



APC ISSUE PAPER

HUMAN RIGHTS IMPACTS OF TAXING POPULAR INTERNET SERVICES

By Justine Limpitlaw

EXECUTIVE SUMMARY

N This paper focuses on recent initiatives in three countries (Uganda, Kenya and Tanzania) to “tax” the internet through introducing excise duties on, essentially, internet access and/or use. The East African focus was not intentional, as these kinds of taxation initiatives are occurring in a number of regions in Africa. However, these are countries that have made actual legal enactments (whether statutory or regulatory) that are in force.

The paper considers the current position of each country with regard to internet penetration and affordability. It also considers what international human rights instruments require in respect of internet access and affordability as part of the right to seek, receive and impart information and ideas, which is a corollary right to freedom of expression.

It concludes that:

- The increased excise duty on internet data services in Kenya is not a violation of international human

Justine Limpitlaw has a BA, LLB (Wits), LLM (Yale), and is an electronic communications law consultant and visiting adjunct professor at the LINK Centre, University of the Witwatersrand.



APC
ASSOCIATION FOR
PROGRESSIVE
COMMUNICATIONS

rights norms and standards, as the increase is unlikely to hinder access to and/or use of the internet for Kenya's people.

- The excise duty in the form of licence-related fees for online content services in Tanzania is a violation of international human rights norms and standards, because the fees imposed are so high that they would render the cost of posting content online – that is, effective internet use – simply unaffordable for the vast majority of Tanzania's people.
- The excise duty on what is defined as “over-the-top services” in Uganda is a violation of international human rights norms and standards, because it renders the cost of accessing such services – that is, effective internet access – simply unaffordable for the majority of Uganda's people.

The paper also makes suggestions for how redress might be sought in respect of Tanzania's and Uganda's human rights violations resulting from the imposition of their excise duty regimes.

As the issue paper has a narrow focus, namely, on whether or not the excise duties in question constitute violations of human rights, it does not address the general issue of the impact of the excise duties on general economic development, including internet uptake, effects on internet penetration, and the like.

CONTEXT AND SCOPE OF PAPER

This issue paper focuses on recent initiatives (2018) to “tax” the internet in three countries: Uganda, Kenya and the United Republic of Tanzania (Tanzania). It is important to note that this issue paper was not intended to focus solely on East Africa, as these kinds of taxation initiatives are occurring in a number of regions in Africa. However, these are three examples of countries where actual legal enactments (whether statutory or regulatory) are in force,¹ as opposed to countries where proposed legal changes have yet to come into force or where laws were enacted but then rescinded due to public pressure.²

This is a law-focused issue paper, as these initiatives are legal: whether statutory (legislation passed by parliament), as has

been done in Kenya and Uganda, or regulatory (secondary legislation promulgated by a person authorised to do so in terms of an act of parliament), as has been done in Tanzania.

Press reports about the different legal processes that have occurred in the three countries under review in this paper have been extremely unhelpful, as the terms used, such as “blogging tax” or “social media tax”, are vague. This is doubtless due to a lack of knowledge on the part of journalists as to legal matters generally and the arcane world of excise duties (which all three countries have in fact imposed) in particular.

Consequently, it is useful to be clear on what is meant by certain terms popularly used when discussing the issue of “taxing” the internet.

BusinessDictionary.com defines an excise duty³ in three different ways: first, as “a percentage levied on the manufacture, sale, or use of [...] produced goods (such as alcoholic drinks or tobacco products)”; second, as “a percentage tax levied on a company's revenue, instead of (like income tax) on the company's income”; and third, as a “fixed tax levied on an activity or occupation, such as the license fee charged from attorneys, doctors, and other professionals”.

In addition, while the focus of this issue paper is on the particular internet-related excise duties recently introduced in Uganda, Kenya and Tanzania, it is important not to lose sight of the fact that both internet users and telecommunications operators in these countries already pay the usual taxes, in accordance with international norms, such as corporate taxes⁴ and value added tax.⁵ Obviously, the customers of the telecommunications operators indirectly but ultimately cover the operators' taxes too. All taxes and excise duties levied on telecommunications services in general, and internet access in particular, contribute to the costs payable by citizens for internet access, and all need to be taken into account when considering the affordability of accessing the internet in these countries.

Before getting into the detail of how these countries tax the internet, it is important to consider the levels of internet penetration in the three countries, as well as their per capita incomes and what these countries' citizens spend on basics such as food as well as on the internet.

3 www.businessdictionary.com/definition/excise-duty.html

4 Note that the corporate tax rate in all three countries is 30%. See: <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html>

5 Note that VAT rates in these countries are 16% for Kenya and 18% for both Tanzania and Uganda. EY. (2018). *Worldwide VAT, GST and Sales Tax Guide 2018*. www.ey.com/Publication/vwLUAssets/EY_Worldwide_VAT,_GST_and_Sales_Tax_Guide_2018/%24File/Worldwide%20VAT,%20GST%20and%20Sales%20Tax%20Guide%202018.pdf

1 For example, in Zambia.

2 For example, in Benin.

Kenya is a developing country according to the United Nations (UN),⁶ but is not on the UN list of “least developed countries” unlike both Tanzania and Uganda.⁷ According to the 2018 World Economic Situation and Prospects report published by the UN, the percentage of the population of East Africa (the region in which all three countries are located) living below the poverty line of USD 1.90 per day is approximately 30%.⁸ In these countries, basic human needs such as food take up a large proportion of income: According to the World Economic Forum, Kenya spends 46.7% of consumer expenditure on food.⁹ According to Uganda’s Bureau of Statistics, the average Ugandan household spends 43% of its income on food.¹⁰ According to the United States Department of Agriculture, the average Tanzanian household spends between 31% (in Dar es Salaam, for example) and 54% (in the rural Lake Zone, for example) of its income on food.¹¹

In each country these percentages differ greatly depending on whether the person lives in an urban or rural area, or is rich or poor. But as national averages, these statistics are among the highest in the world. By contrast, there are eight developed countries whose citizens spend less than 10% of income on food.¹²

In January 2018, internet penetration in East Africa was said to be at 27%,¹³ with the breakdown for the particular countries dealt with in this issue paper as follows:

- Kenya – 85% penetration with over 43 million internet users.¹⁴
- Tanzania – 38.9% penetration with over 23 million internet users.¹⁵

- Uganda – 41.9% penetration with over 19 million internet users.¹⁶

Clearly, the countries under discussion in this issue paper are leaders in the East African region in respect of internet access and use. By way of contrast, countries in the region with internet penetration rates below 10% include Eritrea, Somalia and Burundi.¹⁷

A key issue when considering internet penetration and use rates is pricing. What is the price of internet access? This issue paper focuses on mobile broadband internet access, as this is how most people in Africa access the internet.¹⁸

The Broadband Commission for Sustainable Development (Broadband Commission) – which was established in 2010 by the International Telecommunication Union (ITU) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) with the aim of expanding broadband access to accelerate progress towards national and international development targets¹⁹ – has a target of broadband prices representing 5% of gross national income (GNI) per capita.²⁰ According to the ITU, in 2016:

- Among least developed countries, only three countries had mobile broadband prices²¹ lower than 5% of GNI per capita.²² In this regard, Uganda had an average mobile broadband price of 17.5% of GNI per capita²³ while Tanzania had an average mobile broadband price of 5.39% of GNI per capita.²⁴
- Among developing countries (excluding least developed countries), 73 had mobile broadband prices lower than 5% of GNI per capita, Kenya being one of these with an average mobile broadband price of 4.41% of GNI per capita.²⁵

6 http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf

7 <http://www.un.org/en/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html>

8 United Nations. (2018). *World Economic Situation and Prospects 2018*. https://www.un.org/en/development/desa/dpad/wp-content/uploads/sites/45/publication/WESP2018_Full_Web-1.pdf

9 Gray, A. (2016, 7 December). Which countries spend the most on food? This map will show you. *World Economic Forum*. <https://www.weforum.org/agenda/2016/12/this-map-shows-how-much-each-country-spends-on-food>

10 UBOS. (2017). *The Uganda National Household Survey 2016/17*. www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2017_UNHS_26092017-Final_Presentation.pdf

11 Cochrane, N., & D’Souza, A. (2015, 2 March). Measuring Access to Food in Tanzania: A Food Basket Approach. *United States Department of Agriculture*. <https://www.ers.usda.gov/amber-waves/2015/march/measuring-access-to-food-in-tanzania-a-food-basket-approach>

12 Gray, A. (2016, 7 December). Op. cit.

13 Kemp, S. (2018, 30 January). Digital in 2018: World’s internet users pass the 4 billion mark. *We Are Social*. <https://wearesocial.com/blog/2018/01/global-digital-report-2018>

14 <https://www.internetworldstats.com/stats1.htm>

15 Ibid.

16 Ibid.

17 Ibid.

18 Stork, C., Calandro, E., & Gamage, R. (2014). *The future of broadband in Africa*. https://www.researchictafrica.net/docs/The_Future_of_Broadband_in_Africa_webversion.pdf

19 <https://www.broadbandcommission.org/Pages/default.aspx>

20 ITU. (2017). *ICT Facts and Figures 2017*. <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2017.pdf>

21 Based on 1 GB of data per month.

22 ITU. (2017). Op. cit.

23 <https://www.itu.int/en/ITU-D/Statistics/Pages/default.aspx>

24 Ibid.

25 Ibid.

OVERVIEW OF EXAMPLES OF TAXING POPULAR INTERNET SERVICES

KENYA

On 21 September 2018, Kenya Finance Act, Act 10 of 2018 (the Finance Act) was enacted. The Finance Act amends a number of laws relating to taxes and duties. Different sections of the Finance Act come into force on different dates. For the purposes of this issue paper, section 32(2)(b)(i) of the Finance Act (which came into force, retrospectively, on 1 July 2018)²⁶ amends the First Schedule to the Excise Duty Act, Act 23 of 2015 (the Kenyan EDA) by substituting the existing paragraph 1 of Part II of the schedule to increase excise duty payable on “telephone and internet data services” from 10% to 15%.

Consequently, this is, effectively, a tax on both internet access and internet use.

TANZANIA

On 16 March 2018, Tanzania’s Minister of Information, Culture, Arts and Sports prescribed the Electronic and Postal Communications (Online Content) Regulations of 2018²⁷ (the Regulations), acting in terms of the Electronic and Postal Communications Act, Act 3 of 2010 (the EPC Act).

The Regulations are substantial, running to some 16 pages. In relation to taxing the internet, the key provisions of the Regulations are as follows:

- Section 14(1) provides that “[a]ny person who wishes to provide online content services shall fill in an application form as prescribed in the First Schedule and pay fees as set out in the Second Schedule to these regulations.” The term “online content services” is not defined. But the term “online” is defined, in section 3 of the Regulations, as meaning “a networked environment available via online whereby content is accessible to or by the public whether for a fee or otherwise and which is intended for consumption in or originated from Tanzania”. The term “content” is also defined as meaning “sound, data, text or images whether still or moving”.

- Section 4(a) of the Regulations requires the Tanzania Communications Regulatory Authority (TCRA) to keep a “register of bloggers, online forums...” Bloggers are defined in section 3 of the Regulations as “a writer or group of writers owning and performing the act of blogging and any other acts similar to blogging”, and “blog or weblog” is defined as “a website containing the writer’s or group of writers’ own experiences, observations, opinions including current news, events, journals, advertisements and images, video clips and links to other websites”. An “online forum” is defined as meaning “an online discussion site where people can hold conversations in the form of posted messages or journals”. The effect of this, clearly, is that anyone posting online content originating in Tanzania or intended for Tanzanian audiences is to be registered with the TCRA and has to pay the relevant fees.
- The First Schedule to the Regulations sets out the prescribed form for an “application for licence to provide online content services”, thereby clearly indicating that providing an online content service is to be a licensable activity. Further, the application form is particularly onerous and includes requiring tax clearance certificates and a particular statement about the proposed content if the blog or online content is to contain “specialised content” that is “current affairs and news”. The form also requires information regarding “staff establishment and qualification” and “staff training programs, if any”. However chilling these procedural licence application requirements may be, they fall outside of the scope of this issue paper, and so they will not be further dealt with here.
- The Second Schedule to the Regulations sets out, among other things, the online content services fees and licence period. The duration of the licence is only for three years and the fees are significant: the original licence application fee is TZS 100,000,²⁸ the recurring annual licence fee is TZS 1 million and the fee for renewing a licence is TZS 1 million. The effect of this is that every third year, a blogger will be required to pay the renewal application fee as well as the annual licence fee, a total of TZS 2 million. In the first three years of an online content provider’s initial licence, the online content provider can expect to pay TZS 4.1 million or USD 1,774 at the exchange rate at the time of writing.²⁹
- Section 7(1)(c) read with section 7(2) of the Regulations requires Tanzanian residents, Tanzanian citizens outside the country and non-citizens of Tanzania residing inside the country and blogging or running online forums with

²⁶ Section 1(c) of the Finance Act.

²⁷ Government Notice No. 113.

²⁸ Tanzanian shillings.

²⁹ Based on the exchange rate on 27 November 2018 at <https://www.xe.com/currencyconverter/>

content for consumption by Tanzanians to comply with various conditions, including the “payment of regulatory fees”. Section 18 of the Regulations makes it an offence to contravene any provision in the Regulations and upon conviction, the penalty is a fine of not less than TZS 5 million, imprisonment for a term of not less than 12 months, or both a fine and imprisonment. It is important to point out the unusual wording of the period of imprisonment: usually a maximum period is set in an offences provision. In the Regulations, however, a minimum term of 12 months is set, leaving the maximum possible sentence to the discretion of the person trying the offender.

As a result, this is, effectively, a tax on internet use but not on internet access.

UGANDA

On 30 May 2018, the Ugandan Parliament passed the Excise Duty (Amendment) Act 2018, which came into force on 1 July 2018. It amends the Excise Duty Act, Act 11 of 2014 (the Ugandan EDA). Key amendments for the purposes of this issue paper include:

- A new definition of “over-the-top (OTT) services”³⁰ to be inserted in section 2 of the Ugandan EDA, as follows: “the transmission or receipt of voice or messages over the Internet protocol network and includes access to virtual private networks”³¹ but does not include educational or research sites prescribed by the Minister by notice in the Gazette. The term “messages” is undefined, but it clearly includes services such as WhatsApp, Facebook, Twitter, Truecaller, Viber, Snapchat, Tinder, iMessage, Yahoo Messenger, FaceTime, Instagram and Skype.³²
- A substituted item 13 in Schedule 2 to the Ugandan EDA, which includes imposing a fixed excise duty on

OTT services of “Ushs³³ 200 [USD 0.054]³⁴ per user per day of access”,³⁵ and providing for excise duty to be payable on “internet data” but setting the amount of such excise duty payable at “Nil”.³⁶

- A new section 4(5) in the Ugandan EDA which provides that “[a] telecommunications operator providing data used for accessing over the top services is liable to account for and pay excise duty on the access to the over the top services.” The effect of this is that it is the telecommunications operators that are liable to actually pay over to the revenue authorities the excise duty on access to OTT services which is payable by members of the public.

A number of telecommunications companies³⁷ have issued a joint statement informing the public that these services “can be accessed upon payment of the OTT Tax by the customer of Ushs 200 per user per day” and giving details of mobile money services available for easy payment to each telecommunications operator.³⁸ Interestingly, smaller internet service providers (ISPs) are reportedly “not even bothering with the details of the new [over the top services excise duty]. They have simply increased the cost of data across the board assuming that whoever has access to the Internet will emphatically use [one] of the now taxable sites at least once a day. Tangerine, a smaller ISP in Kampala, sent messages to their customers announcing that its monthly bundles of data will now cost an extra 6000 Ugandan shillings, following a government directive to tax use of over the top Internet services.”³⁹ As the reporter herself noted, “This approach is [in] contradiction with [President] Museveni’s reassurances that the tax would not apply to data itself because the wider Internet is useful for educational purposes.”⁴⁰

Consequently, this is, effectively, a tax on internet access, although crafted as specifically pertaining to accessing what is defined as “over the top services” and not on internet data as such.

30 In 2017, the vice president of the ITU Telecommunication Standardization Sector summarised what is meant by the term “OTT services” as provided for in the ITU Regulation Toolkit as follows: “any service provided over the internet that bypasses traditional operators’ distribution channel” and gave examples of such services under the headings VoIP, SMS, Apps, Cloud Services and Internet Television (Video Streaming). See: www.itu.int/en/ITU-T/Workshops-and-Seminars/bsg/201710/Documents/Park.pdf and www.ictregulationtoolkit.org/toolkit/2.5

31 MTN Uganda has provided its customers with non-closed list of examples of some 57 such services. <https://www.mtn.co.ug/en/products/internet/Pages/OTT-Services.aspx>

32 Ibid.

33 Ugandan shillings.

34 Based on the exchange rate on 27 November 2018 at <https://www.xe.com/currencyconverter>

35 Item 13(b).

36 Item 13(c).

37 Airtel, MTN and Africell.

38 A copy of the statement is available here: Asingwire, N. (2018, 29 June). How you will pay your social media taxes. *Sauti Tech*. <https://www.sautitech.com/digital/how-you-will-pay-your-social-media-taxes>

39 Namubiru, L. (2018, 3 July). How Uganda is implementing its controversial social media tax. *Quartz Africa*. <https://qz.com/africa/1319826/how-ugandas-social-media-tax-works-with-whatsapp-facebook-twitter-blocked>

40 Ibid.

ANALYSIS OF THE DIFFERENT TYPES OF TAX REGIMES

It is clear that the first definition of an “excise tax” dealt with in the first section of this issue paper does not apply to any of the examples in this paper, as the internet is not a “produced good”.

In Kenya, the excise duty is payable as a percentage of the data costs charged by a service provider and is payable by the service provider. There is no direct requirement for users of data to pay the excise duty, although the costs thereof are obviously passed on to the user. Consequently, the excise duty provided for in Kenya clearly falls within the second definition of excise duty listed in the first section: a percentage levied on a company’s revenue arising out of the sale of internet data services.

The licence fee payable by online content providers in Tanzania is clearly an example of the third kind of excise duty, “a fixed tax levied on an activity” as a set of regulatory licence fees, namely an application fee, an annual licence fee and a renewal fee. However, these are not charged to the telecommunications operators or other electronic communications service providers, but rather to online content providers, with no distinction being made between a large corporate entity providing online content and an individual blogger or Facebook user. Consequently, the licence fees payable amount to a de facto tax, given that practically all people with internet access use social media and generate online content, and this requires, almost by definition, uploading posted messages to online forms. As Tanzania has 23 million internet users, this means that they are practically all supposed to be subject to licensing and the payment of the licence fees. If that many applications for licences were in fact made, the TCRA would be overwhelmed. So it remains to be seen if the Regulations can be implemented.

Interestingly, the Ugandan excise duty is also a fixed tax levied on an activity, namely a daily fee payable by those who access what are defined as “over the top services”, but it is actually levied not on individuals but on the companies providing such access (dealt with below). So Uganda is an example of a kind of hybrid of both the second and third types of excise duties discussed above. How a telecommunications operator that provides so-called free Wi-Fi – for example, via a coffee shop, school or university, among others – will collect the excise duty from all people accessing OTT services via the Wi-Fi remains to be seen, however.

ANALYSIS OF STATE OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW WITH REGARD TO TAXING THE INTERNET

The International Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its two optional protocols, and the International Covenant on Economic, Social and Cultural Rights.⁴¹

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations in 1948 as Resolution 217 A.⁴² It set out, for the first time, fundamental human rights to be universally protected.

For the purposes of this issue paper, the most important provisions of the UDHR are:

- Article 19, which provides: “Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁴³
- Article 29(2), which provides: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”⁴⁴
- Article 30, which provides: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

In analysing these provisions, it is important to note that even although the internet did not exist in any form in 1948, the prescience of the drafters to use the broad term “through

41 <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

42 <https://www.un.org/en/universal-declaration-human-rights>

43 https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

44 Ibid.

any media” has meant that the internet is now regarded as a medium through which people have the right to “seek, receive and impart information and ideas.”

It is also important to note the provisions contained in Articles 29(2) and 30 that set out the grounds upon which a limitation on the right to freedom of expression, and in particular on the right to seek, receive and impart information on the internet, may be restricted. These establish that any restrictions must be provided by law and solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The first question to be asked is whether or not the excise duties payable in Kenya, Tanzania and Uganda constitute limitations of Article 19 and are in fact restrictions of the right “to seek, receive and impart information and ideas through any media.” If so (and we consider this issue in detail below), the next question is whether they are restrictions provided by law. The answer to that is clearly yes – by way of legislation in Kenya and Uganda and by way of regulation in Tanzania. The next question is whether or not the laws have been enacted “solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” The only possible application of this provision is that the laws have been enacted “for the purpose [...] of meeting the just requirements of [...] the general welfare in a democratic society.” The basis for this argument is that the excise duties payable contribute to the fiscus, which provides the financial resources necessary for these respective governments to spend on programmes that benefit their populations as a whole. We consider these issues in more detail below.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) is a treaty that sets out a number of civil and political rights. It was adopted by the United Nations in 1966 and came into force in 1976.⁴⁵ All three countries that this issue paper focuses on have acceded to the ICCPR. Kenya acceded to it in 1972, Tanzania in 1976 and Uganda in 1995.⁴⁶ According to Article 2.1.(b) of the Vienna Convention on the Law of Treaties 1969,⁴⁷ the terms “accession” and “ratification”, among others, “mean in each case the international act so named whereby a State establishes on the

international plane its consent to be bound by a treaty.” Consequently, all three countries focused on in this paper have effectively agreed to be bound by the provisions of the ICCPR.

The Preamble to the ICCPR reaffirms that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and, consequently, that rights “derive from the inherent dignity of the human person.”

Article 19 of the ICCPR elaborates on a number of the provisions of the Universal Declaration of Human Rights. It provides:

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) for respect of the rights or reputations of others;
 - (b) for the protection of national security or of public order, or of public health or morals.

It is necessary to point out certain key aspects of Article 19 of the ICCPR as they pertain to the excise duties and licence fees payable in respect of the internet in Uganda, Kenya and Tanzania that are the focus of this issue paper.

Article 19 paragraph 2 is critical. It contains clear provisions that elucidate what components are provided for in the right to freedom of expression, that is, what the right to freedom of expression is made up of. These include:

- The right of everyone to seek information and ideas through any media of his⁴⁸ choice. In this regard, it is important to note that the Human Rights Committee in its General Comment 34 – which interprets, *inter alia*, paragraph 2 of Article 19 of the ICCPR – has specifically stated that means of dissemination of expression⁴⁹ “include all forms of audio-visual as well as electronic and internet-based modes of expression.” The effect of this

45 https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtmsg_no=IV-4&src=IND

46 <http://indicators.ohchr.org>

47 <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

48 The gendered pronoun is used in the ICCPR.

49 <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

is that a person has a right to try to *find* information and ideas on the internet (emphasis added).

- The right of everyone to receive information and ideas through any media of his choice. The effect of this is that a person has a right to *obtain* information and ideas from the internet (emphasis added).
- The right of everyone to impart information and ideas through any media of his choice. The effect of this is that a person has a right to *share* information and ideas on the internet (emphasis added).

Article 19 paragraph 3 of the ICCPR sets out the very specific grounds upon which the above rights to seek, receive and impart information and ideas on the internet may be restricted. Namely, the restrictions on the rights have to be provided by law, and necessary for respect for the rights of others, or for the protection of national security or of public order, or of public health or morals.

The effect of this is that only restrictions that are provided by law and are necessary for respect for the rights of others or to protect national security, public order, public health or public morals are allowed in terms of the ICCPR.

When analysing the excise duties payable in respect of internet services in Uganda, Kenya and Tanzania, it is clear that these are provided by law but are not necessary for respect for the rights of others or to protect national security, public order, public health or public morals. However, they will constitute a violation of paragraph 3 of Article 19 of the ICCPR only if they in fact constitute restrictions on the rights contained in paragraph 2 of Article 19 of the ICCPR.

When does a tax such as an excise duty constitute a restriction on the rights to seek, receive or impart information or ideas on the internet? The answer is when an excise duty or licence fee is so high that it prevents a person from being able to seek, receive or impart information or ideas on the internet. Thus the key issue comes down to the affordability of the excise duties and licence fees in the countries in question.

The Human Rights Committee is a body that has, since 2005, undertaken the UN's Universal Periodic Reviews of every member state's human rights situation every five years.⁵⁰ It takes account of a state's compliance with human rights as set out in the UDHR as well as in the ICCPR. It can and does make recommendations as to actions that states parties can take towards the progressive realisation of rights provided for in the UDHR and ICCPR.

50 <https://www.upr-info.org/en/upr-process/what-is-it>

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵¹ which sets out a number of economic, social and cultural rights, was adopted by the United Nations in 1966 and came into force in 1976.⁵² All three countries that this issue paper focuses on have acceded to or ratified the ICESCR: Kenya in 1972, Tanzania in 1976 and Uganda in 1987.⁵³ According to Article 2.1.(b) of the Vienna Convention on the Law of Treaties 1969,⁵⁴ the terms "accession" and "ratification", among others, "mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty." Consequently, all three countries focused on in this paper have effectively agreed to be bound by the provisions of the ICESCR.

Key aspects of the ICESCR include the following:

- Article 12(1) of the ICESCR recognises the right of everyone to "an adequate standard of living [...] and to the continuous improvement of living conditions."
- Article 15(1) of the ICESCR recognises the right to, among other things, (a) "take part in cultural life" and (b) "enjoy the benefits of scientific progress and its applications." Article 15(3) provides that states parties to the ICESCR undertake "to respect the freedom indispensable for scientific research and creative activity."
- Article 2(1) of the ICESCR, in its relevant part, commits each state party to the ICESCR "to take steps, individually [...] to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The Committee on Economic, Social and Cultural Rights (CESCR), comprising a team of independent experts, is the body that monitors implementation of the ICESCR by its states parties, and it can and does make recommendations as to actions that states parties can take in respect of the progressive realisation of rights provided for in the ICESCR. For example, the CESCR recently published its "Concluding observations on the initial report of South Africa"⁵⁵ which included a section on "Access to the Internet" in which the

51 https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf

52 https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtmsg_no=iv-3&chapter=4&clang=en

53 <http://indicators.ohchr.org>

54 <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

55 <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

CESCR recommended that South Africa “adopts relevant measures to ensure the accessibility and affordability of the Internet.”⁵⁶

The interpretation of what the rights provided for in the ICESCR require from states evolves over time. While the internet was not even named in 1966⁵⁷ when the ICESCR was adopted, its centrality to the concept of development – which, in turn, is key to the concept of “continuously improving living standards” provided for in Article 12(1) of the ICESCR – is self-evident and, as has been set out above, the CESCR does consider states parties’ realisation of internet-related obligations. Further, the United Nations’ 17 Sustainable Development Goals provide additional interpretive assistance when considering what the rights provided for in the ICESCR require in 2018.

SUSTAINABLE DEVELOPMENT GOALS

In 2015, at a UN summit, countries adopted, by way of UN General Assembly Resolution 70/1, the 2030 Agenda for Sustainable Development⁵⁸ (the Development Agenda) and its 17 Sustainable Development Goals (SDGs), agreed upon on 1 January 2016.⁵⁹ However, it is important to note that the 17 SDGs are not legally binding upon member states of the UN,⁶⁰ that is, the Development Agenda is not an international law document as such because it is not an actual agreement between states (capable of being signed, ratified and the like). Nevertheless, the SDGs give interpretative content to obligations to, among other things, continuously improve living standards, which are legally binding on states parties that have ratified the ICESCR.

For the purposes of this issue paper, Goal 9 of the SDGs is the most relevant, namely: “Build resilient infrastructure, promote sustainable industrialization and foster innovation.”⁶¹

The Agenda elucidates what countries are required to do in order to meet Goal 9 and one of these requirements, set out in 9c, is to “significantly increase access to information and communications technology and *strive to provide universal and affordable access to the Internet in least developed countries by 2020*”⁶² (emphasis added).

The ITU has interpreted “universal and affordable access” to mean that “all citizens should have access to the

infrastructure for using the Internet and the cost should be within their economic means.”⁶³ It is beyond the purview of this issue paper to consider the extent of internet infrastructure access in Kenya, Tanzania and Uganda. Instead, this issue paper considers the extent to which the excise duties newly imposed or increased in these countries result in the cost of internet access being beyond the economic means of these countries’ inhabitants.

ACHPR RESOLUTION ON THE RIGHT TO FREEDOM OF INFORMATION AND EXPRESSION ON THE INTERNET IN AFRICA

The African Commission on Human and Peoples’ Rights (ACHPR) Resolution on the Right of Freedom of Information and Expression on the Internet in Africa⁶⁴ (the Resolution) was adopted in Banjul in 2016. Again, while it is not a legally binding document because it is not an actual agreement between states (capable of being signed, ratified and the like), it is important as an aspirational document. For the purposes of this issue paper, the Resolution’s most important provision is clause 1 which specifically calls upon states parties “to respect and take legislative and other measures to guarantee, respect and protect citizen’s right to information and expression through access to Internet services.”

AFRICAN UNION DECLARATION ON INTERNET GOVERNANCE AND DEVELOPMENT OF AFRICA’S DIGITAL ECONOMY

The African Union Declaration on Internet Governance and Development of Africa’s Digital Economy⁶⁵ (the AU Declaration) was adopted at the Kigali AU Summit in January 2018. It is not an international law document as such because it is not an actual agreement between states (capable of being signed, ratified and the like).⁶⁶ Instead it is, as one commentator has put it, “an aspirational human rights instrument that explicitly encourages respect for freedoms and rights on the internet.”⁶⁷

56 Ibid.

57 The first ARPANET message was sent on 29 October 1969. <https://computer.howstuffworks.com/arpnet1.htm>

58 https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

59 <https://www.un.org/sustainabledevelopment/development-agenda>

60 Ibid.

61 <https://www.un.org/sustainabledevelopment/infrastructure-industrialization>

62 Ibid.

63 ITU. (2018). *ICTs, LDCs and the SDGs: Achieving universal and affordable Internet in the least developed countries*. <https://www.itu.int/en/ITU-D/LDCs/Pages/Publications/LDCs/D-LDC-ICTLDC-2018-PDF-E.pdf>

64 Resolution 362. www.achpr.org/sessions/59th/resolutions/362

65 https://au.int/sites/default/files/newsevents/workingdocuments/34444-wd-_declaration_on_internet_governance_adopted_au_summit_2018.pdf

66 Indeed, the AU Declaration does not appear on the list of OAU/AU Treaties, Conventions, Protocols & Charters on the AU’s website: <https://au.int/en/treaties>

67 Ogunjipe, T. (2018, 25 March). Issues in AU Declaration on Internet Governance. *Paradigm Initiative*. <https://paradigmhq.org/issues-in-au-declaration-on-internet-governance>

The AU Declaration is relevant to this discussion because it is the only explicit African intergovernmental declaration whose provisions talk to universal access and affordability of the internet. In this regard:

- Clause 4 of the AU Declaration provides that the member states “remain committed to facilitating a resilient, unique, universal and interoperable Internet that is accessible to all and will *strive to ensure universal and affordable Internet access* for all African citizens including people with specific needs” (emphasis added).
- Clause 14 of the AU Declaration provides that member states “undertake to *ensure legal and regulatory environments that will enable growth of Africa’s Digital economy* through innovative applications and services, making the Internet central to Africa’s development agenda” (emphasis added).

It is clear from the wording of the AU Declaration that the member states of the AU understand the importance of ensuring legal frameworks that facilitate the African digital economy through ensuring universal and affordable internet access for all as part of making the internet central to Africa’s development agenda, in line with the SDGs and the relevant provisions of the ICCPR and the ICESCR.

AFRICAN DECLARATION ON INTERNET RIGHTS AND FREEDOMS

In 2014, a number of organisations from across the African continent (civil society, academic and inter-governmental) came together to develop the African Declaration on Internet Rights and Freedoms⁶⁸ (the African Internet Rights Declaration). The African Internet Rights Declaration is a statement of principles and rights that ought to inform the development of policy, law and regulation in respect of the internet generally by African governments as well as a call to action to various stakeholders.

Indeed, in the Introduction and Preamble to the African Internet Rights Declaration, the drafters thereof make reference to a number of regional standards that have been established, but note that “many governments in Africa lack both the technical and legal resources to legislate appropriately and the political will to provide comprehensive protection to human rights in the context of the Internet and digital technologies” and that the African Internet

Rights Declaration was “motivated by the need to develop and agree on a set of principles which would inform, and hopefully inspire, policy and legislative processes on Internet rights, freedoms and governance in Africa.” The African Internet Rights Declaration is voluminous, and we highlight below only those principles (Principles 2-7) that are specifically relevant to universal and affordable access to the internet, namely:

- **Principle 2. Internet access and affordability:** “Access to the Internet should be available and affordable to all persons in Africa without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Access to the Internet plays a vital role in the full realisation of human development, and facilitates the exercise and enjoyment of a number of human rights and freedoms, including the right to freedom of expression and information, the right to education, the right to assembly and association, the right to full participation in social, cultural and political life and the right to social and economic development” (emphasis added).
- **Principle 3. Freedom of expression:** “Everyone has the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the Internet and digital technologies and regardless of frontiers. The exercise of this right should not be subject to any restrictions, except those which are provided by law, pursue a legitimate aim as expressly listed under international human rights law (namely the rights or reputations of others, the protection of national security, or of public order, public health or morals) and are necessary and proportionate in pursuance of a legitimate aim” (emphasis added).
- **Principle 4. Right to information:** “Everyone has the right to access information on the Internet. All information, including scientific and social research, produced with the support of public funds, should be freely available to all, including on the Internet” (emphasis added).
- **Principle 5. Freedom of assembly and association and the Internet:** “Everyone has the right to use the Internet and digital technologies in relation to freedom of assembly and association, including through social networks and platforms. No restrictions on usage of and access to the Internet and digital technologies in relation to the right to freedom of assembly and association may be imposed a lesser restriction as prescribed by law, pursues a legitimate aim as expressly listed under international human rights law (as specified in Principle 3 of this Declaration) and is necessary and proportionate in pursuance of a legitimate aim” (emphasis added).

68 <https://africaninternetrights.org/wp-content/uploads/2015/11/African-Declaration-English-FINAL.pdf>

- **Principle 6. Cultural and linguistic diversity:** *“Individuals and communities have the right to use their own language or any language of their choice to create, share and disseminate information and knowledge through the Internet”* (emphasis added).
- **Principle 7. Right to development and access to knowledge:** *“Individuals and communities have the right to development, and the Internet has a vital role to play in helping to achieve the full realisation of nationally and internationally agreed sustainable development goals. It is a vital tool for giving everyone the means to participation in development processes”* (emphasis added).
- Meet the applicable three-part test provided for in the UDHR in considering whether or not:
 - the excise duty in question does in fact constitute a restriction of an international human right; and if so
 - the excise duty is provided by law; and if so
 - the excise duty is such that it meets the test of having been enacted “for the purpose [...] of meeting the just requirements of [...] the general welfare in a democratic society.”⁶⁹
- Meet the applicable three-part test provided for in Article 19(3) of the ICCPR in considering whether or not:
 - the excise duty in question does in fact constitute a restriction on the expression rights provided for in article 19(2) of the ICCPR; and if so
 - the excise duty is provided by law; and if so
 - it is necessary “for the respect of the rights of others.”⁷⁰

IMPACT OF TAXES ON THE ENJOYMENT OF HUMAN RIGHTS

Africa has had a unique experience of colonialism, racism and oppression, which requires the development of a particular commitment to standing against these dubious legacies and in favour of an approach to internet-related legislation and regulation that reflects a commitment from states to restoring the dignity and ensuring the full realisation of the human potential of their inhabitants by:

- Meeting their human rights obligations under international law, including with respect to their obligations as states parties to legally binding UN and AU treaties and other international agreements.
- Ensuring that new legislation does not undermine human rights in relation to the internet, specifically with regard to the right to freedom of expression and its inherent corollary right, access to information.
- Passing legislation and regulations that meet the highest international best practice standards as a mark of respect for the inherent dignity of every African. Examples of the requirements of such standards are contained in the international treaties, conventions and declarations set out above.

Turning to the countries discussed in this issue paper, the impact of their chosen form of excise duty in respect of the internet will be considered as measured against the international standards set out above, and in particular states’ parties legal obligations to, among other things:

- Take steps to progressively achieve the full realisation of the rights recognised in the ICESCR.

KENYA

Kenya’s excise duty increase on internet data services from 10% to 15% (effectively a 50% increase) has been sharply criticised.

Bob Collymore, CEO of Safaricom PLC (Safaricom), Kenya’s largest mobile operator⁷¹ with nearly 30 million customers, issued a public statement on the new excise duty on 17 October 2018,⁷² pointing out that the excise duty was in addition to the prevailing value added tax applicable to mobile services at the rate of 16%. In his statement, Collymore gave notice to Safaricom’s customers that with effect from midnight on 18 October 2018, its “headline price for voice calls and data will increase by 30 cents and SMS by 10 cents.” He also informed Safaricom’s customers that it had reviewed its prices for mobile data bundles to give effect to the new 15% excise duty. In closing, Collymore stated: “We are aware of and regret the impact [of] these additional taxes on our customers. It is our sincere hope that these changes will not affect the remarkable gains we have made in mobile phone and internet penetration in Kenya over the last two decades.”

69 The other grounds for legitimate restrictions set out in the UDHR are clearly inapplicable.

70 The other grounds for legitimate restrictions set out in the ICCPR are clearly inapplicable.

71 https://en.wikipedia.org/wiki/List_of_mobile_network_operators_in_Kenya

72 Safaricom. (2018, 17 October). Revision of mobile tariffs. <https://www.safaricom.co.ke/about/media-center/publications/press-release/release/483>

The implicit warning is that the increase in the excise tax might negatively affect, among other things, Kenya's internet penetration rates.

In this regard it is important to recap that, as mentioned earlier, Kenya has an internet penetration rate of 85% and the country falls within the Broadband Commission's target of broadband prices being 5% of GNI per capita, as Kenya's are at 4.41%.

Consequently, it is unlikely that the increase in the excise duty will unduly hinder access to the internet for Kenya's people. It is also important to note that while the Law Society of Kenya has reportedly challenged the increase of the excise duty on internet data,⁷³ it has done so on largely procedural grounds, arguing about the timing of the proposed change in respect of the passage of the bill through parliament, saying the president "had circumvented the normal legislative process." At the time of writing, the case was ongoing.

When considering the effects of the increase in excise duty on internet data services from 10% to 15%, Kenya's position with regards to the progressive realisation of the goals of universal access and affordability is relatively strong. Consequently, it is unlikely that it can be argued that the excise duty increase even constitutes a limitation on the right to freedom of expression, much less an unjustifiable limitation when measured against the arguments that could be made by the Kenyan government in support of the increase, such as the need to ensure appropriate excise duty levels in order to ensure the fiscal sustainability of the state in meeting the developmental and other socioeconomic rights of its inhabitants. All of which would constitute legitimate justifications of:

- Having been passed for the purpose of meeting the just requirements of the general welfare in a democratic society as required in terms of Article 19(2) of the UDHR.
- Being necessary for the respect of the rights of others in terms of Article 19(3) of the ICCPR.

TANZANIA

It is important to recap that, as stated earlier, Tanzania has an internet penetration rate of 38.9% and falls just outside of the Broadband Commission's target of broadband prices being 5% of GNI per capita, as Tanzania's are at 5.39%.

However, unlike Kenya, the cost of Tanzania's new regulations imposing an excise tax in the form of application,

licence and renewal fees is so excessive as to seriously undermine the access to and affordability of the internet for the majority of Tanzania's population. In this regard, the costs for three years of licence fees (for the initial three-year period for an online content services licence) is TZS 4,100,000. If we annualise these fees, this amounts to TZS 1,366,666.67. Freedom House assesses Tanzania's average annual per capita income at USD 872.⁷⁴ At the exchange rate at the time of writing, this results in an average annual per capita income of TZS 2,005,562.10.⁷⁵ Consequently, the cost of the annualised licence fees for the first three years of an online content licence will amount to some 68.42% of the average per capita income. If we add the existing mobile broadband prices, which are at an average of 5.39% already, this amounts to an effective total mobile broadband average price of 73.81% of average per capita income. Given that Tanzanians already spend between 31% and 51% of their average per capita income on food,⁷⁶ it is apparent that the effect of Tanzania's new online content services regulations are prohibitive for the majority of Tanzanians. They will, quite simply, make it impossible for internet users to afford to be online.

Tanzania's new excise duty in the form of online content licence fees fundamentally threatens universal access to and affordability of the internet. Consequently, it clearly constitutes a limitation on the right to freedom of expression. Further, it is unjustifiable when measured against the arguments that could be made by the Tanzanian government in support of the increase, such as the need to ensure appropriate excise duty levels in order to ensure the fiscal sustainability of the state in meeting the developmental and other socioeconomic rights of its inhabitants. Given the importance of the right to access to the internet as recognised internationally, denying the majority of people that right on the basis of being able to fund the developmental and other socioeconomic rights of its inhabitants is not legitimate, because of its lack of proportionality. It is so punitive to the expression rights of Tanzania's inhabitants that the excise duty cannot be said to:

- Have been passed for the purpose of meeting the just requirements of the general welfare in a democratic society as required in terms of Article 19(2) of the UDHR.
- Be necessary for the respect of the rights of others in terms of Article 19(3) of the ICCPR.

Consequently, it is clear that Tanzania's new excise duty in the form of licence-related fees for online content services

73 Kubania, J. (2018, 2 October). LSK fights Uhuru's internet tax, says Kenyans' rights violated. *Daily Nation*. <https://www.nation.co.ke/news/LSK-makes-case-against-internet-tax/1056-4787340-ox240ez/index.html>

74 <https://freedomhouse.org/report/freedom-world/2018/tanzania>

75 Based on the exchange rate on 27 November 2018 at <https://www.xe.com/currencyconverter>

76 Cochrane, N., & D'Souza, A. (2015, 2 March). Op cit.

introduced by way of regulations will constitute an unlawful infringement of the rights of Tanzanians under all the international instruments referred to above. A domestic court challenge to overturn the regulations was unsuccessful at the appeal court, and at the time of writing, the regulations were in place and were resulting in, among other things, a popular blogging site being shut down.⁷⁷

Nevertheless, the excise duty provided for in the relevant regulations can be challenged when Tanzania is under review by the Human Rights Committee or by the CESCR, which have the power to recommend that the regulations in question be amended or repealed. The next Universal Periodic Review for Tanzania is scheduled for May 2021.⁷⁸

UGANDA

It is important to recap that, as previously noted, Uganda has an internet penetration rate of 41.9% and has mobile broadband prices which are three times greater than the Broadband Commission's target of broadband prices being 5% of GNI per capita, as Uganda's are at 17.5%.

Uganda's new excise duty on accessing OTT services of UGX 200 per user per day is excessive and undermines the access to and affordability of the internet for the majority of Uganda's population. In this regard, the annualised cost of the new excise duty is UGX 73,000. Freedom House assesses Uganda's average annual per capita income at USD 674.⁷⁹ At the exchange rate at the time of writing, this results in an average annual per capita income of UGX 2,513,520.⁸⁰ Consequently, the cost of the annualized excise duty will amount to some 2.89% of the average per capita income. If we add the existing average mobile broadband prices which are at an average of 17.5% already, this amounts to an effective total mobile broadband average price of 20.39% of average per capita income. Given that Ugandans already spend 43% of their average per capita income on food,⁸¹ it is apparent that the effect of Uganda's new excise duty on OTT services is prohibitive. It will, quite simply, make it effectively unaffordable for internet users to be online.

Uganda's new excise duty on accessing OTT services fundamentally threatens universal access to and affordability of

the internet. Consequently, it clearly constitutes a limitation on the right to freedom of expression. Further, it is unjustifiable when measured against the arguments that could be made by the Ugandan government in support of the increase, such as the need to ensure appropriate excise duty levels in order to ensure the fiscal sustainability of the state in meeting the developmental and other socioeconomic rights of its inhabitants. Given the importance of the right to access to the internet as recognised internationally, denying the majority of people that right on the basis of being able to fund the developmental and other socioeconomic rights of its inhabitants is not legitimate because of its lack of proportionality. It is so punitive to the expression rights of Uganda's inhabitants that the excise duty cannot be said to:

- Have been passed for the purpose of meeting the just requirements of the general welfare in a democratic society as required in terms of Article 19(2) of the UDHR.
- Be necessary for the respect of the rights of others in terms of Article 19(3) of the ICCPR.

Consequently, it is clear that Uganda's new excise duty on OTT services will constitute an unlawful infringement of the rights of Ugandans under all the international instruments referred to above.

As is the case with Tanzania's excise duty on online content providers, Uganda's excise duty on accessing OTT services can be challenged when Uganda is under review by the Human Rights Committee or by the CESCR, which have the power to recommend that the related legislation be amended or repealed. The next Universal Periodic Review for Uganda is scheduled for November 2021.⁸²

CONCLUSIONS AND QUESTIONS FOR FURTHER RESEARCH

As is set out above, this issue paper concludes that:

- The increased excise duty on internet data services in Kenya is not a violation of international human rights norms and standards.
- The excise duty in the form of licence-related fees for online content services in Tanzania is a violation of international human rights norms and standards.

77 Ng'wanakilala, P. (2018, 29 May). Tanzania government wins court case to impose online regulations. *Reuters*. <https://www.reuters.com/article/us-tanzania-internet/tanzania-government-wins-court-case-to-impose-online-regulations-idUSKCN11U26R>

78 <https://www.upr-info.org/en/review/Tanzania-%28United-Republic-of%29>

79 <https://freedomhouse.org/report/freedom-world/2018/uganda>

80 Based on the exchange rate on 27 November 2018 at <https://www.xe.com/currencyconverter>

81 UBOS. (2017). Op cit.

82 <https://www.upr-info.org/en/review/Uganda>

- The excise duty on OTT services in Uganda is a violation of international human rights norms and standards.

There is little doubt that improving tax collection in African countries is a major challenge for African governments. It goes without saying that increasing tax revenues nationally reduces reliance on foreign donor funding and gives governments the financial means to tackle socioeconomic development challenges. Further, many governments impose so-called "sin taxes"⁸³ on goods such as alcohol, cigarettes or sugared drinks which are designed not only to improve a nation's fiscal health but also its physical health by dissuading the population from purchasing unhealthy goods. However, it is clear that international law requires affordable internet access as a fundamental enabler of human rights. Uganda and Tanzania are, in effect, imposing prohibitive excise duties, akin to a sin tax, on the internet and in so doing are rendering a key driver of economic and social development, the internet, inaccessible and unaffordable to the majority of their populations.

Also, from a fiscal strengthening point of view, Kenya, Tanzania and Uganda's excise duties may well be counter-productive as they tax an activity (internet access and/or use) which may lead to productive business activity, job creation, etc. in the future to such an extent that they stymie the possibility of much larger potential tax revenue generation from productive economic activity resulting from a universal and accessible internet. It would be far better not to impose excise duties on internet access and use among the population and reap the benefits of increased personal and corporate income taxes as well as value added taxes that derive from actual economic activity based on or facilitated by the internet.

While these broader fiscal policy choices are hard to challenge on a legal basis, they can be challenged by civil society, academic institutions, business organisations, chambers of commerce and the like, particularly those with a focus on economic and social development. It would be useful for such entities to consider the following course of action to bring about a repeal of the internet taxes:

- Engaging in economic research on the effects of premature taxation of the internet, an economic activity enabler, as opposed to taxing the actual productive economic activity resulting from the use of the internet.
- Conducting public awareness campaigns so that people are aware of the importance of universal,

affordable internet access and the ways in which such taxes undermine development aspirations.

- Making written and oral submissions to feed into parliamentary and other official governmental processes to pressure state actors to reconsider the internet taxes in the light of the adverse economic impacts thereof.

What legal mechanisms are available to challenge the Tanzanian and Ugandan internet excise duties? Besides the UN mechanisms for recommending legislative or regulatory amendments through the Human Rights Committee and the CESCR discussed above, there are aspects of the excise duties imposed in Tanzania and Uganda that are problematic even outside of their impacts on freedom of expression and the right to affordable internet access and which are not simply hard-to-challenge fiscal policy choices.

For example, as practically all of Tanzania's 23 million internet users are effectively to be subject to the online content provider licensing excise duty, the TCRA would be entirely overwhelmed if that many licence applications were actually made. Consequently, human rights defenders ought to consider domestic court avenues to challenge the regulations on the basis of impossibility of performance, given the fact that the TCRA lacks the resources, technical and human, to process the applications by internet users for online content services licences.

Similarly, it may be possible to bring a legal challenge in Uganda's domestic courts against the Ugandan excise duty for impossibility of performance given that it is not clear how a telecommunications operator that provides so-called free Wi-Fi, for example via a coffee shop, school, university or the like, will collect the excise duty from all people accessing OTT services via so-called free Wi-Fi.

These kinds of legal challenges can be made through Tanzania and Uganda's domestic courts and ought to be taken up by legal assistance NGOs, freedom of expression civil society organisations, academics, as well as by business organisations and chambers of commerce. Again, such court processes ought to be accompanied by a concerted public awareness campaign so that people are aware of the importance of universal, affordable internet access and the ways in which such taxes undermine development aspirations, as well as being, in these specific instances, impossible to police or enforce effectively.

83 Yesnowitz, J., & Fiore, E. (2017, 17 October). The History and Purpose Behind Sin Taxes. *Bloomberg BNA*. <https://www.bna.com/history-purpose-behind-n73014470961>



Internet and ICTs for social justice and development

APC is an international network of civil society organisations founded in 1990 dedicated to empowering and supporting people working for peace, human rights, development and protection of the environment, through the strategic use of information and communication technologies (ICTs).

We work to build a world in which all people have easy, equal and affordable access to the creative potential of ICTs to improve their lives and create more democratic and egalitarian societies.

www.apc.org

info@apc.org

HUMAN RIGHTS IMPACTS OF TAXING POPULAR INTERNET SERVICES
JANUARY 2019

ISBN 978-92-95113-08-4 APC-201901-GAPS-IP-EN-DIGITAL-298

This publication is available under Creative Commons
Attribution-ShareAlike 4.0 International License (CC BY-SA 4.0)

<https://creativecommons.org/licenses/by-sa/4.0/>