



**Analytical summary of national responses to
Special Rapporteur David Kaye's report to
the UN Human Rights Council 35th session**

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1. Introduction

The latest report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye,¹ presented in June 2017 to the UN Human Rights Council, focused on the role of digital access providers in ensuring the provision of human rights, with a particular focus on private actors' responsibilities and the inclusion of these responsibilities in the current legal framework.

In previous years, the Special Rapporteur and his predecessor have focused reports on the impact of surveillance and on communications encryption and anonymity. The topic chosen and the approach adopted by Special Rapporteur Kaye were welcomed by almost all member states, which recognised the growing importance of online freedom of expression and repeatedly stated the need to treat offline and online rights on an equal footing. Notable exceptions included the Russian Federation, which regretted the Special Rapporteur's decision to focus on issues that "only by a long stretch can be considered to be part of the rapporteur's mandate," and Egypt, lamenting the aspiration to "force a human rights approach on technical matters beyond the mandate of the rapporteur and of the council."

Although many states acknowledged the particular role acquired by private actors in the field, their approaches to the matter varied. It is to be noted, however, that a great number of countries barely addressed both of the aspects highlighted by Mr. Kaye's report, focusing instead on country reports and offline violations of freedom of expression and opinion.

This summary will try to synthesise countries' positions on areas of controversy. In line with the Special Rapporteur's thematic reporting, the topics addressed will be necessary and proportionate standards in case of restrictions of freedom of expression online (section 2), network shutdowns (3), and private sector responsibilities, state regulation and state-business interplay (4). National reporting and call-outs to states will be addressed subsequently (section 5).

It is interesting to note that, in addition to the traditional imbalance in participation among regional groupings and the under-representation of the global South in internet-related matters (see Table 1), the regional breakdown partially corresponds to different positions expressed during the session, especially concerning the role of the private sector in human rights provision and model of internet governance.

Table 1. Breakdown of member states that made oral interventions by regional grouping

Africa (6)	Asia-Pacific (4)	Eastern Europe (12)	Latin America & the Caribbean (4)	Western Europe & other states (13)
Benin, Botswana, Egypt, Nigeria, Sudan, Tunisia	Japan, Maldives, Myanmar, Republic of Korea	Albania, Armenia, Estonia, Georgia, Iran, Latvia, Lithuania, Poland, Turkey, Russian Federation, Ukraine	Argentina on behalf of a group of countries, Bolivia, Brazil, Brazil on behalf of a group of countries, Cuba	Belgium, Cyprus, France, Germany, Ireland, Israel, Netherlands, Norway, Portugal, Spain, Switzerland, UK, USA

¹http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22

2. Necessary and proportionate standards for restrictions of freedom of expression online

Various recommendations of the Special Rapporteur included mention of standards of legality, necessity and proportionality in the restriction of freedom of expression, whether through limitation of access, take-down of content, or implementation of surveillance measures. Such measures must, in accordance with the provisions of Article 19 (3), paragraph 2 of the International Covenant on Civil and Political Rights, “be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims.” Special Rapporteur Kaye in this case appealed to the standards elaborated by General Comment No. 34 interpreting Article 19 of the ICCPR,² which notes the “possibility of legally suspending the exercise of certain human rights as the only means of guaranteeing the effective enjoyment of the most fundamental ones,” allowing state parties to unilaterally and temporarily derogate obligations under the Covenant, with due standards.

This position was shared by Argentina on behalf of a group of countries (Brazil, Chile, Colombia, Guatemala, Mexico, Panama, Peru and Uruguay), Armenia, Benin, Cyprus, Germany and the United Kingdom. Brazil, speaking on behalf of the core group on privacy (constituted by Austria, Brazil, Germany, Liechtenstein and Mexico), endorsed these standards generally and reiterated their specific importance in the protection of privacy (Article 17 of the ICCPR), described as an enabling right essential to the enjoyment of freedom of expression. On that occasion, they made reference to a recent resolution on “the right to privacy in the digital age” (A/HRC/34/L.7/Rev.1),³ explicitly recalling that states “should ensure that any interference with the right to privacy is consistent with the principles of legality, necessity and proportionality.” These standards were referred to by Japan in response to the Special Rapporteur's country report.

Nigeria, on the contrary, stressed that “there must be a limit to freedom of expression online, lest it be used to jeopardise good governance, peaceful coexistence and the safety and security of others, as witnessed in cases of radicalisation and recruitment by terrorist organisations.” This position was shared by Turkey, which recalled a series of terrorist attacks and named a series of terrorist organisations in responding to the Special Rapporteur's national report on Turkey. Other states, like Egypt, refuted that situations of emergency related to terrorism should be treated within the framework of freedom of expression and emphasised the fact that measures to prevent terror attacks before they occur are a crucial aspect of human rights provisions. However, it agreed with the standard of legality in accessing users' data and prohibiting encryption. The United States expressed concern over the Special Rapporteur's “widespread use” of necessary and proportionate standards in his report on freedom of expression, arguing that such standards in general are not grounded in the ICCPR international law framework.

3. Network shutdowns

Among restrictions to freedom of expression online, network shutdowns, which had been listed among the Special Rapporteur's priorities for a thematic study, were explicitly addressed by a number of

²<https://www.article19.org/resources.php/resource/2420/en/general-comment-no.34:-article-19:-freedoms-of-opinion-and-expression>

³https://www.article19.org/data/files/HRC.34.L.7.Rev1_Privacy_in_the_digital_age_1.pdf

countries. He reported that “in one year alone, there were reports of shutdowns in Bangladesh, Brazil, Burundi, the Democratic Republic of the Congo, India and Pakistan.”

The European Union condemned “practices that fail to meet human rights standards, such as network shutdowns, intrusive government surveillance and interference with net neutrality.” Armenia, Estonia, France, Latvia, Norway and the Russian Federation also voiced their concerns about network shutdowns, and Cyprus recalled that “maintaining network connectivity may in fact mitigate public safety concerns and help restore public order.” The United Kingdom voiced support on the matter through its engagement on the side of the #KeepItOn campaign⁴ by Access Now, a campaign that unites around 70 NGOs, including the Association for Progressive Communications, in fighting internet shutdowns.

4. Addressing private sector responsibility

One of the main focuses of the report consisted of acknowledging and describing private sector responsibility for access to information and communications technologies (ICTs), from the perspective of provision of freedom of expression and other human rights.

Many states praised the report's emphasis on the role of private actors in the provision of access to the internet, with some raising concerns over excessive corporate power (Benin, Bolivia, Cuba and Maldives), while it was mostly European Union states that acknowledged private sector responsibilities as a matter of fact. Concerns over corporate power were tinted with criticism of forms of imperialist control over ICTs, as expressed for instance by Cuba, advancing the need for participatory democratic governance instead of leaving “a small group of enterprises from a very few countries to determine what is read, seen or heard in the world.” The European Union agreed with the Special Rapporteur’s take on the responsibility of digital access providers to respect human rights, citing the European Commission Strategy on Corporate Social Responsibility,⁵ coherent with the UN Guiding Principles on Business and Human Rights.⁶ However, it is interesting to note that while some European states announced national implementation of the Plan on Business and Human Rights, other member states that aligned with the position expressed in the EU statement still described repartition of duties in a more state-centred fashion: while governments regulate, the private sector should comply, highlighting lack of consensus on the matter even within regional groups.

Some states like Botswana acknowledged the role of the legal system to build trust between business, clients and public authorities and others highlighted the need for international, democratic and participatory governance. It should be noted that this last concern, as expressed by Cuba and the Russian Federation, is to be understood as a demand for equal rights between states in the management of the internet, in particular the global South, in a multilateral rather than a multistakeholder approach, which was left unaddressed by most countries, apart from the endorsement it received from Switzerland.

5. National situations and call-outs

The Special Rapporteur embarked on three country visits in the past year, which resulted in three complementary reports on the situation of freedom of expression and opinion in Japan, Tajikistan and Turkey. The three states responded to allegations in the reports which at times were also addressed by

⁴<https://www.accessnow.org/keepiton>

⁵http://ec.europa.eu/growth/industry/corporate-social-responsibility_en

⁶http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

other states. In addition, some states reported other situations of alleged violations of freedom of expression, complemented by NGOs.

5.1. Japan

The special report on Japan highlighted restrictions to the independence of media (notably through the “secret acts” legislation which was believed to prevent journalists from gathering information on topics specified in the legislation), governmental interference in the recounting of history (concerning World War II and the mention of comfort women), and unnecessary and disproportionate restrictions on electoral campaigning as well as on protest activities, complemented by excessive use of force, with reference to the Okinawa protests.

The Japanese government disputed this report, contesting instances of governmental pressure on journalists as described by the Special Rapporteur’s report, maintaining the independence of textbook authorisation, and arguing that unnecessary and disproportionate actions against freedom of expression were never imposed and that those actions which were undertaken occurred in accordance with relevant laws and regulations.

The Korean Republic devoted its entire statement to denouncing the situation of freedom of expression in Japan, expressing concern over the upsurge of hateful expression in Japan, especially directed towards ethnic Koreans residing in Japan, and addressing correct history education through the issue of so-called comfort women.

NGOs like Franciscans International focused on direct and indirect pressure on the media in Japan, with regards to the Okinawa protests, as well as the arrest of protesters and journalists, a concern echoed by the International Movement Against All Forms of Discriminations and Racism.

5.2. Tajikistan

Despite improvements in freedom of expression, the country report on Tajikistan highlighted concerns around restriction of freedom for political opponents and independent media, both offline and online, especially regarding telecommunications policy (there is a single communications switch centre, allowing the blocking of communications and content and surveillance of communications traffic and data). Tajikistan's response criticised the report on the basis that the Special Rapporteur's arguments and conclusions did not sufficiently take note of national legislation dealing with extremism, terrorism and money laundering and of national specificities. Moreover, it criticised the reliance of the report on non-governmental sources, describing it as biased and non-objective. No further comments were made on the situation of freedom of expression in the country during the session.

5.3. Turkey

In the special country report on freedom of expression in Turkey, the Special Rapporteur acknowledged security concerns, but nonetheless expressed concerns over the prolonged state of emergency, restrictions on internet access and content, academic freedom and political activity, and the significant weakening of judiciary power and lack of judicial review.

The Turkish response, while assuring respect of freedom of expression, as guaranteed by the constitution, regretted that the report did not reflect the seriousness of terrorist threats by the FETÖ, PKK, DHKP/C and DAESH terrorist organisations, justifying the ongoing state of emergency,

investigations of journalists and closure of online media institutions when related to terrorist organisations. Moreover, it assured care in striking a balance between fundamental rights and freedoms and public order and security, and emphasised the establishment of an Inquiry Commission on State of Emergency Measures. It added that it is assessing dismissals of public employees and the closure of associations, institutions and media outlets, and will soon start to receive applications for reversal.

Many European states mentioned Turkey in their responses, praising the Special Rapporteur's report and encouraging the country to respect freedom of expression. The OSCE encouraged Turkey to "continue work with UN and CoE mechanisms and support lifting of the state of emergency, release of those detained on exercise of FoE and invite to establish independent and transparent mechanisms to challenge dismissal from public service," and the United States mentioned the name of a particular individual, Amnesty International Turkey Chair Taner Kilic.

5.4. Bahrain

Although Bahrain was not mentioned in the Special Rapporteur's report or in national responses, two NGO statements, from the International Federation for Human Rights (on behalf of the World Organisation Against Torture, Reporters Without Borders, IFEX, the Bahrain Center for Human Rights and the Gulf Center for Human Rights) and the Iraqi Development Organization and Americans for Democracy and Human Rights in Bahrain, denounced the situation of human rights and freedom of expression in Bahrain. The reports cited the example of human rights defender Nabeel Rajab, imprisoned by the Bahraini authorities, who are also responsible for the closing of the independent newspaper al-Wasat and have criminalised support for Qatar in online or offline media.

5.5. Russian Federation

The statement of Ukraine, although never explicitly mentioning the Russian Federation, draws attention to freedom of expression and freedom of the press, detailing crimes, violence and intimidation and denouncing the banning of access to Russian-registered online resources in Ukraine. It is to be noted that emphasis in the Russian statement was put upon sovereignty but no response was provided.