authority-Request-Legal-Overview\\_March-2017.pdf](https://www.telenor.com/wp-content/uploads/2015/05/Authority-Request-Legal-Overview_March-2017.pdf)> accessed 20 November 2020

<sup>112</sup> UNGP 23 Commentary; EC Guide (n 44) 30

<sup>113</sup> UNGP 24

rights to freedom of expression and access to information, which may, in a narrow context, not lead to irremediable harm. As such, this system of prioritisation in the UNGPs may lead ISPs to prioritise other risks when faced with a shutdown order. For example, several ISPs have recorded that such orders are accompanied by threats to ground staff and employees.<sup>114</sup> As these impacts may constitute irremediable harm, an ISP may have to prioritise such risks, over the risk to users in their immediate response.

### 3.2 Human Rights Policy

Companies should have a policy commitment on human rights, as outlined by foundational principle 15 and operational principle 16. This should be publicly available and be reflected in operational policies and procedures.<sup>115</sup> The policy should be “approved at the most senior level of the business enterprise”<sup>116</sup> and be “communicated actively to entities with which the enterprise has contractual relationships”.<sup>117</sup> As the UNGPs apply to all businesses, the Principles do not impose specific requirements for human rights policies that directly apply to Internet shutdowns. However, the EC Guide states that the policy commitments should be included in the terms or appended to the contract,<sup>118</sup> and that the company should consider the Principles for Responsible Contracts<sup>119</sup> when concluding licencing agreements with governments.<sup>120</sup>

The EC Guide also states that ICT companies operating in challenging contexts should include their approach to managing the additional risks in their policy commitment, or in a separate, supporting policy document.<sup>121</sup> For ISPs that face particular risks in relation to shutdown orders that may not be lawful, this is of particular relevance. The TID suggests that this could contain a guide to relevant personnel on how government orders can be interpreted as narrowly as possible.<sup>122</sup> It can outline the relevant procedures and points of contact for shut-

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<sup>114</sup> Admire Mare, ‘State-Ordered Internet Shutdowns and Digital Authoritarianism in Zimbabwe’ (2020) *International Journal of Communication* (online) <<https://go-gale-com.ezproxy.uio.no/ps/i.do?p=LitRC&u=oslo&id=GALE%7CA635453961&v=2.1&it=r>> accessed 20 January 2021; Regeringskansliet (n 1) 17 and 25

<sup>115</sup> UNGP 16d; EC Guide (n 44) 20

<sup>116</sup> UNGP 16a

<sup>117</sup> UNGP 16 Commentary

<sup>118</sup> EC Guide (n 44) 24

<sup>119</sup> The Principles for Responsible Contracts is issued as an addendum to Special Representative John Ruggie’s final report to the UN Human Rights Council. It outlines 10 principles designed to help guide the integration of human rights risk management into contract negotiations.

<sup>120</sup> EC Guide (n 44) 51

<sup>121</sup> EC Guide (n 44) 19

<sup>122</sup> TID Principles (n 39) 3b

down orders,<sup>123</sup> and ensure that demands are reviewed by “appropriately qualified and experienced personnel” in order to assess the compliance with legal and due process.<sup>124</sup>

The ISP Telenor has a publicly available human rights policy approved by the Board of Directors.<sup>125</sup> Additionally, the company has created a specific policy on handling orders from the governments, called the Telenor Group Manual on Authority Requests. The Manual is referred to on the Telenor websites and by the GNI but has not been made available to the public. Therefore, any reference to the content of the Manual is based on secondary sources. Sources claim that the Manual provides mandatory requirements for handling government requests,<sup>126</sup> but it seems that these mainly concern request for personal information or other data related to privacy or data protection.<sup>127</sup>

Telenor’s Human Rights Policy outlines that “in the event that there are differences between such laws and regulations and the standards set out in our Code of Conduct, the highest standard consistent with applicable local laws shall be applied.”<sup>128</sup> But how should they deal with this if local laws are inconsistent with IHRL? According to the GNI Assessment Report, Telenor’s Authority Request Manual sets out that “when requests lack a clear legal basis or pose a significant risk of serious human rights impact, business units shall inform the authority accordingly and refrain from executing the request, to the extent reasonably possible without risking disproportionate reprisals”.<sup>129</sup> From this, several questions arise; Does this entail that if they are at risk of disproportionate reprisals, they are allowed to pose a significant risk of serious human rights impact? In that case, what would be disproportionate?

It is important for companies to have clear procedures on how they handle and respond to authority requests, not least to ensure that they are not complying with orders that have not been properly authorised. In 2019, the ISP Zain Sudan implemented a wide-reaching Internet shutdown in Sudan, and claimed that this was based on verbal orders from the proper authori-

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<sup>123</sup> EC Guide (n 44) 44-45; TID Principles (n 39) 3

<sup>124</sup> TID Principles (n 39) 3a

<sup>125</sup> Telenor Human Rights Policy (n 101); Global Network Initiative, ‘The GNI Principles at Work: public report on the third cycle of independent assessments of GNI company members 2018/2019’ (Global Network Initiative 2019) 80 <<https://globalnetworkinitiative.org/wp-content/uploads/2020/04/2018-2019-PAR.pdf>> accessed 20 January 2021 (GNI Assessment Report)

<sup>126</sup> GNI Assessment Report (n 125) 80

<sup>127</sup> Considering that the Manual is managed by the Group Privacy Officer and locally by the Data Protection Officer, see Telenor Group Legal Overview (n 111) 3

<sup>128</sup> Telenor Human Rights Policy (n 101)

<sup>129</sup> GNI Assessment report (n 125) 81

ty.<sup>130</sup> The domestic court reportedly overruled their claim and ordered the ISP to reinstate the Internet in the affected areas.<sup>131</sup>

However, a policy should not just outline the procedure to ensure that an order has been provided by the right authorities and in the right form. It should also include procedures for establishing whether the order is in line with international human rights. It needs to be transparent, to enable public insight into how these specific human rights risks are dealt with. Telenor speaks openly about their commitment to the UNGPs and have established a human rights policy and an additional authority request handling policy. Nonetheless, it appears that Telenor has not interpreted this as preventing the company from implementing the long-lasting Internet shutdown in Myanmar. It can thus be deduced that clearer guidelines may be necessary, to ensure that companies have procedures and policies in place to consider whether an order is in line with IHRL.

Both general human rights policies and specific policies relating to the operating context or particular challenges needs to be implemented throughout their operations and be continuously informed by the company's HRDD processes.

### **3.3 Human Rights Due Diligence**

As mentioned in the introduction to this chapter, the UNGPs emphasise that HRDD is among the central duties of any enterprise. HRDD was first set out in the UNGPs and is one of the most important normative developments in the field of business and human rights.<sup>132</sup> The HRDD constitutes the company's implementation of their human rights policy, and their practical application of respecting IHRL in their operations. The HRDD process should enable a company to identify human rights risks, prevent or mitigate the potential or actual impact, and account for any actual or potential adverse human rights impacts.<sup>133</sup> This process should include "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed".<sup>134</sup> It

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<sup>130</sup> Khalid Abdelaziz, 'Sudan court orders company to end military-ordered internet blackout: lawyer' *Reuters* (23 June 2019) <<https://www.reuters.com/article/us-sudan-politics-internet-idUSKCN1T00FV>> accessed 20 November 2020

<sup>131</sup> Abdelaziz (n 130)

<sup>132</sup> Taylor (n 98) 88

<sup>133</sup> UNGP 17

<sup>134</sup> UNGP 17



goes beyond the risks to the company itself and include risks to right-holders.<sup>135</sup> The due diligence should be ongoing, “recognizing that the human rights risks may change over time” as the operations and operating context evolves.<sup>136</sup>

HRDD involves the assessment and management of human rights risks arising from a company’s activities or relationships.<sup>137</sup> Human rights risks are defined as “the business enterprise’s potential adverse human rights impacts”.<sup>138</sup> Identifying potential sources of risk to human rights might be as broad as mapping the status of rule of law and the country’s human rights record,<sup>139</sup> including sources of risk in society such as discrimination or vulnerability.<sup>140</sup> As part of the HRDD, the company should draw on expertise and involve meaningful consultation with potentially affected groups.<sup>141</sup> If this is not possible, the company should consult credible independent experts and resources, including human right defenders and other members of civil society.<sup>142</sup> Once the sources of risks have been mapped, the analysis should identify how the company activities interacts with these risks.<sup>143</sup> The company shall then take appropriate action through mitigating or preventive measures, to ensure that the risk does not turn into an adverse impact on people’s rights.<sup>144</sup>

The HRDD should be specifically adapted to the context and operations of the company. For an ISP, this can be particularly complex as provision of access to the Internet has a range of possible human rights impacts. Still, any properly conducted HRDD should reveal whether the government is willing and able to order an Internet shutdown. In the case of Telenor, their HRDD should reveal that Myanmar has a broad history of restricting access to the Internet and other media, and that increased restrictions were implemented after the “clearance operations” against the Rohingya Muslims in Rakhine in 2016.<sup>145</sup> The first well-known network shutdown in Myanmar was amid the ‘Saffron Revolution’ in 2007, during

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<sup>135</sup> UNGP 17 Commentary

<sup>136</sup> UNGP 17c

<sup>137</sup> Taylor (n 98) 92

<sup>138</sup> UNGP 17 Commentary; UNGP Interpretive Guide (n 33) 6-7

<sup>139</sup> Taylor (n 98) 93

<sup>140</sup> Taylor (n 98) 92

<sup>141</sup> UNGP 18b

<sup>142</sup> UNGP 18 Commentary

<sup>143</sup> Taylor (n 98) 93

<sup>144</sup> Taylor (n 98) 92

<sup>145</sup> Joe Freeman, “Myanmar Journalists Grapple With Lack of Access, Legal Fears” *VOA News* (6 July 2017)

<<https://www.voanews.com/east-asia-pacific/myanmar-journalists-grapple-lack-access-legal-fears>> accessed 30 January 2021 cited in FFM Report (n 7) para 446

which the population protested against the regime and demanded democracy following a spike in petrol prices. It has been widely reported that the shutdown was implemented to quell protests and prevent information about police brutality and the killing of protesters reaching media outside of Myanmar.<sup>146</sup> Since then, the Internet has been shut down several times, drawing criticism that they employ this tool to conceal human rights violations in the country.<sup>147</sup> Considering the limited use of Internet in Myanmar before 2013, it is likely that an Internet shutdown in the country today will have much larger human rights impacts than it did a decade ago.

While it is clear that a shutdown may adversely affect Internet users, the EC Guide does not address the impact on freedom of expression and access to information for users in the context of a shutdown.<sup>148</sup> Instead, the guide emphasises the risk of ground staff being threatened by government officials if they refuse to comply with a network suspension order, and the risk of breach of privacy rights through unlawful surveillance.<sup>149</sup> As such, the impact a shutdown has on the right to freedom of expression and information, or the right to Internet access as a facilitator of other rights, is not considered in the EC guiding document. Considering that the EC Guide targets the ICT sector in particular, it is notable that the rights of users are not considered. This shows that the human rights framework for Internet shutdowns is under development, and that it may be difficult for ISPs to know which human rights risks they need to focus on and prioritise.

### 3.3.1 Prioritising Responses to Human Rights Risks

The UNGPs state that, if necessary, the company should identify general areas where the risk of adverse human rights impacts are most significant and prioritise these for human rights due diligence.<sup>150</sup> The responsibility to respect human rights is proportional to the severity of potential human rights impacts. The ISPs should assess the severity by the scale, scope and irremediable character of the human rights impact.<sup>151</sup> However, addressing the impacts deemed most severe does not mean that other human rights do not need to be ad-

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<sup>146</sup> Myanmar Centre for Responsible Business et al (n 11) 128

<sup>147</sup> FFM Report 2019 (n 7) 82; Ewelina U Ochab, 'Myanmar: Shutting Down Internet as a Means of Curbing Human Rights' *Forbes* (7 February 2020) <<https://www.forbes.com/sites/ewelinaochab/2020/02/07/myanmar-shutting-down-internet-as-a-means-of-curbing-human-rights/?sh=30ff3cd07711#4b1694477711&gt;>> accessed 20 January 2021

<sup>148</sup> EC Guide (n 44) 13

<sup>149</sup> EC Guide (n 44) 12

<sup>150</sup> UNGP 17 Commentary

<sup>151</sup> UNGP 14 Commentary

dressed.<sup>152</sup> Instead, this principle sequences the response, in case all impact cannot be addressed at once.<sup>153</sup>

With regards to Internet shutdowns, this is may be a difficult principle to deconstruct. The human right impacts of a shutdown can be significant, considering the number of Internet users that may be impacted, but each user may be impacted to a greater or smaller extent. The scope may be wide, as access to the Internet has become key to facilitate and ensure the respect for and observance of other fundamental human rights, as demonstrated in Chapter 2. Additionally, it has been recorded on several occasions that shutdown orders are accompanied by direct or indirect threats to ground staff, of political harassment, victimisation or arbitrary imprisonment.<sup>154</sup> As such, it poses difficulties for ISPs not only to handle conflicting legal requirements, but also to establish which rights are the most severe and irremediable. Not only does the company have responsibilities in relation to its employers and the community, it also directly or indirectly affects its users, who in practice might be millions of people.<sup>155</sup>

### 3.3.2 Preventing or Mitigating Human Right Impacts

For ISPs, it may be of utmost importance to adopt strategies to anticipate, respond and minimise potential impact on freedom of expression in the event of a shutdown order.<sup>156</sup> This should include measures to mitigate any potential impact. Such measures may involve reviewing the demand with the relevant authority, as well as seeking clarification and modification to narrow the scope and impact of a shutdown.<sup>157</sup> For example, Telenor Myanmar has decreased the price for phone calls and text messaging for those impacted by the Internet shutdown, to minimise the impact on their access to communication technologies.<sup>158</sup> This is also a method of remediation. Furthermore, the ISP can appeal to other relevant branches of the government, engage the UN or other supranational bodies, contact home governments or institutions for diplomatic support or engage stakeholders such as the media or NGOs in support of freedom of expression.<sup>159</sup>

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<sup>152</sup> UNGP Interpretive Guide (n 33) 84

<sup>153</sup> UNGP Interpretive Guide (n 33) 84

<sup>154</sup> Mare (n 114); Regeringskansliet (n 1) 17 and 25

<sup>155</sup> Rikke Jørgensen, 'Human Rights and Private Actors in the Online Domain' In Molly Land & Jay Aronson (eds) *New Technologies for Human Rights Law and Practice* (Cambridge University Press 2018) 259

<sup>156</sup> TID Principles (n 39) 4 i-vi

<sup>157</sup> TID Principle (n 39) 4 i-vi

<sup>158</sup> Telenor Group, 'Internet services restricted in Myanmar townships' (Telenor Group 12 May 2020) <<https://www.telenor.com/internet-services-restricted-in-five-townships-in-myanmar-03-february-2020/>> accessed 20 January 2021

<sup>159</sup> TID Principles (n 39) 4 i-vi

Preventing and mitigating human rights impacts could involve the use of leverage by an ISP. Leverage exists where the enterprise has the ability to effect change in the wrongful practices of an entity that causes harm.<sup>160</sup> The UNGP Commentary states that where a business enterprise has leverage, it should use it.<sup>161</sup> The appropriate action of the business enterprise in situations involving negative human rights impacts of business relationships will vary according to their extent of their leverage.<sup>162</sup> As in the case of Telenor, the company engages with a number of organisations to advance its human rights objectives, which could strengthen their leverage in communications with governments.<sup>163</sup> Organisations with a global reach, such as the GNI, are undertaking much important work in relation to shutdowns and handling of government orders, both through dialogue, cooperation and policy engagement. There are also several centres and institutions working to promote access to the Internet and digital rights, with which the ISPs can engage in dialogue and cooperation.<sup>164</sup>

However, when using this leverage, the ISP should also consider whether terminating the relationship would in itself have adverse human rights consequences. In the case of ISPs and Internet shutdowns this may pose a dilemma. It could be the case that using leverage will make certain ISPs less favourable for states with weak human rights institutions. In response, governments may provide licences to ISPs that are less concerned with their responsibility to respect human rights.

The case of Telenor Myanmar provides an example of this. The company is reportedly the most favoured telecommunication brand in the country, serving 22 million customers and businesses across the country and covering more than 92% of the population.<sup>165</sup> Seemingly, they should have strong leverage when communicating with the government. However, Telenor Myanmar's biggest competitor is the Qatar-based company Ooredoo.<sup>166</sup> This compa-

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<sup>160</sup> UNGP 19 Commentary

<sup>161</sup> UNGP 19 Commentary

<sup>162</sup> UNGP 19

<sup>163</sup> Including UN Global Compact, the Global Network Initiative, GSMA, the Joint Audit Cooperation and Global Union, as reported in the Telenor Annual Report 2019 (n 101) 48

<sup>164</sup> See e.g. local centres such as the Centre for Human Rights and Business in Myanmar and global initiatives such as the Global Network Initiative

<sup>165</sup> Telenor Annual Report 2019 (n 101) 12; Telenor Myanmar, 'About' (n 29)

<sup>166</sup> Lucy Purdon, 'Telenor and Ooredoo enter Myanmar' (Institute for Human Rights and Business 27 June 2013)

<<https://www.ihrb.org/focus-areas/information-communication-technology/commentary-telenor-ooredoo-myanmar>> accessed 20 January 2021

ny does not have a human rights policy and have scored among the lowest on indexes ranking companies on respect for digital rights, such as the Corporate Accountability Index of Ranking Digital Rights.<sup>167</sup> As such, if Telenor was to lose its licence because it put too much pressure on the government, the outcome may in turn lead to adverse human rights impacts. If Ooredoo was to take over Telenor's licence, it is unlikely that this would lead to an improved human rights situation. Assumingly, the human rights situation in general, and the right to access Internet in particular, would be worse off.

### 3.3.3 Tracking and Communicating Responses

As part of the process, the UNGPs entail that the business enterprise should track the effectiveness of their response to the findings in the HRDD<sup>168</sup>, and communicate externally how they address their human rights impacts.<sup>169</sup> The tracking should be based on qualitative and quantitative indicators, and draw on feedback from internal and external sources.<sup>170</sup> When communicating their response to human rights challenges, the information should be sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved.<sup>171</sup> For ISPs it could be relevant to carefully track the number of requests to shut down the Internet and how these requests were dealt with.

Telenor provides the latter in an Annual Authority Requests Disclosure Report. However, for ISPs the reporting may be misleading as domestic laws may prohibit the company from reporting certain incidents, or this may be a condition in the licencing tenders and bids. Moreover, it may be difficult to interpret the scope of the shutdown by the numbers. For example, the 2019 report shows that Telenor received one shutdown request in Myanmar and one shutdown request in Norway, both of which were implemented. At first glance, the situation may seem similar in Myanmar and Norway. However, the report does not indicate the longevity or extent of the shutdown, not does it include requests to extend an already implemented shutdown. The shutdown in Norway impacted mobile network in relation to a bomb

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<sup>167</sup> Ranking Digital Rights, '2019 Corporate Accountability Index' (Ranking Digital Rights 2019) <<https://rankingdigitalrights.org/2019/06/12/arab-regions-telecommunications-companies-fail-to-respect-users-digital-rights/>; <https://rankingdigitalrights.org/index2019/>> accessed 25 January 2021

<sup>168</sup> UNGP 20

<sup>169</sup> UNGP 21

<sup>170</sup> UNGP 20a and B

<sup>171</sup> UNGP 21b

threat in the municipality of Alta and lasted less than one hour.<sup>172</sup> In contrast, the shutdown in Rakhine and Chin States in Myanmar was implemented on 21 June 2019 and is still ongoing, although some restrictions on 2G mobile network has been lifted.<sup>173</sup> Another fault of the reporting is that Telenor does not disclose how they handle instances where a government order poses significant risk to human rights, but the refusal of the order may lead to disproportionate reprisals.

### 3.4 Remedies

Pillar III of the UNGPs focuses on remedies and operational-level grievance mechanisms for companies. Such grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and serve as a source of continuous learning.<sup>174</sup> For operational-level mechanisms, they must be based on engagement and dialogue.<sup>175</sup> The UNGPs state that businesses should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.<sup>176</sup> This is part of its responsibility, either by itself or in cooperation with other actors.<sup>177</sup> Operational-level grievance mechanisms activities can be an effective means of enabling remediation,<sup>178</sup> as well as offering additional benefits for the business. They support the identification of adverse human rights impacts and provides a channel for those impacted to raise concerns,<sup>179</sup> in addition to providing important feedback on the effectiveness of the company's HRDD and mitigation strategies.

For an ISP, such a mechanism may provide valuable input as to the human rights consequences of an Internet shutdown, but it is challenging to find the most appropriate way to remediate harm. An important factor for ISPs' grievance mechanisms is that they can overcome the usual obstacle of creating awareness of the mechanism, as they typically have the possibility to communicate with their users through mobile connectivity. Still, ISPs face particular challenges in designing mechanisms that are capable of effectively handling complaints from

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<sup>172</sup> Telenor Group, 'Authority request disclosure report 2019' (Telenor Group 2020) <[https://www.telenor.com/wp-content/uploads/2020/08/Telenor-Disclosure-report-2019\\_08.pdf](https://www.telenor.com/wp-content/uploads/2020/08/Telenor-Disclosure-report-2019_08.pdf)> accessed 20 January 2021; Alexandra Kosowski and Kim Gaare, 'Stengte av mobilnettet i Alta etter bombetrussel mot fly' *Nettavisen* (27 February 2019) <<https://www.nettavisen.no/nyheter/stengte-av-mobilnettet-i-alta-etter-bombetrussel-mot-fly/s/12-95-3423598999>> accessed 20 January 2021

<sup>173</sup> Telenor Group, 'Press releases: Continued network restrictions for Myanmar' (n 6)

<sup>174</sup> UNGP 29a-g; UNGP 22

<sup>175</sup> UNGP 29h

<sup>176</sup> UNGP 29

<sup>177</sup> UNGP 22 Commentary

<sup>178</sup> UNGP 22 Commentary

<sup>179</sup> UNGP 29 Commentary

a potentially large number of highly dispersed individuals.<sup>180</sup> The EC Guide suggests that companies can address negative impacts arising from an Internet shutdown through compensation for lost services or extended bill payment periods.<sup>181</sup> However, in the cases of government-ordered shutdowns, one might deem it disproportionate that the company should bear the responsibility for remediating all negative impacts arising from a shutdown.

### **3.5 Conflicting Requirements**

A particular difficulty of ISPs when ordered to shut down the Internet is the question of how to manage the conflicting requirements. This is outlined in Principles 23 and 24 of the UNGPs, related to ‘Issues of Context’. As noted in relation to the responsibility to respect all recognised human rights, several dilemmas already arise. Furthermore, identifying risks to human rights in corporate activities often leads to dilemmas for the enterprise.<sup>182</sup> According to the UNGPs, companies should respect IHRL over and above national laws, independently from the state’s own responsibility. For ISPs operating on government licences, this poses a difficult dilemma. The dilemma can be partly solved through a concrete human rights policy adapted to the specific challenges of the company, implemented through rigorous due diligence processes.

The HRDD for an ISP requires a wide-ranging evaluation of many different factors. For instance, the ISP would need to assess everything from the labour conditions in their operations to the human right conditions of their supply chain, to the potential human rights impact on the perhaps millions of network users. Finally, if human rights abuses are taking place, the UNGPs urge the business to use leverage to prevent or mitigate this abuse, while considering whether the leverage or the termination of the relationship itself can have adverse human rights impacts.

The pressing question is then pertaining to how ISPs can respect the human rights of people affected by shutdowns, while balancing the power of the state to “protect national security” or other justifications for shutdowns. The HRDD in the UNGPs can be considered as a regulatory technique used to encourage business respect for human rights.<sup>183</sup> Thus far, it has

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<sup>180</sup> EC Guide (n 44) 79

<sup>181</sup> EC Guide (n 44) 54

<sup>182</sup> Taylor (n 98) 93

<sup>183</sup> Taylor (n 98) 88

come a long way in terms of successfully creating attitudinal and behavioural change among companies and states.<sup>184</sup> Nonetheless, it is not obvious what ISPs should do when there is a conflict of law, such as in Myanmar. Moreover, the risk of reprisals for not complying with an unlawful shutdown order creates additional uncertainty for companies seeking to operate in line with the UNGPs. And, if all shutdowns are a violation of IHRL, how should the ISPs tackle any shutdown requests from governments? This is the subject of the final chapter of this thesis, which examines how ISPs should navigate the dilemmas arising from their responsibility.

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<sup>184</sup> Bård A Andreassen and Vo Khanh Vinh, 'Introduction. Business' Duties Across Borders: The New Human Rights Frontier' in Bård A Andreassen and Vo Khanh Vinh (eds) *Duties Across Borders: Advancing Human Rights in Transnational Business* (Intersentia 2016) 19



## 4 Navigating the Responsibility to Respect Human Rights

In the cases of ISPs and Internet shutdowns, dilemmas can arise where national law is contradicting IHRL, or gives room for orders that may be unlawful under international law.<sup>185</sup> This presents a dilemma for companies that not only need to comply with applicable laws, but also meet their responsibility to respect human rights in all contexts.<sup>186</sup> When companies are faced with conflicting requirements, the UNGPs state that they should “seek ways to honour the principles of internationally recognised human rights” and be able to “demonstrate their efforts in this regard”.<sup>187</sup> To do so, they should draw on external expertise and relevant stakeholders, to assess how best to respond.<sup>188</sup> But what should these external experts advice the company to do? How far does this responsibility to respect international human rights go? This chapter will discuss how ISPs can navigate the dilemmas they are faced with when ordered to shut down the Internet. It also explores to what extent and under which conditions a company can implement an Internet shutdown while still operating in line with the corporate responsibility to respect human rights under the UNGPs.

### 4.1 Compliance with Domestic Law; a Legitimate Excuse?

Enterprises have a fundamental obligation to comply with applicable laws.<sup>189</sup> In countries where domestic law allows for the suspension of telecommunications, ISPs have used this as a reason for complying with shutdown orders. However, as has been previously discussed, the corporate responsibility to respect human rights goes beyond the mere obligation to comply with domestic law.<sup>190</sup> Indeed, the responsibility of corporations is also grounded in transnational norms derived from IHRL.<sup>191</sup> Some claim that human rights responsibilities of corporations are non-discretionary, meaning that the enterprises are required to refuse orders that violate IHRL.<sup>192</sup> This is based on the premise that any sovereign government that authorises human rights violations is not acting with legitimate authority in that instance, and that the legal duty to comply with the order is no longer justified.<sup>193</sup>

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<sup>185</sup> UNGP Interpretive Guide (n 33) 78

<sup>186</sup> UNGP Interpretive Guide (n 33) 78

<sup>187</sup> UNGP 23 and Commentary

<sup>188</sup> UNGP 23 Commentary

<sup>189</sup> UNGP 23

<sup>190</sup> Backer (n 96)

<sup>191</sup> Backer (n 96); UNGP 12

<sup>192</sup> Ann Certanec, ‘The connection between corporate social responsibility and corporate respect for human rights’ (2019) 10(2) *Law, Economics and Social Issues Review* 103, 107

<sup>193</sup> David J Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (Cambridge University Press 2014) 52

Under international law, domestic legal constraints cannot excuse non-compliance with international law.<sup>194</sup> However, this is grounded in international law as being applicable to states, and the states' ability to amend domestic laws that conflicts with international norms.<sup>195</sup> Corporations do not have the capacity to change domestic norms, at least not directly. Still, allowing corporations to rely on 'compliance with domestic law' as a legitimate ground for violating international norms when faced with conflicting requirements, would be problematic for a range of reasons.<sup>196</sup> For example, allowing compliance with domestic law as a legitimate excuse for violations of international norms would exacerbate the incentive for states to delegate their authority to other actors and serve as a loophole for states to evade their own obligations.<sup>197</sup> As such, the common point of departure for the following sections is the premise that ISPs cannot rely on domestic laws as an excuse for violating the right to freedom of expression through implementing an Internet shutdown.

#### **4.2 Lawful Restrictions to Internet Access**

The question pertaining to what a company should do when faced with conflicting requirements, remain contested in both scholarly and policy-making domains. As noted in the Introduction and Chapter 2, UN Special Representatives and Rapporteurs have claimed that Internet shutdowns always constitute a violation of IHRL. However, the analysis of the relevant rights in chapter 2 indicates that there is yet no independent right to access the Internet, but it is attached to that of freedom of expression and access to information. Therefore, there may be room for lawful restrictions to Internet access under IHRL, if they comply with the requirements of legality, necessity and proportionality.

Any restriction on the right to freedom of expression must be required by law. This must be "accessible" and formulated with "sufficient precision".<sup>198</sup> Even though a suspension of telecommunication may be proscribed by an accessible law, it may be difficult to formulate such a law with precision such that it identifies exactly during which situations a shutdown is lawful. To apply this to the case of Telenor Myanmar, the Telecommunications Law in My-

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<sup>194</sup> With respect to treaty obligations this is explicit in the Vienna Convention on the Law of Treaties Article 27

<sup>195</sup> Yael Ronen, 'Big Brother's Little Helpers: The Right to Privacy and the Responsibility of Internet Service Providers' (2015) 31(80) Utrecht Journal of International and European Law 72

<sup>196</sup> Ronen (n 195)

<sup>197</sup> Scott Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' (2009) 31 Human Rights Quarterly 299, 305; Ronen (n 195)

<sup>198</sup> ICCPR 19(3); CCPR GC 34 (n 59)

anmar allows for suspensions to telecommunication services.<sup>199</sup> This law is widely accessible, and Telenor has also made the law available through their Legal Overview for authority requests.<sup>200</sup> However, as demonstrated in section 3.1, the law does not define the ‘emergency situation’ that would allow for such suspension.<sup>201</sup> Additionally, it does not provide guidance as to who has the authority to declare an emergency situation, granting vague and broad discretionary powers to the government.<sup>202</sup> As such, the law itself fails to meet the requirement of being formulated with the necessary precision.<sup>203</sup>

In order to meet the requirement for necessity and proportionality, the restriction must be necessary and proportionate to achieve a legitimate government objective.<sup>204</sup> In particular, restrictions must “target a specific objective and not unduly intrude upon the rights of targeted persons” and must be “the least intrusive instrument among those which might achieve the desired result”.<sup>205</sup> To evaluate these factors, the ISP must assess a range of factors that the company is often not privy to. In relation to an Internet shutdown extension order by the Myanmar MoTC, no reason for the order was given, despite requests from Telenor.<sup>206</sup> Additionally, the Burmese government has never specified a time frame for the end of the shutdown.<sup>207</sup> In this instance, such a shutdown may clearly be unlawful and should not have been implemented from the outset.

In many instances, the justifications have been to protect national security or prevent acts of terrorism,<sup>208</sup> and the ISP may not have sufficient information to consider the necessity and proportionality of the measure.<sup>209</sup> Information on threats to national security may be classified or confidential, and the government is not obligated to share that information with private companies. This can create an information gap between the government, which may have information they are lawfully acting on, and ISPs. In Myanmar, one justification for the shut-

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<sup>199</sup> Myanmar Telecommunications Law 2013, Section 77

<sup>200</sup> Telenor Group Legal Overview (n 111)

<sup>201</sup> FFM Report 2019 (n 7) para 469

<sup>202</sup> FFM Report 2019 (n 7) para 469

<sup>203</sup> FFM Report 2019 (n 7) para 469

<sup>204</sup> Freedom of Expression in the Digital Age (n 80) 3

<sup>205</sup> ICCPR GC 34 (n 59) para 34

<sup>206</sup> Telenor Group, ‘Press releases: Continued network restrictions in Myanmar’ (n 6)

<sup>207</sup> FFM Report 2019 (n 7) para 256; The current extension is until 31 March 2021 as per Telenor Group Press Release, but this does not necessarily mark the end of the shutdown, as this has been extended for more than 1,5 years as of January 2021.

<sup>208</sup> Telenor Group, ‘Press releases: Continued network restrictions in Myanmar’ (n 6)

<sup>209</sup> Ronen (n 195)

down was to “reduce racial hatred” online and stem hate speech on social media.<sup>210</sup> Through monitoring anti-Rohingya hate speech online, the UN Fact-Finding Mission to Myanmar found that no action was taken to remove or prevent this in other places of the country.<sup>211</sup> Furthermore, if this was a legitimate concern, the government could have tailored restrictions to specific individuals, accounts or social media platforms, instead of imposing a blanket shutdown impacting approximately one million people.<sup>212</sup> Furthermore, as research has found that Internet shutdowns often lead to increased violence,<sup>213</sup> it is unlikely that such a measure would be the best strategy to prevent hate speech from escalating to violence, nor protect national security or prevent terrorism in the longer term.

Unlike other forms of censorship, Internet shutdowns are not typically targeted towards specific persons, and it is unlikely that a shutdown is the least intrusive measure amongst those that can achieve the desired result.<sup>214</sup> It can also be difficult to demonstrate that a shutdown will be necessary to achieve a legitimate aim, and specially to demonstrate that this measure cause the least collateral damages.<sup>215</sup> As such, shutdowns should be considered a remedy of last resort, applied only when governments cannot use any other measures to safeguard a legitimate aim, such as to prevent an imminent cyberattack that could cause human harm and destruction of national property.<sup>216</sup>

### **4.3 Actions Required by Internet Service Providers**

It seems that some Internet shutdowns may amount to lawful restrictions to human rights, although the untargeted and disproportional nature of a shutdown makes these instances very rare. Under the UNGPs, companies are required to find ways to honour the principles of internationally recognised rights,<sup>217</sup> by taking “appropriate” measures to prevent and mitigate adverse human rights impacts.<sup>218</sup> In order to honour the principles of internationally recognised rights, the ISPs should take measures to minimize the conflicting requirements. This could be done by taking actions that make any shutdown more in line with the lawful re-

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<sup>210</sup> FFM Report 2019 (n 7) para 470

<sup>211</sup> FFM Report 2019 (n 7) para 471

<sup>212</sup> FFM Report 2019 (n 7) para 471

<sup>213</sup> Rydzak (n 46)

<sup>214</sup> UN Human Rights Committee, ‘General Comment 27: Article 12 (Freedom of movement)’ (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 14

<sup>215</sup> Internet Society Policy Brief (n 5)

<sup>216</sup> De Gregorio and Stremlau (n 81)

<sup>217</sup> UNGP 23

<sup>218</sup> UNGP 19

strictions to rights. It is important to understand the exact nature, scope and implications of the conflicting requirement to address this dilemma.<sup>219</sup>

This could be done through seeking clarifications from the government on the scope and necessity of the shutdown, or challenging the shutdown in its entirety.<sup>220</sup> The company itself can also work to develop and publish guidelines on what kind of precision they require to implement a shutdown order,<sup>221</sup> or prescribe which situations it deems as constituting an emergency situation. As the right to access the Internet is attached to the right to freedom of expression and access to information, the ISP can also try to mitigate the impact on this specific right in alternative ways. To mitigate the human rights impacts of the long-lasting shutdown in Myanmar, Telenor has decreased the price on phone calls and messages, which has remained available throughout the shutdown.<sup>222</sup> Although these are not necessarily sufficient in themselves, they should form part of a larger set of mitigating and preventive measures implemented by the ISPs.

When operating in circumstances of conflicting requirements, the ISP should respect human rights to the greatest extent possible given the circumstances and be able to demonstrate their efforts in this regard.<sup>223</sup> The following sections outlines some of the efforts ISPs need to take in order to operate in line with their responsibility to respect human rights and prevent implementations of unlawful shutdowns.

#### 4.3.1 Narrow Interpretations of Shutdown Orders

In order to minimize negative impacts on human rights, the ISP should interpret any shutdown order as narrowly as possible to be in line with lawful restrictions. The shutdown must be demonstrated to be of direct material necessity, and should only be invoked in emergency situations, with real and imminent threats to national security.<sup>224</sup> If this is not possible, the ISP should seek clarification or modification from the government.<sup>225</sup> Instead of ceding to the government's interpretation of the relevant laws, the ISPs should engage external exper-

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<sup>219</sup> UNGP Interpretive Guide (n 33) 78-79

<sup>220</sup> UNGP Interpretive Guide (n 33) 78-79

<sup>221</sup> Barrie Sander, 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation' (2020) 43 *Fordham International Law Journal* 939, 972

<sup>222</sup> Telenor Group, 'Internet services restricted in Myanmar townships' (n 158)

<sup>223</sup> UNGP 23 Commentary

<sup>224</sup> Lucy Purdon, 'Security v Access: The Impacts of Mobile Network Shutdowns' (Institute of Human Rights and Business 2015) 44 <[https://www.ihrb.org/uploads/reports/2015-09%2C\\_IHRB\\_Report%2C\\_Security\\_v\\_Access\\_-\\_The\\_Impact\\_of\\_Mobile\\_Network\\_Shutdowns.pdf](https://www.ihrb.org/uploads/reports/2015-09%2C_IHRB_Report%2C_Security_v_Access_-_The_Impact_of_Mobile_Network_Shutdowns.pdf)> accessed 20 January 2021 (Purdon Report)

<sup>225</sup> GNI Implementation Guidelines (n 40) 3.2.f and 3.3.a

tise and legal counsel to interpret the local laws and precedence.<sup>226</sup> ISPs should only accept orders that set out an explicit time frame and geographical scope for the shutdown, which shall be proportionate to the perceived risk.<sup>227</sup> The ISP should have “appropriately qualified and experienced personnel” that should assess whether the order is legal and complies with due process.<sup>228</sup>

#### 4.3.2 Dialogue with Governments

To ease this process, ISPs and their relevant personnel should have ongoing dialogue with the government, as highlighted by TID and GNI. The ISPs should highlight the possible human rights impacts of a shutdown and suggest alternative ways of responding to threats. ISPs must clarify which public authorities that are authorised to take control of communication networks in an emergency, and importantly what constitutes an emergency.<sup>229</sup> Shutdown requests should be approved or authorised by the highest level of the government.<sup>230</sup> Clear request processes should be established, with a limited number of actors in authorised law enforcement agencies allowed to make requests.<sup>231</sup> All shutdown requests must be made in writing, to ease the analysis and reporting process for ISPs.<sup>232</sup> ISPs should push to include this in their licencing agreements and contractual documents with states.

Further, ISPs should encourage governments to formulate restrictions that are specific and transparent, in line with IHRL, and inform them of how this can be done. This includes engaging proactively with governments to form a shared understanding of how restrictions can be applied in a way that is consistent with the freedom of expression.<sup>233</sup> ISPs should also review the state legislation on telecommunications and suggest amendments to this if necessary. Dialogue between ISPs and governments can also contribute to positive outcomes. For example, Telenor Pakistan and other operators engaged the Government of Pakistan in discussions on freedom of speech in Pakistan, which resulted in some limitations on network shut-

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<sup>226</sup> David Sullivan, ‘Five ways telecommunications companies can fight internet shutdowns’ Lawfare Blog (23 August 2020) <<https://www.lawfareblog.com/five-ways-telecommunications-companies-can-fight-internet-shutdowns>> accessed 20 January 2021

<sup>227</sup> Purdon Report (n 224) 11

<sup>228</sup> TID Principles (n 39) 3; Purdon Report (n 224) 11; EC Guide (n 44) 44-45

<sup>229</sup> Purdon (n 224) 38

<sup>230</sup> Purdon Report (n 224) 11; the phrase “highest level of government” is copied from the UNGPs

<sup>231</sup> Purdon Report (n 224) 11; EC Guide (n 44) 44-45; TID Principles (n 39) 3

<sup>232</sup> In line with GNI Implementation Guidelines (n 40) 3.2.b

<sup>233</sup> In line with GNI Implementation Guidelines (n 40) 3.1.b

downs in terms of scope and duration, and a more streamlined process of submitting requests.<sup>234</sup>

#### 4.3.3 Network Connectivity Infrastructure

ISPs should develop infrastructure that allows for geographically limited shutdowns, and ensure that any shutdown does not impact the connection of relief and emergency services.<sup>235</sup> It will be the task of the ISPs to build a resilient infrastructure that makes it difficult for the government to have one ‘kill switch’. This can be done through resilient connectivity solutions, such as more widely distributed and more numerous Internet exchange points, along with increased connectivity at international borders.<sup>236</sup> This operation should be carried out in cooperation with the governments, which should facilitate this work. ISPs should also include clauses to this effect in their licencing agreement with the state.

#### 4.3.4 Procedures for Escalating Requests

ISPs should have clear procedures in place for escalating the handling of shutdown orders. This involves ensuring that requests are documented and passed for review by senior executives. This procedure prevents a situation where an Internet shutdown is implemented locally without the awareness of the ISP’s headquarters.<sup>237</sup> Furthermore, if shutdown requests are accompanied with threats to local staff, clear and public procedures of decision-making at the regional or global level of the company can be instrumental to safeguarding the physical integrity of local staff. This can also buy time and create opportunities to consult with other companies and consider a joint response and increase their leverage.<sup>238</sup>

#### 4.3.5 Cooperation and Leverage

Gathering ISPs’ voices through joint initiatives could strengthen ISP objectives in the context of Internet shutdowns. It may also be that other ISPs are facing similar dilemmas and that coordinating their response can have a larger impact on the ‘delinquent’ government.<sup>239</sup> There are examples of ISPs working through voluntary initiatives to challenge the legality of Internet shutdowns. The GNI is an example of such a multi-stakeholder initiative, working to

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<sup>234</sup> Purdon Report (n 224) 10 and 42

<sup>235</sup> Inspired by the proposed legal amendment in Egypt as outlined in Purdon Report (n 224) 38

<sup>236</sup> Internet Society Policy Brief (n 5)

<sup>237</sup> Sullivan (n 226)

<sup>238</sup> Sullivan (n 226)

<sup>239</sup> Taylor (n 98) 94

establish global guidelines for ICT companies. Such platforms can also be used to discuss ways forward and encourage dialogue between local operators on the ground.<sup>240</sup> Additionally, the ISP should conduct stakeholder engagement, in line with the UNGPs.<sup>241</sup> Joining forces with civil society and other stakeholders, and aligning business and civil society objectives and efforts, could lead to real and long-lasting action that can improve the enjoyment of human rights. Through engagement with such initiatives, ISPs can increase their leverage to improve their ability to deal effectively with government orders.<sup>242</sup>

#### 4.3.6 Transparency

Through public reporting on unreasonable demands by governments, companies provide vital information for civil society, stakeholders and affected users.<sup>243</sup> The Ranking Digital Rights Corporate Accountability Index found significant gaps in disclosure on policies and practices that affect their users' freedom of expression.<sup>244</sup> Companies and multi-stakeholder initiatives should publicly report on the shutdown orders they receive.<sup>245</sup> Companies should clarify to their business relations that they will report on such issues, and if necessary agree on a framework for such reporting. All network disruptions should be recorded and logged, and the companies should publish a list of all shutdowns and shutdown requests.<sup>246</sup> This increased ability to analyse data regarding Internet shutdowns can bring greater visibility and transparency, including on the scope, duration and impact of a shutdown order.<sup>247</sup> The company should also have publicly available policies on how they handle such procedures.<sup>248</sup> This should include how the ISP will respond to orders that do not adhere to the agreed procedure, and consider when ISPs should challenge such demands.<sup>249</sup> Furthermore, the ISP should also extend this transparency to their users. They should also give clear and timely notice to users if any restrictions have been implemented, including their reasons, duration, geography and services affected.<sup>250</sup>

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<sup>240</sup> Purdon Report (n 224) 10

<sup>241</sup> UNGP 18b

<sup>242</sup> Taylor (n 98) 94

<sup>243</sup> Taylor (n 98) 95

<sup>244</sup> Ranking Digital Rights, '2017 Index' (Ranking Digital Rights 2017) <<https://rankingdigitalrights.org/index2017/>> as cited in Rikke F Jørgensen, 'When private actors govern human rights' in Ben Wagner, Matthias C Kettmann and Kilian Vieth (eds) *Research Handbook on Human Rights and Digital Technology* (Ed Elgar 2019), 355

<sup>245</sup> Purdon Report (n 224) 44

<sup>246</sup> Purdon Report (n 224) 11; In line with GNI Implementation Guidelines (n 40) 3.2.c

<sup>247</sup> Internet Society Policy Brief (n 5)

<sup>248</sup> In line with GNI Implementation Guidelines (n 40) 3.2.b-c

<sup>249</sup> In line with GNI Implementation Guidelines (n 40) 3.1.d

<sup>250</sup> Purdon Report (n 224) 11



#### 4.3.7 Suing Governments for Unlawful Shutdown Orders

Suing governments for unlawful shutdown orders can form part of the remedy under the UNGP, but it is also an effective tool for ISPs for long-term prevention and mitigation of the human rights impacts of shutdowns. ISPs should collaborate with civil society and human rights defenders to challenge Internet shutdowns in domestic courts.<sup>251</sup> Suing governments for unlawful orders can contribute to creating important legal precedence and putting the legality of internet shutdowns up for debate in the courts. This has already happened in states such as Sudan, Zimbabwe, Togo, India, Indonesia and Pakistan.<sup>252</sup> In 2012, Telenor Pakistan filed a writ petition in the Sindh High Court, challenging the network shutdowns.<sup>253</sup> In response to the petition from Telenor and from a number of citizens, the Sindh High Court made an initial order that any directive to shut down the network should be made through a “speaking order with cogent reasons given for it” and that it should only apply to specific areas and be valid for a specific duration.<sup>254</sup> Such cases may lead to the necessary changes in domestic legislation, to ensure that any order complies with IHRL. Additionally, increasing the pressure against governments in domestic courts may lead to an international precedence in the future.

#### 4.3.8 Consider Terminating Operations

If the ISP is unable to prevent or mitigate the adverse impacts through the measures above, the UNGPs state that they should consider terminating their operations in the particular country.<sup>255</sup> This was done by Yahoo! and Google in China in 2005 and 2010,<sup>256</sup> which begs the question of whether this is required by ISPs as well. In doing so, the UNGPs require the company to take into account “credible assessments of potential adverse human rights”.<sup>257</sup> Some argue that divestment is an inherently ineffective measure with respect to human rights, as the withdrawal of one company could merely lead to the entry of another company less committed to respecting human rights.<sup>258</sup> This was demonstrated in Section 3.3.2 with regards to Telenor in Myanmar, and their competitor Ooredoo. However, a company cannot exonerate themselves from responsibility by claiming that another company would lead to more adverse

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<sup>251</sup> The importance of this is highlighted in the FFM Report 2019 (n 7) para 468

<sup>252</sup> HRW (n 5)

<sup>253</sup> Tahir Siddiqui, ‘Cellphone service suspension, SHC issues notice to PTA chairman, others’ *Dawn* (20th November 2012) <<http://www.dawn.com/news/765389/cellphone-service-suspension-shcissues-notice-to-pta-chairman-others>> accessed 20 January 2021

<sup>254</sup> Purdon Report (n 224) 25

<sup>255</sup> UNGP 19 Commentary; Taylor (n 98) 95

<sup>256</sup> Ronen (n 195)

<sup>257</sup> UNGP 19 Commentary

<sup>258</sup> Ronen (n 195)

human rights impacts.<sup>259</sup> Removing themselves from the situation may also be the only option to avoid complicity in human rights violations.<sup>260</sup> The UNGPs state that corporations should take “appropriate” measures to prevent and mitigate adverse human rights impacts.<sup>261</sup> It does not require companies to take every possible measure, which may indicate that terminating operations in the country may not be required under the UNGPs.<sup>262</sup>

#### 4.4 Finding Sustainable Solutions

This chapter has shown that very few Internet shutdown orders are in line with IHRL and the corporate responsibility to respect human rights. As such, companies are left with few good options, and the decision to terminate a relationship may not be necessary nor constructive. The UNGPs have been criticised for providing insufficient guidelines to companies on how to handle such conflicting requirements. Some claim that the UNGPs allow for too much “wobble room” for companies, and that coupled with its non-authoritative language, the UNGPs are unlikely to provoke a normative response.<sup>263</sup> Some go even further to claim that these factors can invite inaction from companies that remain hesitant about their responsibility to act.<sup>264</sup> The lack of clarity also runs the risk that companies believe that implementing a HRDD process is sufficient to meet its responsibility to respect human rights.<sup>265</sup> However, it is possible to implement HRDD, whilst similarly contributing to adverse human rights impacts.<sup>266</sup> The responsibility can only be fulfilled by not infringing on human rights.<sup>267</sup>

The solution is engagement with the problems and the people affected by them.<sup>268</sup> ISPs should consider the short-term and long-term consequences of every course of action, including the possibility of terminating the business relationship.<sup>269</sup> For as long as a business is linked to human rights violations, it should be able to demonstrate its efforts to mitigate the impact, and be prepared to accept any consequences of the continued connection.<sup>270</sup> This can

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<sup>259</sup> Ronen (n 195)

<sup>260</sup> Alexander Kriebitz and Raphael Max, ‘The Xinjiang Case and Its Implications from a Business Ethics Perspective’ (2020) 21 Human Rights Review 243, 260

<sup>261</sup> UNGP 19

<sup>262</sup> Ronen (n 195)

<sup>263</sup> Justine Nolan, ‘The corporate responsibility to respect human rights: Soft law or not law?’ in Surya Deva & David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 159

<sup>264</sup> Nolan (n 263) 159

<sup>265</sup> Taylor (n 98) 105

<sup>266</sup> Taylor (n 98) 105

<sup>267</sup> Taylor (n 98) 105; UNGP 17 Commentary

<sup>268</sup> Taylor (n 98) 94

<sup>269</sup> Taylor (n 98) 94; UNGP Interpretive Guide (n 33) 78-79

<sup>270</sup> UNGP 19 Commentary

be of a legal nature, and there are examples of cases being brought jointly against a state and an ISP for implementing a shutdown.<sup>271</sup> It is also the responsibility of the ISP to bring its operations back in line with human rights.<sup>272</sup> However, the lack of clear answers presents a need for further and clearer requirements for ISPs on how to respond to Internet shutdown requests.

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<sup>271</sup> E.g. ZLHR and MISA Zimbabwe as mentioned in Aayush Rathi, Arindrajit Basu and Anoushka Soni, 'Dialling in the Law' (Association for Progressive Communications 2020) 11 <[https://www.apc.org/sites/default/files/Internet\\_Shutdowns\\_20.11.10.pdf](https://www.apc.org/sites/default/files/Internet_Shutdowns_20.11.10.pdf)> accessed 20 January 2021

<sup>272</sup> Taylor (n 98) 107

## 5 Conclusion

The internet is one of the most transformative and fast-growing technologies.<sup>273</sup> As digital means of political participation and exercising human rights supplant analogue equivalents, our dependency on the Internet is only set to increase.<sup>274</sup> This dependency offers governments unparalleled opportunities to limit access,<sup>275</sup> and highlights the need to clarify the responsibilities of ISPs and empirically map cogent pathways to a world in which all Internet shutdowns are legal, necessary and proportionate, as outlined by IHRL.

This thesis has demonstrated that ISPs have a wide-ranging responsibility to respect human rights under the UNGPs. ISPs have a responsibility to create and adopt a publicly available human rights policy, which shall be approved at the most senior level of the business enterprise.<sup>276</sup> This should be communicated actively to their business relations.<sup>277</sup> The human rights policy should be adapted to the context that the ISP is operating in, and the particular human rights risks that are prevalent in this context. It is also clear that the ISPs must undertake HRDD to identify and assess the risks to human rights in their operating context, and how these may be linked to their activities. When the ISP identifies interaction with human rights risks, it should take measures to mitigate and prevent that such a risk develops into an adverse impact on human rights. HRDD should take place on a continuous basis and inform the ISP's policy documents and activities at all times.

As Internet shutdowns have become a global phenomenon to control and suppress protests and civil movements, and the Internet has been demonstrated to be so closely linked to human rights, ISPs are regularly operating in contexts where there is a clear risk of violations of the right to freedom of expression and access to information. This risk is often made even more prevalent and pressing, as it is authorised by the same government that licenced the ISP. In this context of conflicting requirements to the ISP, the ISP should respect human rights to the greatest extent possible in the circumstances and be able to demonstrate their efforts in

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<sup>273</sup> Max Roser, Hannah Ritchie and Esteban Ortiz-Ospina, 'Internet' (Our World in Data 2015) <<https://ourworldindata.org/internet>> accessed 20 January 2021

<sup>274</sup> Shandler and Canetti (n 16) 98

<sup>275</sup> Shandler and Canetti (n 16) 82

<sup>276</sup> UNGP 16a

<sup>277</sup> UNGP 16 Commentary

this regard.<sup>278</sup> It is clear that an ISP cannot justify a violation of their responsibility by relying on domestic laws that conflict with IHRL. This could have a range of adverse impacts and create a loophole for states to evade their own human rights obligations. As such, the onus is on the ISP to find ways of honouring the principles of internationally recognised rights.

In understanding how an ISP can fulfil this responsibility, this thesis analysed whether and in what circumstances an Internet shutdown can be lawful under IHRL. Although these situations would in practice be very few, Internet shutdowns can be implemented in line with the lawful restrictions to the right to freedom of expression and access to information under IHRL. The thesis outlined a range of measures the ISP can take to do this. These measures included establishing internal policies for how to interpret the legality and legitimacy of a request. It highlighted the importance of dialogue with governments to develop a shared understanding of how shutdown orders should be communicated and how they can be requested in line with IHRL. The thesis also emphasised the importance of the ISP to develop an infrastructure that allows for limited and specific implementations of shutdowns, that do not disturb the connection to vital services such as emergency services or health services.

Among the most important measures is the collaboration with stakeholders and industry initiatives. This can assist ISPs in building leverage and having a stronger voice when communicating and requesting clarifications and modifications from the government. Several such initiatives already exist. One example is the GNI, being among the most prominent initiatives working to tackle the issues of Internet shutdowns and ISP responsibility. Such multi-stakeholder initiatives should be considered on the multilateral level and inform official statements and resolutions of UN human rights mechanisms.

The thesis also considered whether an ISP is required to terminate their relationship with a government, if none of these measures are sufficient to ensure that a shutdown can be implemented in line with IHRL. When considering terminating a business relationship, the ISP should consider any adverse human rights impacts of such a decision, both short-term and long-term. Based on the wording in the UNGPs, it seems that ISPs are not required to take such action. In the case that they do not terminate the relationship, but continue operating in a context where they are linked to human rights violations, it is the responsibility of the ISP to

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<sup>278</sup> UNGP 23 Commentary

ensure that their operations are brought back in line with their responsibility to respect human rights.

As such, ISPs' responsibility to respect human rights is not simply a negative obligation to avoid infringing on human rights, but it is an operational framework requiring proactive responsibilities that should assist companies in assessing, mitigating and remediating any negative human rights impacts linked to their activities or business relationships.<sup>279</sup> The UNGPs have gone a long way in strengthening corporate responsibility to respect human rights, and have successfully made way for an attitudinal change to this responsibility. However, the UNGPs in themselves do not provide sufficient guidance on how ISPs can ensure that their operations are in line with their responsibility to respect human rights.

In order to develop clearer rules, the international community should increase its focus on this particular issue. More should be done in international human rights bodies to address the dilemmas faced by ISPs and increase the pressure on governments who too easily turn to Internet shutdowns. The Human Rights Committee should continue to link the right to access to the Internet to the right to freedom of expression and access to information, as well as related rights such as political participation and education. The Committee on the Rights of the Child could stress the importance of access to the Internet to fulfil the right to education for children. The HRC should also stress these connections, recognise the work of non-governmental initiatives and encourage governments to cooperate with ISPs to solve the growing issue of Internet shutdowns.

More work should be done to establish clearer guidance for ISPs on how to handle dilemma situations. This should include guidelines on which measures are required by an ISP when faced with conflicting obligations. It should answer the question of when an ISP is required to terminate the business relationship, and which considerations it should take and how these should be weighed against each other. Further work should also focus on guidelines for how ISPs should provide remedies for individuals impacted by Internet shutdowns, which may arise millions of users.<sup>280</sup> In the future, it may also be possible to see such precise guide-

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<sup>279</sup> Jørgensen, 'When private actors govern human rights' (n 244) 362

<sup>280</sup> Jørgensen, 'Human Rights and Private Actors in the Online Domain' (n 155) 267

lines develop into hard law at the domestic, regional and global levels, with stricter requirements both for governments and ISPs.

Envisioning a world without Internet shutdowns may lead to alternative ways of restricting freedom of expression and access to information, such as surveillance and censorship, which may be no more likely to comply with human rights than Internet shutdowns. Although Internet shutdowns should not be discussed in isolation from these issues, it may be easier and less controversial to begin the debate on the right to Internet access and to stop the increasing trend among governments who employ Internet shutdowns as a strategic and political tool.

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