

UGANDA'S TAX ON SOCIAL MEDIA: FINANCIAL BURDENS AS A MEANS OF SUPPRESSING DISSENT

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ABSTRACT

In response to political upheaval, African states have restricted access to social media platforms. In what appears to be the start of a regional trend, several East African nations have imposed taxes and fees on social media. Uganda has levied the world's first tax on social media users, imposing in 2018 a daily tax on the use of fifty-eight websites and applications, including Facebook, Twitter, Instagram, WhatsApp, and Skype. To access these platforms, one must pay a daily fee of 200 Ugandan Shillings (\$.054 USD).

This Note will use the Ugandan social media tax as a case study through which to examine the legality, under international law, of financial burdens designed to suppress political dissent. While the analysis will focus solely on Uganda's law, much of it will apply beyond Uganda's borders to countries pursuing similar legislation.

Part I provides important background with respect to the Ugandan scheme. Part II explores freedom of expression over the Internet under international law and determines what types of restrictions on expression are legally permissible. Part III analyzes whether a tax that affects speech would be considered a restriction of expression. Finally, Part IV examines the social media tax through the lens of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and analyzes the consequences of a determination that the social media tax violates international norms, both within Uganda and more broadly across East Africa.

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INTRODUCTION

On December 17, 2010, Tarek el-Tayeb Mohamed Bouazizi, a 26-year-old Tunisian street vendor, set himself alight in protest of the autocratic regime of President Zine El Abidine Ben Ali. This act of self-immolation became a catalyst for the Tunisian revolution and the wider Arab Spring protests.¹ Videos recorded of Mr. Bouazizi's act quickly spread across the Internet, and protests calling for the end of the Ben Ali regime erupted throughout Tunisia. Four weeks later, President Ben Ali was forced to flee the country.² At the same time, in Egypt, Esraa Abdel Fattah, an activist known as "Facebook Girl" for her use of that platform to organize the April 6 Facebook Youth Movement in 2008, once again took to social media to organize protests against Egyptian President Muhammad Hosni El Sayed Mubarak.³ Like President Ben Ali, President Mubarak was removed from power less than a month after the protests began.⁴ While social media did not cause the underlying discontent in these countries, the ability to communicate and organize quickly through social media played an integral role in the ousting of President Ben Ali and the overthrow of President Mubarak.⁵

In response to these regime changes in North Africa, increased access to the Internet across Africa, and a corresponding increase in the use of social media to express political dissent, many African states have enacted laws or taken other action to restrict access to—and the content of—social media. In recent years, Algeria, Burundi, the Democratic Republic of the Congo, Eritrea, Ethiopia, Gabon, The Gambia, Uganda, and Zimbabwe have all restricted

1. *The Arab Spring: A Year of Revolution*, NPR (Dec. 17, 2011), <https://www.npr.org/2011/12/17/143897126/the-arab-spring-a-year-of-revolution> [<https://perma.cc/YPQ9-KY5F>].

2. *Id.*

3. *Esraa Abdel Fattah: Organizing Egypt's Revolution*, HUMAN RIGHTS FIRST (Mar. 1, 2012), <https://www.humanrightsfirst.org/2012/03/01/esraa-abdel-fattah-organizing-egypts-revolution> [<https://perma.cc/Y324-TNQG>].

4. Sara J. Robbins, *Esraa Abdel Fattah, "Facebook Girl": The World-Changer*, GLAMOUR (Nov. 1, 2011), <https://www.glamour.com/story/esraa-abdel-fattah> [<https://perma.cc/YA9B-2F6N>].

5. Ekaterina Stepanova, *The Role of Information Communication Technologies in the "Arab Spring,"* PONARS EURASIA POLICY MEMO NO. 159 1, 1 (May 2011), http://pircenter.org/kosdata/page_doc/p2594_2.pdf [<https://perma.cc/4QM4-TTSE>].

access to the Internet during elections.⁶ Moreover, a few African states have used vaguely worded laws to arrest people who spoke critically of the government over social media.⁷

In the past two years, a number of states have adopted a new approach. Several East African nations have imposed taxes and registration fees on the use of social media. In March 2018, for example, Tanzania enacted the Electronic and Postal Communications (Online Content) Regulations, which impose an annual licensing fee on all online content creators—not only large media conglomerates, but also individual bloggers and small-scale journalists.⁸ The licensing fee requires an initial payment of 2.1 million Tanzanian Shillings (TSh) (\$911 USD).⁹ In a country where the GDP per capita is \$879 USD¹⁰ and approximately 70% of the population lives on less than \$2 a day,¹¹ this fee effectively prevents all but the largest media outlets from reporting the news.

Uganda has taken an even more restrictive approach—one that imposes the world's first tax on the users of social media. On July 1, 2018, Uganda amended the Excise Duty Act of 2014 to include a daily tax on the use of “over the top” (OTT) mobile apps and

6. Sharon Anyango Odhiambo, *Internet Shutdowns During Elections*, AFRICA UP CLOSE (May 18, 2017), <https://africaupclose.wilsoncenter.org/Internet-shutdowns-during-elections/> [<https://perma.cc/8Z8K-63CJ>].

7. *How African Governments Try to Control What Is Said Online*, ECONOMIST (Apr 19, 2018), <https://www.economist.com/middle-east-and-africa/2018/04/19/how-african-governments-try-to-control-what-is-said-online> [<https://perma.cc/VL2W-GFL9>].

8. The Electronic and Postal Communications (Online Content) Regulations 2018, Regulations 7(1), 7(2) (Tanz.), https://www.tcra.go.tz/images/documents/regulations/SUPP_GN_NO_133_16_03_2018_EPOCA_ONLINE_CONTENT_REGULATIONS_2018.pdf [<https://perma.cc/8FYE-VFBJ>].

9. Daniel Mumbere, *Tanzania Cyber Law Introduces \$900 Fees for Bloggers, Compulsory Passwords*, AFRICANEWS (Apr. 12, 2018), <https://www.africa-news.com/2018/04/12/tanzania-cyber-law-introduces-900-fees-for-bloggers-compulsory-passwords/> [<https://perma.cc/BU94-HXCD>].

10. *Freedom in the World 2017: Tanzania*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2017/tanzania> [<https://perma.cc/X346-LZ6X>].

11. *Tanzania Mainland Poverty Assessment: A New Picture of Growth for Tanzania Emerges*, WORLD BANK, (May 7, 2015), <http://www.worldbank.org/en/country/tanzania/publication/tanzania-mainland-poverty-assessment-a-new-picture-of-growth-for-tanzania-emerges> [<https://perma.cc/P4XA-VBUZ>].

services.¹² The Excise Duty Amendment Act of 2018 defined OTT services as “the transmission or receipt of voice or messages over the Internet.”¹³ The Ugandan tax is levied on the use of more than sixty websites and applications, including Facebook, Twitter, Instagram, WhatsApp, and Skype.¹⁴ To access social media, one must pay a daily fee of 200 Ugandan Shillings (USh) (\$.054 USD) to the government.¹⁵

This looks to be the start of a regional trend. Other East African states have proposed implementing their own financial burdens on the use of social media. Kenya, for example, has proposed licensing fees that would make posting videos to the Internet exorbitantly expensive. Under the Kenyan regime, the minimum cost to post a single video to the Internet would be 18,000 Kenyan Shillings (Kes) (\$177 USD) in a country where the average annual income is 115,000 Kes (\$1,135 USD).¹⁶ In addition, social media users would have to send their videos to the Kenya Film and Classification Board for approval before they can be uploaded.¹⁷ Zambia, Rwanda, and the Democratic Republic of the Congo have also considered enacting laws similar to those in Uganda and Tanzania.¹⁸ Regardless of the intent behind imposing these financial burdens, the increased cost to access social media will reduce the use of social media for all purposes, including for political organization.

This Note will use the Ugandan social media tax as a case study through which to examine the legality, under international law, of financial burdens which result in the suppression of speech as a direct consequence. While the analysis will focus solely on Uganda’s law, much of it will apply beyond Uganda’s borders to the many

12. Excise Duty (Amendment) Act 2018, Bill No. 11 of 2018, amend. 2 (Uganda), <http://parliamentwatch.ug/wp-content/uploads/2018/05/L-03-04-18-The-Excise-Duty-Amendment-Bill-2018.pdf> [<https://perma.cc/WQM5-QQT9>].

13. *Id.*

14. Rebecca Ratcliffe & Samuel Okiror, *Millions of Ugandans Quit Internet Services as Social Media Tax Takes Effect*, *GUARDIAN* (Feb. 27, 2019), <https://www.theguardian.com/global-development/2019/feb/27/millions-of-ugandans-quit-internet-after-introduction-of-social-media-tax-free-speech> (on file with the *Columbia Human Rights Law Review*).

15. Excise Duty (Amendment) Act 2018, amend. 6(g) (Uganda).

16. *Eastern Africa: New Tax and Licensing Rules for Social Media Threaten Freedom of Expression*, *ARTICLE 19* (June 26, 2018), <https://www.article19.org/resources/eastern-africa-new-tax-and-licensing-rules-for-social-media-threaten-freedom-of-expression/> [<https://perma.cc/8RHB-J26H>].

17. *Id.*

18. *Id.*

countries pursuing similar legislation. With the proliferation of social media across the globe and the increasing importance of social media in the political realm, it is likely that attempts by governments to control content on social media will become more common over the next few years.

Part I provides important background with respect to the Ugandan scheme. Part II explores freedom of expression over the Internet under international law and determines what types of restrictions on expression are legally permissible. Then, Part III analyzes whether a tax that affects speech would be considered a restriction of expression. Finally, Part IV examines the social media tax through the lens of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and analyzes the consequences of a determination that the social media tax violates international norms, both within Uganda and more broadly across East Africa.

I. BACKGROUND OF THE UGANDAN LAW

In order to effectively analyze the social media tax, one must first understand the relevant political context in Uganda. Part I.A will examine the various and changing reasons proffered by the Ugandan government for the social media tax. Part I.B will focus on Uganda's history of repression of free expression, with particular attention paid to past use and control of social media, in order to discern whether the official justifications for the tax are pretextual. Part I.C will provide a brief overview of the economic status of Ugandans, to evaluate the effect the tax will have on many people in Uganda.

A. The Official Explanations for the Tax

In public statements made over the course of several months, Ugandan government officials gave five different reasons justifying the imposition of the social media tax.

First, Ugandan President Yoweri Museveni defended the tax as a measure necessary to reduce the spread of gossip and falsehood over social media. In a letter to Finance Minister Matia Kasaija ordering the government to impose the tax, President Museveni wrote:

I am not going to propose a tax on Internet use for educational, research or reference purposes . . . these must remain free. However, olugambo [gossip] on social media (opinions, prejudices, insults, friendly

chats) and advertisements by Google and I do not know who else must pay tax because we need resources to cope with the consequences of their lugambo [gossip].¹⁹

This is not the first time that President Museveni has taken aim at gossip on social media. On the day of the 2016 presidential election, in which Museveni was elected for his fifth consecutive term, the Ugandan government blocked access to social media to stop people from “telling lies.”²⁰ President Museveni explained, “Some people misuse those pathways. You know how they misuse them—telling lies. If you want a right then use it properly.”²¹

Second, President Museveni claimed that the purpose of the social media tax was to raise revenue. In a blog post published on July 4, 2018, three days after the tax went into effect, Museveni called attention to the ratio of tax revenue to GDP in Uganda (14.2%), which was significantly lower than the ratio in some European states (30%). Due to this disparity, Museveni declared that the Ugandan government would pursue any means possible to raise revenue through taxation.²² Before the tax went into effect, the government estimated that it would generate between US\$ 400 billion and US\$ 1.4 trillion (\$100–400 million USD) from social media users annually, which would significantly lower the amount of foreign aid on which Uganda relies.²³ Uganda is rightfully worried about low revenue streams—the Uganda Revenue Authority is expected to collect only US\$ 17 trillion (\$4.6 billion USD) in the 2018–19 fiscal year, slightly

19. Yasiin Mugerwa & Tom Malaba, *Museveni Slaps Taxes on Social Media Users*, DAILY MONITOR (Apr. 1, 2018), <http://www.monitor.co.ug/News/National/Museveni-taxes-social-media-users-Twitter-Skype/688334-4366608-oilivjz/index.html> [https://perma.cc/W3YW-XHZV].

20. *Uganda Election: Facebook and Whatsapp Blocked*, BBC (Feb. 18, 2016), <https://www.bbc.com/news/world-africa-35601220> [https://perma.cc/L9F3-YKT9].

21. *Id.*

22. Yoweri Museveni, *President Responds to Feedback to Earlier Statement on the New Social Media and Mobile Money Taxes*, YOWERI K. MUSEVENI: PRESIDENT OF THE REPUBLIC OF UGANDA (July 12, 2018), [https://www.yowerikmuseveni.com/blog/museveni/president-responds-feed-back-earlier-statement-new-social-media-and-mobile-money-taxes](https://www.yowerik Museveni.com/blog/museveni/president-responds-feed-back-earlier-statement-new-social-media-and-mobile-money-taxes) [https://perma.cc/PFB6-DFH7].

23. Mugerwa & Malaba, *supra* note 19; *see also* Halima Athumani, *Uganda’s Social Media Tax Challenged in Constitutional Court*, VOA NEWS (July 2, 2018), <https://www.voanews.com/a/uganda-social-media-tax-challenged-in-constitutional-court/4463288.html> [https://perma.cc/5B6U-YDPE].

over half of the country's budget of US\$ 32.5 trillion (\$8.7 billion USD).²⁴

Third, the Ugandan government has claimed that the tax was imposed specifically to target the use of foreign companies and foreign-designed products. In his July 4 blog post, President Museveni wrote, "some of our countrymen donate those dollars back to foreigners by chatting endlessly on the social media. Is this correct or fair? Is it good for our country?"²⁵ In his July 12 blog post, Museveni again raised this point, arguing that foreign companies were acting as "parasites"—taking money from the Ugandan people and promoting societal unrest through the use of social media.²⁶ In the same vein, Frank Tumwebaze, Ugandan Minister for Information and Communications, said that if Ugandans were giving money to the foreign creators of social media platforms, then the Ugandan government should receive increased tax revenue as well.²⁷

Fourth, the Ugandan government claimed that the tax was necessary to prevent people from circumventing existing taxes on the purchase of airtime, used for conventional voice calls. The Report of the Committee on Finance, Planning, and Economic Development on the Excise Duty (Amendment) Bill found that voice and text messaging traffic had predominantly moved from conventional phone services to Internet and online messaging services, such as WhatsApp and Skype.²⁸ Unlike conventional voice calls, which had an excise duty attached to them, Internet messaging services did not. The government claimed that the social media tax was designed to prevent Ugandans from avoiding the existing duty on voice calls.²⁹

Fifth, and finally, several public statements by officials indicated that social media was viewed by the government as a

24. Alon Mwesigwa, *Budget 2018: The Taxes You Face*, OBSERVER (June 14, 2018), <https://observer.ug/news/headlines/57941-budget-2018-the-taxes-you-face.html> [<https://perma.cc/R6CN-4QCZ>].

25. Gyagenda Kabuubi, *Museveni: Why I Imposed Tax on Social Media, Mobile Money*, INTELPOST (July 4, 2018), <https://intelpostug.com/2018/07/04/museveni-why-i-imposed-tax-on-social-media-mobile-money/> [<https://perma.cc/3ESG-26T4>].

26. Museveni, *supra* note 22.

27. Athumani, *supra* note 23.

28. COMMITTEE ON FINANCE, PLANNING AND ECONOMIC DEVELOPMENT, *Report on the Excise Duty (Amendment) Bill, 2018*, 2018, Parliament of Uganda § 4(ii), <http://csbag.org/wp-content/uploads/2018/10/FPED3-18-Report-on-the-Excise-Duty-Amendment-No.-2-Bill-2018-1.pdf> [<https://perma.cc/3JTU-BLUV>].

29. *Id.*

luxury good, and a tax on social media was therefore no different than taxes imposed on other luxury products. Instead of something that should be accessible to all, officials in the Ugandan government argued that access to social media is only necessary for the societal elite. President Museveni, in his July 11 blog post, stated, “using internet to access social media . . . is definitely a luxury.”³⁰ Likewise, Odonga Otto, Member of Parliament for Aruu County, said in the parliamentary debate regarding the tax:

WhatsApp, Viber, Facebook are ostentatious commodities. They are almost like perfume. The ordinary man in the village can do without it. . . . We are looking for a certain category of people who do not mind about the Shs 200. Personally, I do not mind because I need WhatsApp. It is a tax, which is targeting the elites³¹

B. Suppression of Free Expression and Political Dissent in Uganda

As demonstrated in this section, it is likely that the given reasons for the social media tax are largely pretextual and that the tax was instead imposed to suppress political dissent. The social media tax is not Uganda’s first restriction on the use of social media. In recent years, the use of social media to share political news, express political beliefs, and organize political movements has proliferated within Uganda. As a result, the government has taken action to restrict access to social media, as well as freedom of the press, in order to maintain control over the country.

Yoweri Museveni has been the President of Uganda since 1986.³² Museveni won the first presidential election held after the adoption of the current Constitution of Uganda in 1996. He was reelected in 2001, 2006, 2011, and, most recently, in 2016.³³ Throughout his time in office, opposition parties have complained about illegal acts during elections, including people voting multiple

30. Museveni, *supra* note 22.

31. Uganda Parl. Deb. 38 (May 30, 2018) (remarks of Member of Parliament Hon. Odonga Otto), <https://www.parliament.go.ug/documents/2034/hansards-2018-may> (on file with the *Columbia Human Rights Law Review*).

32. *Uganda’s President Yoweri Museveni Wins Fifth Term*, BBC (Feb. 20, 2016), <https://www.bbc.com/news/world-africa-35620934> [<https://perma.cc/VG64-KWHC>].

33. *Id.*

times, fraudulent ballots, and inconsistencies while counting ballots.³⁴ Despite the Ugandan Supreme Court's recognition of the illegality of these practices and noncompliance with electoral law, the Court has nevertheless found the results of the elections to be lawful.³⁵ However, in the most recent election in 2016, election observers from the European Union, the Commonwealth of Nations, and Ugandan civil society found that the Electoral Commission was not independent and lacked transparency.³⁶ Most people in Uganda do not believe the elections are legitimate—in a poll taken immediately before the 2016 election, only 40% believed the “elections would be free and fair.”³⁷

1. Social Media as a Tool to Effect Political Change in Uganda

Internet access in Uganda has increased rapidly in recent years. At the end of 2016, 22% of Ugandans had access to the Internet.³⁸ By March 2017, that rate had increased to approximately 31%.³⁹ By the end of September 2017, the rate was 48%.⁴⁰ 75.5% of Internet users in Uganda use the Internet primarily for social networking.⁴¹ 25.3% of Internet users use social networking sites daily, and 23.2% use instant messaging applications, primarily

34. Fred Sekindi, *Presidential Election Disputes in Uganda: A Critical Analysis of the Supreme Court Decisions*, 16 J. AFRICAN ELECTIONS 154, 165 (2017).

35. *Id.* at 165, 167–68.

36. Richard M. Kavuma, *Ugandan Elections Marred by Shambolic Polls and Claims of Fraud*, GUARDIAN (Feb. 22, 2016), <https://www.theguardian.com/global-development/2016/feb/22/ugandan-elections-polls-fraud-yoweri-museveni> (on file with the *Columbia Human Rights Law Review*).

37. *Id.*

38. *Freedom on the Net 2017: Uganda*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-net/2017/uganda> [<https://perma.cc/KQ5Q-4U3M>].

39. See Yasiin Mugerwa, *China to Help Uganda Fight Internet Abuse*, DAILY MONITOR (July 26, 2017), <http://www.monitor.co.ug/News/National/China-Uganda-Internet-Evelyn-Anite-Africa-Internet-Users/688334-4032626-u1161r/index.html> [<https://perma.cc/5723-SBB9>].

40. THE COLLABORATION ON INT'L ICT POLICY FOR E. & S. AFR. (CIPESA), NATIONAL INFORMATION TECHNOLOGY SURVEY: 2017/18 REPORT 38 (2018).

41. *Id.* at 143.

WhatsApp, daily.⁴² Further, 90.8% of Internet users in Uganda have signed up for at least one social networking site.⁴³

People between the ages of fifteen and twenty-nine make up approximately 75% of Facebook users in Uganda.⁴⁴ 78% of Uganda's citizenry are under thirty—the largest percentage of young people in the world.⁴⁵ While official numbers show low youth unemployment rates,⁴⁶ a survey carried out by ActionAid Uganda in 2012 found that 61.1% of young people were unemployed.⁴⁷ According to the African Development Bank, the youth unemployment rate may be as high as 83%—the highest rate in Africa.⁴⁸ In contrast to Uganda's youthful population, President Museveni is seventy-five years old, and the median age of his cabinet ministers is sixty-five.⁴⁹ By and large, young people increasingly feel excluded from meaningful participation in the country's economic and political processes and believe the current government does not represent their interests or positions.⁵⁰ Museveni's primary constituency tends to be older

42. *Id.* at 154.

43. *Id.* at 156.

44. Ahmed Hadji, *Breaking Boundaries: The Opportunities for Using Social Media in Civil Society Networking, Activism and Civic Engagement*, in REALITY CHECK: ASSESSING THE IMPACT OF SOCIAL MEDIA ON POLITICAL COMMUNICATION AND CIVIL ENGAGEMENT IN UGANDA 72, 85 (Mathias Kamp ed., 2016).

45. *Uganda Has the Youngest Population in the World*, NEW VISION (Dec. 14, 2012), https://www.newvision.co.ug/new_vision/news/1311368/uganda-population-world [https://perma.cc/8HS2-W9ZC].

46. See Anne-Marit Pettersen, *Youth Unemployment in Uganda* 11 (Nov. 2017) (unpublished Master's thesis, University of Tromsø—The Arctic University of Norway), <https://munin.uit.no/bitstream/handle/10037/11953/thesis.pdf> [https://perma.cc/EM5A-YQ98].

47. *Id.*

48. Alon Mwesigwa, *Uganda's Unemployed Graduates Held Back by Skills Gap*, GUARDIAN (Jan. 16, 2014), <https://www.theguardian.com/global-development/2014/jan/16/uganda-unemployed-graduates-held-back-skills-gap> (on file with the *Columbia Human Rights Law Review*).

49. See Molly Schwartz, *If You Charge People to Tweet, They'll Revolt in the Street*, N.Y. MAG. (Oct. 2, 2018), <http://nymag.com/developing/2018/10/uganda-social-media-tax-youth-protest.html> [https://perma.cc/ZT5L-YMXJ].

50. See Mwesigwa, *supra* note 48; Schwartz, *supra* note 49; Isaac Mufumba, *High Youth Unemployment Persists Despite Entrepreneurship Training*, DAILY MONITOR (July 4, 2018), <http://www.monitor.co.ug/Special-Reports/High-youth-unemployment-persists-entrepreneurship-training/688342-4644926-563r8fz/index.html> [https://perma.cc/TBL8-APXU].

members of society in Uganda, and young people in general do not support him.⁵¹

The social media tax comes at a time when social media is more capable than ever before of playing a large role for political opposition movements in Uganda. For the first time in Uganda's history, mass protests have been planned entirely over social media. In fact, the first mass protest planned entirely over social media by feminist activists occurred just one day before the social media tax went into effect.⁵² Photos and videos from this protest have been widely shared on social media to help raise awareness of the reasons behind the protest and to highlight police harassment of peaceful protestors.⁵³

Social media has also been used by opposition party candidates to flout government attempts to suppress their political activities. On June 14, 2015, for example, former Prime Minister John Patrick Amama Mbabazi announced his presidential candidacy over social media. It was alleged that state operatives had planned to block a formal announcement of his presidential bid at a press conference, but Mbabazi was nevertheless able to utilize social media to make this announcement free from government interference.⁵⁴

The use of social media by individuals in Africa to spread political news and messages far surpasses its use for these purposes elsewhere in the world. According to the "How Africa Tweets" study, political hashtags make up 8.67% of all Twitter hashtags across

51. David Pilling, *Uganda's Bobi Wine Embodies the Rise of African Youth*, FIN. TIMES (Aug. 29, 2018), <https://www.ft.com/content/bc872538-aab5-11e8-94bd-cba20d67390c> (on file with the *Columbia Human Rights Law Review*); Rosebell Kagumire, *Bobi Wine and the Beginning of the End of Museveni's Power*, AL JAZEERA (Aug. 28, 2018), <https://www.aljazeera.com/indepth/opinion/bobi-wine-beginning-museveni-power-180828111608108.html> [<https://perma.cc/YF77-SRN2>]; Edith Honan & Elias Biryabarema, *Uganda's Museveni Wins Election; Opposition Cries Foul*, REUTERS (Feb. 20, 2016), <https://www.reuters.com/article/us-uganda-election/ugandas-museveni-wins-election-opposition-cries-foul-idUSKCN0VT08A> [<https://perma.cc/MN9C-8EQA>].

52. Edna Ninsiima, *Ugandan Women March for Their Lives*, DAILY MONITOR (July 7, 2018), <http://www.monitor.co.ug/Magazines/Full-Woman/Ugandan-women-lives-feminist-activists-femicides/689842-4649360-4b6v28/index.html> [<https://perma.cc/9M7C-72B9>].

53. Hadji, *supra* note 44, at 81.

54. *Id.* at 23.

Africa.⁵⁵ This percentage is about four times higher than the proportion of political hashtags in the United States or the United Kingdom.⁵⁶

A look at one of the most prominent opposition figures in Uganda, Robert Kyagulanyi Ssentamu, a musician popularly known as Bobi Wine, reveals the power of social media in Ugandan politics. Wine used Facebook, Twitter, and YouTube to criticize the Museveni administration and promote his own political views.⁵⁷ In June 2017, he used these platforms to propel himself into the Ugandan Parliament with 78% of the vote.⁵⁸ Since his election, an additional five candidates for parliament that Wine supported have also won office.⁵⁹ However, in August 2018, Wine was arrested for illegal possession of firearms (a fairly common charge made against political opponents⁶⁰), beaten badly by government authorities, and charged before a military court, even though Wine is a civilian.⁶¹ These charges were eventually dropped, but Wine was immediately rearrested on charges of treason.⁶²

Videos and images of Wine in which he appeared to have been tortured were widely circulated and led to mass protests which, in the

55. *Politics and the Twitter Revolution*, PORTLAND COMMUNICATIONS, <https://portland-communications.com/publications/politics-and-the-twitter-revolution/> [<https://perma.cc/9VMT-F39R>].

56. Christine Mungai, *How Africa Tweets: 10 Surprising Trends and Insights*, MAIL & GUARDIAN (Apr. 11, 2016), <https://mg.co.za/article/2016-04-11-how-africa-tweets-10-surprising-trends-and-insights> [<https://perma.cc/SJ9E-RSEW>].

57. Philip Effiom Ephraim, *Bobi Wine Case Demonstrates the Power of Social Media*, CONVERSATION (Aug. 27, 2018), <https://theconversation.com/bobi-wine-case-demonstrates-the-power-of-social-media-102179> [<https://perma.cc/6GJX-W2Y4>]; Kemigisa Jacky, *Museveni Is Losing the Battle Against Free Speech in Uganda Thanks to the Free Bobi Wine Movement*, INDEP. (Aug. 26, 2018), <https://www.independent.co.uk/voices/free-bobi-wine-movement-uganda-museveni-speech-a8508526.html> [<https://perma.cc/JBD5-QNZG>].

58. Jacky, *supra* note 57.

59. *Id.*

60. *Tramped Up Charges Is How NRM Addresses Opponents, Besigye Speaks Out*, DAILY MONITOR (Aug. 16, 2018), <http://www.monitor.co.ug/News/National/Tramped-up-charges-NRM-addresses-opponents-Besigye-speaks/688334-4715126-rqr93n/index.html> [<https://perma.cc/MQX6-QDP5>].

61. Jacky, *supra* note 57.

62. Stephanie Busari & Gertrude Kitongo, *Pop Star MP Bobi Wine Charged with Treason in Uganda*, CNN (Aug. 23, 2018), <https://www.cnn.com/2018/08/23/africa/uganda-mp-bobi-wine-treason-charge/index.html> [<https://perma.cc/QE6H-BTCD>].

end, compelled the government to allow Wine to be flown to the United States for medical treatment.⁶³ In addition, a photo of a journalist who was attacked by the military while he covered the protests was posted to social media, and, after mass protests against the perceived impunity enjoyed by military personnel, a Ugandan army spokesperson condemned the attack and promised arrests of those responsible.⁶⁴

2. Government Restrictions on Social Media

In response to the increased use of social media by political opponents of President Museveni, the government has placed a number of restrictions on access to social media. As mentioned in Part I.A, the Ugandan government blocked access to social media on the day of the 2016 presidential election.⁶⁵ In May 2016, on the inauguration day for President Museveni's fifth term, the government again blocked social media. Authorities claimed that this was done for national security reasons.⁶⁶

The 2011 presidential elections occurred during the Arab Spring protests, and, in response to worries about similar protests in Uganda, the government intercepted and blocked all text messages that contained certain words, including "dictator," "police," and "people power."⁶⁷ Patrick Mwesigwa, head of the Ugandan Communications Commission, stated that any messages that were "deemed to be controversial or advanced to incite the public, should be stopped or blocked."⁶⁸

63. See Ephraim, *supra* note 57; *Bobi Wine Arrives in US for Medical Treatment*, AL JAZEERA (Sept. 1, 2018), <https://www.aljazeera.com/news/2018/09/bobi-wine-arrives-medical-treatment-180901193811236.html> [https://perma.cc/FH6S-DB9V]; John Semakula, *Bobi Wine's Family to Fly Him Out for Treatment*, NEW VISION (Aug. 24, 2018), https://www.newvision.co.ug/new_vision/news/1484267/bobi-wine-family-fly-special-treatment [https://perma.cc/2RGL-ECW9].

64. Jacky, *supra* note 57.

65. See *Uganda Election: Facebook and Whatsapp Blocked*, *supra* note 20.

66. *Uganda Creates Unit to Spy on Social Networks*, REPORTERS WITHOUT BORDERS (June 30, 2017), <https://rsf.org/en/news/uganda-creates-unit-spy-social-networks> [https://perma.cc/7XCL-JLQ4].

67. Elias Biryaberema, *Uganda Bans SMS Texting of Key Words During Poll*, REUTERS (Feb. 17, 2011), <https://af.reuters.com/article/topNews/idAFJ0E71G0M520110217> [https://perma.cc/5XR6-9DSM].

68. *Id.*

In addition to restrictions on social media and electronic communications during elections, Uganda has passed several laws aimed more generally at restricting free use of the Internet. In 2011, Uganda enacted the Computer Misuse Act, which criminalized electronic communications that “disturb[ed] the peace, quiet or right of privacy of any person.”⁶⁹ This law has been used to convict, among others, a government activist accused of leaking classified government information over Facebook,⁷⁰ a professor at Makerere University accused of insulting President Museveni over Facebook,⁷¹ a journalist accused of publishing a story critical of Uganda’s Inspector General of Police,⁷² and a leader of a political opposition party.⁷³ The professor, Dr. Stella Nyanzi, was convicted and sentenced to 18 months in prison for her Facebook post.⁷⁴

In 2017, the Uganda Media Centre, a regulatory authority created by President Museveni, announced that it had established a team to scan Facebook and other social media sites to find posts critical of the government.⁷⁵ The Uganda Media Centre Executive Director Ofwono Opondo justified this program on the grounds that “social media users are bitter and depressed people who are always complaining on their pages about the government and everything in the country.”⁷⁶

69. Computer Misuse Act, 2011, § 25, Supp. No. 2, CIV UGANDA GAZETTE No. 10, <https://ulii.org/ug/legislation/act/2015/2-6> [<https://perma.cc/X2TY-2XBW>]; Lydia Namubiru, *Uganda Has Thrown an Academic in Jail over a “Buttocks” Insult to President Museveni*, QUARTZ AFRICA (Apr. 12, 2017), <https://qz.com/africa/956379/uganda-has-thrown-an-academic-in-jail-over-a-buttocks-insult-to-president-museveni/> [<https://perma.cc/9PSY-NC35>].

70. Joseph Kimbowa, *Who’s Tom Voltaire Okwalinga—TVO?*, OBSERVER (June 10, 2015), <https://www.observer.ug/news-headlines/38278-who-s-tom-voltaire-okwalinga-tvo> [<https://perma.cc/29X8-JX33>].

71. Namubiru, *supra* note 69.

72. *Police Interrogates Editor for “Offensive Communication,”* HUM. RTS. NETWORK FOR JOURNALISTS—UGANDA (June 20, 2017), <https://hrnjuganda.org/?p=3620> [<https://perma.cc/A7YT-DAJV>].

73. *FDC Chairperson Arrested over Posting Museveni in Coffin on Facebook*, DAILY MONITOR (Dec. 13, 2016), <http://www.monitor.co.ug/News/National/FDC-chairperson-arrested-over-posting-Museveni-in-coffin/688334-3485026-6lkhc9z/index.html> [<https://perma.cc/E9FV-TD44>].

74. Oswald T. Brown, *Defiant Activist Jailed for Speaking Out Against Ugandan President*, WASH. INFORMER (Aug. 21, 2019), <https://washingtoninformer.com/defiant-activist-jailed-for-speaking-out-against-ugandan-president/> [<https://perma.cc/L4DR-49L5>].

75. *Uganda Creates Unit to Spy on Social Networks*, *supra* note 66.

76. *Id.*

More recently, in August 2019, the government created a registration scheme for social media influencers under which all individuals with heavily followed social media accounts are required to register with the government so that the government can monitor the substance of their posts.⁷⁷ Uganda Communications Commission spokesperson Ibrahim Bbosa said, “As a data communicator . . . you’re pushing out content which could easily violate the known parameters of morality, of incitement, of ethnic prejudice or not be factual We want online platforms to register with the commission so that we can monitor [them].”⁷⁸ Thus, government restrictions on the use of social media have functioned as a means of stifling political dissent in Uganda over the past decade.

3. Restrictions on Protests, Assembly, and the Press

In addition to the restrictions that it has imposed on the Internet in recent years, the Ugandan government has also restricted assembly and the press. Following the 2011 presidential elections, opposition party activists called on the Ugandan people to walk to work as a way to protest rising fuel prices.⁷⁹ The government claimed that the protests were unlawful and sent police and military to stop them. Government forces killed nine people, including a two-year-old child.⁸⁰ On June 30, 2018, one day before the social media tax went into effect, a Women’s March took place in Kampala to protest police inaction after the kidnapping and murder of forty-three women in Kampala the preceding year.⁸¹ The police initially blocked the

77. Elias Biryabarema, *Uganda to Register, Monitor Social Media Influencers*, REUTERS (Aug. 8, 2019), <https://www.reuters.com/article/us-uganda-communications/uganda-to-register-monitor-social-media-influencers-idUSKCN1UY265> [<https://perma.cc/69VX-G4UB>]. Registered individuals must also pay a \$20 USD fee as part of the scheme. *Id.*

78. *Id.*

79. *Uganda: Five Years On, No Justice for “Walk to Work” Killings*, HUM. RTS. WATCH (Apr. 21, 2016), <https://www.hrw.org/news/2016/04/21/uganda-5-years-no-justice-walk-work-killings> [<https://perma.cc/V3JL-GUTN>].

80. *Id.*

81. Joseph Kato, *IGP Ochola Blocks Planned Women Protest Against Kidnaps, Murders*, DAILY MONITOR (June 27, 2018), <http://www.monitor.co.ug/News/National/IGP-Ochola-blocks-women-protest-over-kidnaps-murders/688334-4634738-14jemldz/index.html> [<https://perma.cc/W49S-D5KD>]; *Ugandans Protest Surge in Violence Against Women*, EAST AFRICAN (June 30, 2018), <https://www.theeastafrican.co.ke/news/ea/Ugandans-protest-surge-in-violence-against-women/4552908-4640120-k89n2jz/index.html> [<https://perma.cc/W7U8->

Women's March, stating that the reasons for the demonstration had already been addressed publicly by President Museveni.⁸² After public outcry, mostly over social media, the police allowed the protest to take place.⁸³

The Ugandan government has also arrested, assaulted, and harassed journalists to suppress the reporting of unfavorable news. During the Bobi Wine protests in September 2018, for example, at least nine journalists were arrested and had their recording equipment confiscated by the police.⁸⁴ During the 2016 election, the government banned all broadcasts of the main opposition party and the opposition-led "defiance campaign," threatening to revoke the licenses of any media outlet who covered the campaign.⁸⁵ A 2010 report by Human Rights Watch explained:

The Ugandan government uses its national laws to bring charges against journalists, restrict the number of people who can lawfully be journalists, revoke broadcasting licenses without due process of law, and practice other forms of repression. . . . Ugandan government authorities use these laws not to safeguard national security, but rather to stifle speech.⁸⁶

Uganda's history of repression of free expression, and in particular the government's past restrictions on social media, casts

DK35]; *see also* Kagumire, *supra* note 51 (noting the recent increase in crime which resulted in the kidnapping, rape, and murder of 43 women).

82. Kato, *supra* note 81.

83. Brian Asimwe, *Gen Odongo Asked Police to Permit Much Anticipated Women's March, Says Nyanzi*, SOFT POWER NEWS (June 30, 2018), <https://www.softpower ug/gen-odongo-asked-police-to-permit-much-anticipated-womens-march-says-nyanzi/> [<https://perma.cc/CZN9-3Y45>]; *see also* *Ugandans Protest Surge in Violence Against Women*, *supra* note 81 (describing the protest after it was allowed to take place).

84. *Uganda: Continued Harassment and Arbitrary Arrest of Journalists Must End*, ARTICLE 19 (Sept. 21, 2018), <https://www.article19.org/resources/uganda-continued-harassment-and-arbitrary-arrest-of-journalists-must-end/> [<https://perma.cc/XG47-Z49V>].

85. Nelson Wesonga & Nelson Bwire, *Government Bans Live Broadcast of FDC's Defiance Campaign*, DAILY MONITOR (May 5, 2016), <http://www.monitor.co.ug/News/National/Government-bans-live-broadcast-of-defiance-campaign-/688334/3189888/-/p4lt72z/-/index.html> [<https://perma.cc/CB48-WDSJ>].

86. *A Media Minefield: Increased Threats to Freedom of Expression in Uganda*, HUM. RTS. WATCH (May 2, 2010), <https://www.hrw.org/report/2010/05/02/media-minefield/increased-threats-freedom-expression-uganda> [<https://perma.cc/9H8W-X5SQ>].

serious doubt on the government's given reasons for the social media tax.

C. Economic Impact of the Social Media Tax

The social media tax has had a substantial impact on the ability of the poorest members of Ugandan society to access social media. Even before the social media tax was enacted, 76.6% of individuals who used the Internet considered its high cost to be a top barrier preventing Ugandan people from accessing the Internet.⁸⁷ Where data is available, without taking into account the tax, only four countries in Africa have more expensive mobile Internet plans as a percentage of income than does Uganda.⁸⁸ The imposition of the social media tax makes the Internet even more inaccessible. In some parts of Uganda, the social media tax, if paid every day, would be as high as 22.6% of the average income in the region.⁸⁹

Uganda's annual gross national income per capita is approximately US\$ 2.2 million (\$600 USD),⁹⁰ and 27% of Ugandans survive on less than US\$ 4,500 (\$1.25 USD) a day.⁹¹ In September 2017, the average household expenditure on Internet access was US\$ 17,000 (\$4.62 USD) per month.⁹² At US\$ 200 (\$.05 USD) a day, the social media tax would add an additional US\$ 6,000 (\$1.63 USD) a month, significantly increasing the cost to access the Internet. Further, because more than 35% of households spent less than US\$ 5,000 (\$1.36 USD) a month on Internet access, the tax would more

87. CIPESA, *supra* note 40, at xxii.

88. *Price of Broadband Data (1GB Mobile Prepaid) as % of GNI Per Capita*, ALLIANCE FOR AFFORDABLE INTERNET (2017), <https://a4ai.org/mobile-broadband-pricing-data/> [<https://perma.cc/8KG9-4RA9>].

89. Abdi Latif Dahir, *Uganda's "Regressive" Social Media Tax May Cost Its Economy Hundreds of Millions of Dollars*, QUARTZ AFR. (Sept. 1, 2018), <https://qz.com/africa/1375795/ugandas-regressive-social-media-tax-may-cost-its-economy-hundreds-of-millions-of-dollars/> [<https://perma.cc/9SRN-BFUA>].

90. *GNI Per Capita, Atlas Method (Current US\$)*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=UG> [<https://perma.cc/PZV5-4JNL>].

91. Martin Luther Oketch, *3.4 Million More Ugandans Slip into Poverty*, DAILY MONITOR (Sept. 28, 2017), <http://www.monitor.co.ug/News/National/34-million-Ugandans-poverty-income-prices/688334-4115106-mulfd7z/index.html> [<https://perma.cc/7T99-J54Y>].

92. CIPESA, *supra* note 40, at 125.

than double the cost of the Internet for a substantial portion of the Ugandan population.⁹³

The impact of the social media tax is far greater on the poorest people in Uganda than on Uganda's more affluent citizens. Before taking the tax into account, a one gigabyte data plan in Uganda would cost members of the lowest income group in Uganda nearly 30% of their average monthly income.⁹⁴ With the social media tax, the cost to access the Internet for that group would increase to 40% of their average income.⁹⁵ The richest income group in Uganda, by contrast, would experience only an increase of 1% in their cost to connect.⁹⁶ Thus, even if the government's asserted reasons for the tax were made in good faith, the tax disproportionately affects the ability of low-income individuals to access social media affordably.

It is likely that some people who could afford to access the Internet before the imposition of the tax have been priced out and thus unable to use social media. The tax has significantly decreased use of social media in Uganda. According to the Uganda Communications Commission, in the three months after the tax took effect, subscriptions to the social media platforms that were implicated by the tax fell by more than 2.5 million.⁹⁷ Additionally, the tax has not generated the revenue that the government expected. Eight million people paid the tax in July 2018, but only 6.8 million were still paying the tax by September.⁹⁸ According to a public study on the effects of the tax, released just two weeks after the tax took effect, 15% of regular social media users had not used social media at all since the law took effect.⁹⁹ 71% of those polled reported being "extremely inconvenienced"; only 6% reported that they were not inconvenienced at all.¹⁰⁰

93. *Id.*

94. *Uganda: New Social Media Tax Will Push Basic Connectivity Further out of Reach for Millions*, ALLIANCE FOR AFFORDABLE INTERNET (June 6, 2018), <https://a4ai.org/uganda-social-media-tax/> [https://perma.cc/3UJK-HTAK].

95. *Id.*

96. *Id.*

97. Ratcliffe & Okiror, *supra* note 14.

98. *Id.*

99. WHITEHEAD COMMUNICATIONS, UGANDA SOCIAL MEDIA AND MOBILE MONEY TAXES SURVEY REPORT 1, 21 (July 17, 2018), <http://ictau.ug/wp-content/uploads/2018/07/ugtaxsurveywhiteheadcomm-1.pdf> [https://perma.cc/N5RM-VM5W].

100. *Id.* at 29.

II. FREEDOM OF EXPRESSION AND THE INTERNET UNDER INTERNATIONAL LAW

International law provides an important framework for analyzing the Ugandan social media tax. Because attempts to restrict social media use through the imposition of financial burdens are becoming more commonplace throughout the world, an analysis under international law will help provide guidance on the permissibility of these efforts in Uganda and beyond. In addition, a constitutional challenge to the social media tax, alleging that the law contravenes articles within the Constitution of Uganda that protect economic rights, free expression, and access to information, is pending before the Ugandan judiciary as of February 2020.¹⁰¹ The Supreme Court of Uganda often turns to international law to help interpret provisions within the Constitution. Of particular relevance here, the Supreme Court has relied upon both the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (ICCPR) to determine the extent of free speech protection under the Ugandan Constitution.¹⁰²

101. Constitutional Petition at 2–7, *Cyber Law Initiative v. Attorney General of Uganda*, Petition No. 06 of 2018, <https://assets.documentcloud.org/documents/4570496/Uganda-Social-Media-Tax-PETITION.pdf> [<https://perma.cc/T472-C3Q7>]; see also Athumani, *supra* note 23 (describing the widespread opposition to the social media tax); Simone Schlindwein, *Uganda: One Year of Social Media Tax*, DW (July 20, 2019), <https://www.dw.com/en/uganda-one-year-of-social-media-tax/a-49672632> (describing the state of the tax one year after being implemented) [<https://perma.cc/CF3V-5E49>].

102. See, e.g., *Charles Onyango Obbo & Anor v. Attorney General*, Constitutional Appeal No. 02 of 2002 (Uganda Feb. 10, 2004) (opinion by the Ugandan Supreme Court referring to Article 9 of the African Charter on Human and Peoples' Rights' Declaration of Principles on Freedom of Expression in Africa and Article 19 of the ICCPR and concluding that, “[f]rom the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving, and imparting all forms of opinions ideas and information. It is not confined to categories, such as correct opinions, sound ideas, and truthful information”); *Attorney-General v. Susan Kigula & 417 Others*, Constitutional Appeal No. 03 of 2006, 29–31 (Uganda Jan. 21, 2009, unreported) (referring to articles 3 and 5 of the Universal Declaration of Human Rights, articles 6(1),(2),(4), and 7 of the ICCPR, the Human Rights Committee’s decision in *Ng v. Canada*, and article 4 of the African Charter when determining the constitutionality of the death penalty). There are, however, arguments within Ugandan law that international law should not play a role in constitutional interpretation. See *Paul Kawanga Ssemwogerere & Others v. Attorney-General of Uganda*, Constitutional Appeal No. 3 of 2003 (Uganda Mar. 21, 2003) (“The International Human Rights

Part II.A will present an overview of the status of free expression under international law. Part II.B will focus more particularly on the importance of the Internet and social media under international law. Finally, Part II.C will provide an overview of the provisions of the ICCPR that articulate the test for permissible restrictions to free expression under international law.

A. Importance of Free Expression under International Law

In 1946, during its first session, the U.N. General Assembly declared, “Freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the U.N. is consecrated.”¹⁰³ In its general comment¹⁰⁴ concerning free speech, the Human Rights Committee, an adjudicatory body established to protect the rights contained in the ICCPR, noted that freedom of expression helps to ensure that all human rights norms are maintained.¹⁰⁵ Freedom of expression promotes government transparency and aids accountability efforts for violations of human rights.¹⁰⁶

Conventions mentioned in the petition are not part of the Constitution of the Republic of Uganda. Therefore, a provision of an Act of Parliament cannot be interpreted against them.”)

103. G.A. Res. 59(I), at 95 (Dec. 14, 1946); MANFRED NOWAK, U.N. COVENANT OF CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 443 (2005).

104. General comments are the “means by which a UN human rights expert committee distills its considered views on an issue which arises out of provisions of the treaty, whose implementation it supervises, and presents those views in the context of a formal statement.” Phillip Alston, *The Historical Origins of ‘General Comments’ in Human Rights Law*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY* 763, 764 (De Chazournes & Gowlland-Debbas eds., 2001). There is some debate as to the authority of General Comments. Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in *UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY* 116, 118 (Keller & Ulfstein eds. 2012). Nevertheless, General Comments allow the Human Rights Committee to “develop objective standards for monitoring compliance with the Covenant and promotes compliance with the Covenant by fleshing out the scope and content of vaguely articulated rights therein. *Id.* at 126.

105. U.N. Human Rights Committee, General Comment 34, U.N. Doc. CCPR/C/GC/34, ¶¶ 2–4 (Sept. 12, 2011) [hereinafter General Comment 34].

106. *Id.*

Many international agreements guarantee the freedom of expression under international law.¹⁰⁷ In addition, freedom of expression is also widely considered to be a norm of customary international law.¹⁰⁸ Customary international law exists when there is a relatively uniform and consistent state practice regarding a particular matter, and *opinio juris*, a belief among states that such practice is legally compelled.¹⁰⁹ As stated in Article 38(1)(b) of the Statute of the International Court of Justice, “international custom, as evidence of a general practice accepted as law,” constitutes a source of international law.¹¹⁰ If a practice is determined to be protected by customary international law, then the requirement that it be protected is binding upon all states, regardless of a state’s adherence to, or ratification of, relevant treaties.¹¹¹

International law is especially protective of open political debate and the right to criticize public officials. The Human Rights Committee has stressed the importance of free expression in the political sphere as a means of upholding the democratic form of government.¹¹² In General Comment No. 25, concerning participation in public affairs, the Committee wrote, “the free communication of information and ideas about public and political issues between

107. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).

108. SANDRA COLIVER, THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK 24 (Aug. 1993); CENTRE FOR LAW AND DEMOCRACY, FREEDOM OF EXPRESSION: BRIEFING NOTE SERIES 2 (July 2014), http://www.law-democracy.org/live/wp-content/uploads/2012/08/Briefing-notes.full-version.Eng_.pdf [<https://perma.cc/Z82P-7MMA>]; Emily Howie, *Protecting the Human Right to Freedom of Expression in International Law*, 20 INT’L J. SPEECH-LANGUAGE PATHOLOGY 12, 12 (2018); Amal Clooney & Philippa Webb, *The Right to Insult in International Law*, 48 COLUM. HUM. RTS. L. REV. 1, 20 (2017).

109. See Daniel M. Bodansky, *The Concept of Customary International Law*, 16 MICH. J. INT’L L. 667, 670 (1995).

110. Statute of the International Court of Justice, art. 38, § 1(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

111. *Customary International Humanitarian Law: Questions & Answers*, INT’L COMMITTEE OF THE RED CROSS (ICRC) (Aug. 15, 2005), <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm> [<https://perma.cc/C98E-B48B>].

112. *Aduayom et al. v. Togo*, Comm. Nos. 422–424/1990, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990, 424/1990, ¶ 7.4 (Hum. Rts. Comm. July 12, 1996); *Park v. Republic of Korea*, Comm. No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995, ¶ 10.3 (Hum. Rts. Comm. Nov. 3, 1998); Human Rights Committee, Summary Record of the 128th Meeting, ¶ 20 (statement by Mr. Tomuschat), U.N. Doc. CCPR/C/SR.128 (April 16, 1979) [hereinafter Tomuschat].

citizens, candidates, and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint.”¹¹³ Because of the importance of political speech, the Human Rights Committee has stated that restrictions on free expression can never be imposed “as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.”¹¹⁴

B. Status of the Internet and Social Media under International Law

International treaties make clear that all forms of expression and all means of information dissemination, including the Internet, are protected under international law.¹¹⁵ In particular, the Human Rights Council, an intergovernmental body that works to protect human rights covered by the U.N. Charter, and the U.N. General Assembly have emphasized that freedom of expression, as well as other human rights, apply online.¹¹⁶ Additionally, the Human Rights Committee has confirmed that protected platforms for expression include “electronic and Internet-based modes of expression.”¹¹⁷ Furthermore, the Committee has expanded the definition of journalists under the ICCPR to explicitly include bloggers and any

113. Human Rights Comm., General Comment No. 25 (57), ¶ 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996).

114. General Comment 34, *supra* note 105, at ¶ 23; *see* Mukong v. Cameroon, Comm. No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, ¶¶ 9.6–9.7 (Hum. Rts. Comm. 1994).

115. International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; GENERAL COMMENT 34, *supra* note 105, at ¶¶ 11–12; NOWAK, *supra* note 103, at 445.

116. *See* Human Rights Council Res. 20, U.N. Doc. A/HRC/20/L.13, ¶ 1 (June 29, 2012) [hereinafter HRC Res. 20] (“Affirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the [ICCPR].”); *see also* Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 21, U.N. Doc A/HRC/17/27 (May 16, 2011) [hereinafter Special Rapporteur Report May 2011] (“[International human rights law] was drafted with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression. Hence, the framework of international human rights law remains relevant today and equally applicable to new communication technologies such as the Internet.”).

117. General Comment 34, *supra* note 105, ¶ 12.

others who self-publish their work on the Internet.¹¹⁸ Thus, any restrictions on websites, blogs, or other Internet-based systems for expression are allowed only if they are consistent with the ICCPR.¹¹⁹

Several international legal bodies and officials have stressed the importance of the Internet in promoting freedom of expression.¹²⁰ For example, Frank La Rue, the former United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, asserted:

Unlike any other medium, the Internet enables individuals to seek, receive and impart information and ideas of all kinds instantaneously and inexpensively across national borders. By vastly expanding the capacity of individuals to enjoy their right to freedom of opinion and expression, which is an “enabler” of other human rights, the Internet boosts economic, social and political development, and contributes to the progress of humankind as a whole.¹²¹

The Special Rapporteur has stated that attempts by states to “restrict, control, manipulate and censor content disseminated via the Internet,” if enacted through vague laws without legal justification, are violations of international law and are dangerous due to the

118. *Id.* ¶ 44.

119. *Id.* ¶ 43; Human Rights Comm., Concluding Observations on the Syrian Arab Republic from Its Eighty-Fourth Session, ¶ 13, U.N. Doc. CCPR/CO/84/SYR (Aug. 9, 2005).

120. See Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 10, U.N. Doc. A/66/290 (Aug. 10, 2011) [hereinafter Special Rapporteur Report August 2011] (“The Internet has become a vital communications medium which individuals can use to exercise their right to freedom of expression”); Special Rapporteur Report May 2011, *supra* note 116, ¶ 2 (“[T]he Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies.”); Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 30, U.N. Doc. E/CN.4/2006/55 (Dec. 30, 2005) (“The Internet revolution has definitely opened a new era for freedom of opinion and expression”); General Comment 34, *supra* note 105, ¶ 15; Human Rights Council Res. 12/16, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/RES/12/16, ¶¶ 3(a), 5(m), 5(p)(iii), 9 (Oct. 12, 2009) (expressing the importance of the Internet in promoting human rights and calling for states to ensure universal access to the Internet).

121. Special Rapporteur Report May 2011, *supra* note 116, at ¶ 19.

“chilling effect” these laws have on the right to freedom of expression.¹²²

The Special Rapporteur has also highlighted the importance of the Internet in countries—such as Uganda—where journalists have limited access to information.¹²³ The Internet offers a means for marginalized and disadvantaged groups to “obtain information, assert their rights, and participate in public debates.”¹²⁴ Similarly, the Human Rights Committee has recognized the importance of social media as a source of objective information about the government.¹²⁵

C. International Covenant on Civil and Political Rights

The ICCPR provides key protections for civil and political rights, including freedom of expression. The Covenant compels governments to take action to protect the rights enshrined in the treaty and forbids government action that would violate or suppress the protected rights. It is binding on all parties that have ratified it. To date, there are 172 States Parties to the ICCPR, including Uganda.¹²⁶

Article 19 of the ICCPR provides that:

Everyone shall have the right to hold opinions without interference.

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,¹²⁷ regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and

122. *Id.* ¶ 26.

123. Special Rapporteur Report August 2011, *supra* note 120, ¶ 13.

124. Special Rapporteur Report May 2011, *supra* note 116, ¶ 62.

125. Special Rapporteur Report August 2011, *supra* note 120, ¶ 12.

126. *Status of Ratification Interactive Map: International Covenant on Civil and Political Rights*, U.N. OFFICE OF THE HIGH COMMISSIONER OF HUM. RTS., <http://indicators.ohchr.org/> [<https://perma.cc/8DQ2-WVBZ>].

127. At the time of drafting, there was apparently little consideration given to whether seeking or receiving information represented an act of expression. Regardless, as written in the text, and as interpreted in subsequent practice, Article 19 protects imparting as well as receiving information. NOWAK, *supra* note 103, at 443; MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 381, 393 (1987).

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 (*ordre public*), or of public health or morals.¹²⁸

Article 19(3) outlines a three-part test to determine the legality of a law which limits expression.¹²⁹ A restriction on free expression must be provided by law, made in pursuance of one of the permissible government interests outlined in Article 19, and must be necessary to achieve that interest. This three-part test is the primary means to determine whether the Ugandan social media tax is permissible under international law. To ascertain the legality of the tax under international law, however, one must first establish whether the financial burden imposed on speech by the tax qualifies as a restriction at all. If the tax does not restrict expression, it would be permissible under international law. Under international law, only a restriction must be justified by one of the enumerated government interests.

III. IS THE SOCIAL MEDIA TAX A RESTRICTION UNDER INTERNATIONAL LAW?

Part III will explore to what extent taxes that touch on speech are considered a restriction on expression and will therefore determine whether an analysis of the tax under the ICCPR is necessary or appropriate. Part III.A will explore the *travaux préparatoires* (drafting history) of the ICCPR and relevant Human Rights Committee case law for any insights into this question. Then, Part III.B will analyze the importance of universal access to the Internet under international law. Finally, because there has not been extensive case law on this issue under international law, Part III.C will turn to U.S. constitutional law to see if U.S. jurisprudence can shed light on whether taxes that burden speech are considered restrictions on speech.

128. ICCPR, *supra* note 115, art. 19.

129. *Id.* ¶ 22; Velichkin v. Belarus, Comm. No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001, ¶ 7.3 (Hum. Rts. Comm. Nov. 23, 2005); U.N. Human Rights Committee, General Comment No. 10, Freedom of Expression (Article 19), U.N. Doc. 29/06/83 ¶ 4 (1983); ARTICLE 19, Johannesburg Principles on National Security, Freedom of Expression, and Access to Information, U.N. Doc. E/CN.4/1996/39, Principle 1, annex (Mar. 22, 1996).

In conducting this analysis, Part III will conclude that it is likely that a tax large enough to effectively limit expression would constitute a restriction under international law. While it is possible that a tax that only incidentally impacts speech would fall below this threshold and thus would be permissible under international law, the *travaux préparatoires* of the ICCPR, Human Rights Committee case law, and general principles of international law indicate that the Ugandan social media tax would be considered a restriction on expression.

A. *Travaux Préparatoires* of the ICCPR and Human Rights Committee Case Law

Under the European Convention on Human Rights (ECHR), which was drafted four years before the ICCPR,¹³⁰ states can impose formalities, conditions, restrictions, or penalties on expression to promote fundamental government interests.¹³¹ The draft wording of ICCPR Article 19(3) mirrored the ECHR's language, using the phrase "penalties, liabilities, and restrictions" to describe the permissible limitations on expression.¹³² However, "penalties" and "liabilities" were removed from the text and the final language of the ICCPR refers only to restrictions.¹³³

According to Manfred Nowak, an Austrian law professor and the former U.N. Special Rapporteur on Torture, however, this omission may not be relevant. Nowak postulates that the use of the word "restriction" in Art. 19(3) may "also include formalities (e.g. imprint duty for printed works), conditions (e.g. licensing of a broadcasting company) or penalties (e.g. criminal offences to protect the reputation of others)."¹³⁴

A Human Rights Committee decision has also supported the conclusion that "restriction" as defined by the ICCPR was intended to incorporate formalities, conditions, and penalties, despite its narrow wording in comparison with the ECHR. In *Ross v. Canada*, the Committee defined a restriction on expression as any action by a

130. NOWAK, *supra* note 103, at 440.

131. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

132. BOSSUYT, *supra* note 127, at 389.

133. *Id.*; ICCPR, *supra* note 115, at art. 19(3).

134. NOWAK, *supra* note 103, at 458 n.102. Nowak makes this comment in a footnote and does not explain his reasoning.

public body that causes a tangible harm as a consequence of engaging in expressive activities.¹³⁵ In that case, Ross, a teacher, was transferred to a non-teaching position due to his outspoken anti-Semitic beliefs. This transfer constituted a restriction on Ross' expression under Article 19.¹³⁶ Applying this definition to the Ugandan context, the social media tax was enacted by the Parliament of Uganda, a public body, and effectively limits access to social media, causing a tangible harm. Thus, under the definition put forward in *Ross*, the tax would likely be considered a restriction on expression.

During the drafting process for Article 19, there was a proposed provision which would have directly addressed whether taxes that limited speech were permissible. The provision stated that "nothing in this article shall affect the right of any State Party to this Covenant to take measures which it deems necessary in order to bring its balance of payments into equilibrium."¹³⁷ This proposed language was rejected because it dealt with "temporary solutions or technical problems, rather than the right to freedom of expression itself, and should not, therefore, be included in a universal instrument of a lasting character."¹³⁸ Though the proposed language was not rejected as inapplicable to the meaning of Article 19, it is still worth noting that this payment-based provision was not included in the final language of Article 19.

B. Universal Access to the Internet as a Human Right

Given the importance international law places upon ensuring universal access to the Internet as a means of expression, it seems likely that any law that increases the cost of Internet access would be considered a restriction on expression. States may even have a positive obligation under international law to reduce the cost of Internet access. The 2011 Joint Declaration on Freedom of Expression and the Internet declared that states are obligated to implement regulatory mechanisms that would help control the cost of

135. *Malcolm Ross v. Canada*, Comm. No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 ¶ 11.1 (Hum. Rts. Comm. Oct. 18, 2000).

136. *Id.* The Committee went on to conclude that the restriction was necessary to protect the rights and reputations of persons of the Jewish faith and therefore permissible. *Id.* ¶ 11.6.

137. BOSSUYT, *supra* note 127, at 396–97.

138. *Id.*

the Internet so poorer people can gain access to it.¹³⁹ While such declarations are not binding upon states, they are viewed as an authoritative interpretation of international law.¹⁴⁰

The Special Rapporteur on Freedom of Opinion and Expression has separately argued that states should adopt policies “to make the Internet widely available, accessible and affordable to all.”¹⁴¹ In another report, the Special Rapporteur wrote that states should take action to make the Internet less expensive by enacting regulations to ensure public access to the Internet, and by potentially subsidizing Internet services and the hardware necessary to allow access to the Internet for the state’s poorest people.¹⁴² Finally, the Special Rapporteur has declared that the cost to access information from public institutions should not be excessive, as high fees would act as a barrier to access.¹⁴³ While these reports are also not binding upon states, they may be viewed as compelling interpretations of the law.¹⁴⁴

If states have a positive obligation to lower the cost to connect to the Internet and to ensure that the poorest members of society have Internet access, it would be implausible that states would be permitted under international law to impose taxes that would raise the cost of Internet access, potentially creating insurmountable barriers to portions of the population. Thus, it seems likely that a tax that made accessing the Internet more expensive would be considered

139. The Joint Declaration was signed by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights, the Representative on Freedom of the Media for the Organization for Security and Cooperation in Europe, and the Special Rapporteur on Freedom of Expression for the African Commission on Human and Peoples’ Rights. Frank LaRue et al., *Joint Declaration on Freedom of Expression and the Internet*, ORG. FOR SEC. & COOPERATION IN EUR. § 6(e) (June 1, 2011), <https://www.osce.org/fom/78309?download=true> [<https://perma.cc/CFB9-L9B4>] [hereinafter *Joint Declaration*].

140. TOBY MENDEL, *THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES* 235 (2015).

141. Special Rapporteur Report May 2011, *supra* note 116, at ¶ 66.

142. Special Rapporteur Report August 2011, *supra* note 120, at ¶ 66.

143. Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, § IV(B)(4), U.N. Doc. A/68/362 (Sept. 4, 2013).

144. *FAQs: United Nations Special Rapporteurs*, ACLU, <https://www.aclu.org/other/faqs-united-nations-special-rapporteurs> [<https://perma.cc/77XJ-8TTJ>]; Surya P. Subedi, *Protection of Human Rights Through the Mechanism of UN Special Rapporteurs*, 33 *HUM. RTS. Q.* 201, 203–04 (2011).

to be a restriction on expression that could only be justified if it complied with Article 19(3).

Given the economic impact of the social media tax, the law would serve to prevent many Ugandan citizens from accessing social media platforms. As mentioned in Part I.C, for the poorest people in Uganda, the tax would double the cost of accessing the Internet, and would potentially increase the cost to access the Internet to 40% of their average income.¹⁴⁵ The tax would serve as a barrier to the poorest members of society, and many people who would be able to access the Internet if not for the tax would be unable to after the imposition of the tax.

C. The United States Model

While it is likely that a use tax would constitute a restriction under international law, case law on this issue is absent. When international law is unclear, adjudicators at times have turned to other sources, including national law, to help interpret international law. For instance, the International Court of Justice has examined the jurisprudence of national courts as evidence of international law.¹⁴⁶ Thus, American case law on this issue, which is well developed, may provide guidance as to how to best interpret international law.

It is possible that the Supreme Court of Uganda would look to American principles of free expression when determining whether the social media tax violates the Constitution of Uganda. The Ugandan Supreme Court has referred to United States Supreme Court decisions to help interpret constitutionally protected rights in the past,¹⁴⁷ and refers often to jurisprudence of the high courts of foreign

145. See *supra* Part I.C.

146. Thomas M. Franck, *International Law: Through National or International Courts?*, 8 VILL. L. REV. 139, 139–40 (1963) (stating that the ICJ used national court decisions as evidence of international law in the *Minquiers and Erehos* Case).

147. See, e.g., *Attorney-General v. Susan Kigula & 417 Others*, Constitutional Appeal No. 03 of 2006, 29–31 (Uganda Jan. 21, 2009, unreported) (analyzing United States decisions on the issue in determining the constitutionality of the death penalty under Ugandan law, including *Trop v. Dulles*, 356 U.S. 86 (1958); *Furman v. Georgia*, 408 U.S. 238 (1972); and *Gregg v. Georgia*, 428 U.S. 153 (1976)).

countries in its opinions.¹⁴⁸ In determining permissible limits on expression under the Ugandan constitution, the Ugandan Supreme Court has relied in part on American jurisprudence. In *Charles Onyango Obbo and Anor v. Attorney General*,¹⁴⁹ the Ugandan Supreme Court referred to *Thornhill v. Alabama*,¹⁵⁰ *Trop v. Dulles*,¹⁵¹ and the writings of Alexander Meiklejohn,¹⁵² a noted American scholar, to help illuminate the universal importance of public speech to a democratic state. Two lines of cases in the United States—taxes imposed specifically on the press and the peddling tax cases—help define what kinds of financial burdens impermissibly burden speech.

1. Taxes Imposed Solely on the Press

The First Amendment protects speech from not only manifest and overt government action, but also from more subtle action.¹⁵³ Among the subtle actions that the U.S. Supreme Court has considered are taxes imposed exclusively on the press or a subset of the press.

In *Grosjean v. American Press Co.*, the Court held that a Louisiana tax imposed only upon newspapers with a high circulation rate violated the First Amendment because it punished certain publishers, curtailed newspaper circulation, and restricted information to which the public was entitled.¹⁵⁴ The Court determined

148. Jamil Ddamulira Mujuzi, *International Human Rights Law and Foreign Case Law in Interpreting Constitutional Rights: The Supreme Court of Uganda and the Death Penalty Question*, 9 AFR. HUM. RTS. L.J. 576, 588 (2009) (“As in the case with international human rights law, the Supreme Court examined jurisprudence from other countries to reach some of the decisions.”).

149. *Charles Onyango Obbo & Anor v. Attorney Gen.*, Constitutional Appeal No. 02 of 2002 (Uganda Feb. 10, 2004).

150. *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

151. *Trop v. Dulles*, 356 U.S. 86, 103 (1958).

152. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960) (“The principle of the freedom of speech springs from the necessities of the program of self-government.”).

153. See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 522–25 (1960); *Smith v. California*, 361 U.S. 147, 149–50 (1959); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 461–62 (1958); *Am. Commc’ns Ass’n. v. Douds*, 339 U.S. 382, 402 (1950); *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

154. *Grosjean*, 297 U.S. at 244 (explaining that, because the tax was imposed on newspapers that had a weekly circulation above 20,000, only thirteen newspapers were subject to it. Four daily newspapers and 120 weekly newspapers were exempt from the tax because their circulation numbers were below 20,000).

that the tax, when viewed in its historical context,¹⁵⁵ was “a deliberate and calculated device in the guise of a tax to limit the circulation of information.”¹⁵⁶ The state legislature implemented the tax to punish newspapers that published articles critical of Senator Huey Long,¹⁵⁷ and the tax in effect deprived citizens from receiving speech critical of the government.¹⁵⁸

The Supreme Court refined its approach in determining the constitutionality of taxes on the media in *Minneapolis Star v. Minneapolis Commissioner of Revenue*. In *Minneapolis Star*, the Court struck down a tax on paper and ink products used specifically for periodic publications.¹⁵⁹ While acknowledging that the government can subject media outlets to generally applicable economic regulations,¹⁶⁰ including generally applicable taxes, the Court declared that a tax imposed solely on the media is subject to strict scrutiny.¹⁶¹ Under this holding, differential taxes on the press would have to be justified through some characteristic unique to the press.¹⁶² The Court also confirmed that evidence of an improper legislative intent was not necessary to find the tax unconstitutional.¹⁶³

Moreover, taxes on the press are considered constitutionally suspect because they can potentially be used to single out particular members of the press. In *Minneapolis Star*, the Court stated that “recognizing a power in the State not only to single out the press but

155. The historical context behind *Grosjean* was explored in detail in a later case, *Minneapolis Star*: “All but one of the large papers subject to the tax had ‘ganged up’ on Senator Huey Long, and a circular distributed by Long and the governor to each member of the state legislature described ‘lying newspapers’ as conducting ‘a vicious campaign’ and the tax as ‘a tax on lying.’” *Minneapolis Star v. Minneapolis Comm’r of Revenue*, 460 U.S. 575, 579–80 (1983).

156. *Grosjean*, 297 U.S. at 250.

157. *Id.* at 251 (“[The tax] is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.”).

158. *See id.* at 250.

159. *Minneapolis Star*, 460 U.S. at 591–93.

160. *Id.* at 581.

161. *See id.* at 582 (“A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest.”).

162. *Id.* at 585.

163. *Id.* at 592 (“Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”).

also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.¹⁶⁴ This more overt risk of content discrimination formed the basis for the Court's decision in *Arkansas Writers' Project v. Ragland*. In *Arkansas Writers'*, a generally applicable sales tax that exempted some magazines, but not all, was overturned due to the discrimination inherent in only a subset of magazines being subject to the tax.¹⁶⁵ The discrepancy in treatment within a class of publications was treated as evidence of discrimination based on the subject matter of the speech.¹⁶⁶

After *Arkansas Writers'*, the Arkansas legislature amended its sales tax to exempt most segments of the media, but not cable companies.¹⁶⁷ For this reason, the amended law was again subject to suit. In the resulting litigation, *Leathers v. Medlock*, the Court held that there was no First Amendment violation because the tax did not single out the press or threaten to prevent the press from providing a check upon the government.¹⁶⁸ There was no indication that the statute was designed to discriminate based on the content of cable broadcasts. Nor was there evidence that the content in cable broadcasts differed from the content of other media sources.¹⁶⁹ The Court held that a differential taxation on free speech is a violation of the First Amendment only if the legislature intends to, or does, create a tax capable of suppressing particular ideas.¹⁷⁰ The Court found that this was the case in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers'*, but not in *Leathers*.¹⁷¹

Taken together, these cases indicate that a differential tax—a tax imposed only on the press, rather than a general tax—that affects speech is constitutionally suspect when it threatens to suppress particular viewpoints. Absent a compelling interest, the government cannot impose taxes that single out the press in a way that suppresses, or has the potential to suppress, particular ideas and

164. *Minneapolis Star*, 460 U.S. at 592.

165. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987).

166. See *id.* at 230.

167. *Leathers v. Medlock*, 499 U.S. 439, 442–43 (1991).

168. *Id.* at 453.

169. *Id.* at 449.

170. *Id.* at 453.

171. *Id.*

viewpoints from being expressed.¹⁷² Likewise, a tax that targets a particular group of speakers is also constitutionally suspect.¹⁷³

2. Peddling Taxes

The peddling tax cases provide additional insight into the constitutionality of taxes that inhibit speech. In *Murdock v. Pennsylvania*, the Court struck down a city ordinance that required all solicitors to have a license for which a fee had to be paid.¹⁷⁴ Because the license tax was a condition placed upon the exercise of constitutionally protected activity, the Court found the tax unconstitutional.¹⁷⁵ Justice Douglas stated:

Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way . . . Accordingly, [the financial burden imposed by the license tax] restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise.¹⁷⁶

The Court emphasized that, because taxes have the potential to restrict fundamental rights, they could constitute an impermissible restraint on expression.¹⁷⁷ Subsequent cases have followed this holding. In *Follett v. Town of McCormick*, for example, the Court declared that “[the] exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of censorship or a previous restraint.”¹⁷⁸

3. Analysis of the Social Media Tax under U.S. Law

It is likely that under U.S. law, the Ugandan social media tax would be constitutionally suspect. The tax is a differential tax

172. *Id.*; *Minneapolis Star v. Minneapolis Comm’r of Revenue*, 460 U.S. 575, 585 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233, 244–49 (1936).

173. *Minneapolis Star*, 460 U.S. at 592; *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987).

174. *Murdock v. Pennsylvania*, 319 U.S. 105, 133 (1943).

175. *Id.* at 113–14.

176. *Id.* at 111, 114.

177. *Id.* at 113. (“A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.”); *see also id.* at 112 (“The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.”).

178. *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944); *see also Murdock*, 319 U.S. at 113.

imposed on the use of certain websites and thus threatens to suppress particular viewpoints. As stated in Part I.B.1, people between the ages of fifteen and twenty-nine make up 75% of Facebook users in Uganda. Ugandan citizens in this age group have very high unemployment figures, and they generally do not support President Museveni.¹⁷⁹ Further, opposition parties have used social media platforms to express their message when other methods of communication have been blocked.¹⁸⁰ Thus, groups who rely on social media to spread their messages may have their viewpoints suppressed by the tax.

Unlike the generally applicable sales taxes at issue in *Leathers*, the Ugandan social media tax was specifically imposed only on social media platforms. *Leathers* involved an exemption which operated as a subsidy from a generally applicable sales tax. The social media tax, however, is not an exemption from a generally applicable tax, but rather a tax imposed specifically upon certain platforms. Subsidies or exemptions that discriminate on account of viewpoint are subject to strict scrutiny, whereas subsidies that differentiate on account of mode of communication are not.¹⁸¹

In addition, the Ugandan government has made the use tax applicable to only some social media platforms. Because not every social media platform is included within the tax, the tax suffers from the same flaws as the taxes in *Minneapolis Star* and *Arkansas Writers'*.¹⁸² There is the potential for discrimination among platforms and thus a substantial risk of content discrimination. Further, the platforms singled out by the Ugandan tax scheme are those typically used in organizing protests against the government, so the tax is effectively viewpoint discrimination as well.

Finally, the social media tax acts as a form of pre-censorship similar to the license tax at issue in *Murdock*. In his opinion, Justice Douglas stated that taxes that inhibit fundamental rights of any person, including but not limited to members of the press, are constitutionally suspect.¹⁸³ The license tax operated as a form of pre-

179. See *supra* Part I.B.1.

180. *Id.*

181. See *Leathers v. Medlock*, 499 U.S. 439, 453 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540, 548–50 (1983).

182. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 238 (1987); *Minneapolis Star v. Minneapolis Comm'r of Revenue*, 460 U.S. 575, 591–92 (1983).

183. *Murdock*, 319 U.S. at 113.

censorship for people who could not pay the tax. Similarly, the social media tax effectively censors people who are unable to afford to pay the daily fee. This is especially problematic in the Ugandan context because the tax constitutes a significant portion of the income of many people.

Because the Ugandan law imposes a differential tax that distinguishes among social media sites and has a significant impact on the poorest members of society, the social media tax would be considered a restriction under both international law and U.S. constitutional law. As a result, the tax would be permissible under international law only if it survives the three-part test outlined in Article 19 of the ICCPR.

IV. IS THE UGANDAN SOCIAL MEDIA TAX A VALID RESTRICTION ON EXPRESSION?

Part IV will evaluate the Ugandan social media tax under the ICCPR to determine whether the law violates international law, and, if it does, what the effect of that determination would be in Uganda and across East Africa. Part IV.A will examine the tax through the three prongs of the Article 19 test, exploring each of the justifications for the tax proffered by the Ugandan government, as well as determining if any other government interests could justify the tax. Next, Part IV.B will assess the authority of the ICCPR in Uganda, and, in doing so, determine the significance within Uganda of a Human Rights Committee decision that the tax violates international law. Finally, Part IV.C will consider the wider effects of such a determination by the Committee. Because financial burdens enacted to suppress political dissent are becoming commonplace in East Africa, it is necessary to ascertain the consequences this determination could have on states with similar laws.

A. Analysis of the Social Media Tax

Article 19 of the ICCPR provides the primary test to determine whether a restriction upon expression is permissible under international law. First, the restriction on free expression must be provided by law. Second, it must be made in pursuance of one of the purposes laid out in paragraph 3—that is, to protect the rights or reputations of others, to protect national security or the public order (*ordre public*), or to protect public health or morals. This is a comprehensive list—no other government interests can justify a restriction on free expression. Third, the restriction must be

necessary to achieve its protective function—it must be the least intrusive means of achieving the permissible government interest.¹⁸⁴ A restriction is not necessary if the government interest could be achieved in other ways that do not restrict freedom of expression.¹⁸⁵

Limitations on expression are permitted only to the extent provided for in Article 19(3),¹⁸⁶ which, under Article 5(1) of the ICCPR, must be strictly interpreted.¹⁸⁷ Furthermore, the Human Rights Committee has held that because free expression in particular is essential to a democratic society, any restrictions on speech “must meet a strict test of justification.”¹⁸⁸

1. Provided by Law

Once it has been established that a government action constitutes a restriction on freedom of expression, the first requirement for the restriction to be permissible under international law is that it must be set down in formal legislation and must not be vague. The restriction must be established by general rule so as to avoid arbitrary restrictions on human rights.¹⁸⁹ In addition, the law must be precise enough “to enable an individual to regulate his or her conduct accordingly, and it must be made accessible to the public.”¹⁹⁰

The Excise Duty Amendment Act was enacted by the Parliament of Uganda on July 1, 2018. While not much was known about the specifics of the tax and how it would operate before the tax went into effect, it was nevertheless set down in formal legislation. The operation of the law is sufficiently precise—the websites that are blocked are listed, and it is clear what a social media user must do to

184. General Comment 34, *supra* note 105, ¶ 34; Alexandre Charles Kiss, *Permissible Limitations on Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 290, 308 (Louis Henkin ed., 1981).

185. General Comment 34, *supra* note 105, ¶ 34.

186. Kiss, *supra* note 184, at 291.

187. ICCPR, *supra* note 115, art. 5(1):

Nothing in the present Covenant may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

188. *Park v. Republic of Korea*, *supra* note 112, ¶ 10.3.

189. Kiss, *supra* note 184, at 304.

190. General Comment 34, *supra* note 105, at ¶ 25.

gain access to those platforms. In sum, the restriction was established by law, and, at least in this regard, complies with Article 19(3).

2. Is the Tax Necessary to Further a Legitimate Aim?

For the tax to be valid under the ICCPR, it must be necessary under one of the justifications provided by the ICCPR and must be proportional. As stated in Part I, the Ugandan government attempted to justify the law on several grounds: to reduce gossip, to raise state revenue, to tax the use of foreign-created products, and to prevent circumvention of existing taxes. The Ugandan government also argued that access to social media was a luxury rather than a necessity or fundamental right, and therefore required no unusual justification. This subsection will examine each of these justifications under the ICCPR and whether they meet the necessity and proportionality requirements.

i. To Prevent the Spread of Gossip

Among its several justifications, the Ugandan government argued that the social media tax was necessary to prevent the spread of *lugambo*—that is, opinions, prejudices, insults, and friendly chats.¹⁹¹ Of the justifications permitted by Article 19(3), prevention of gossip is closest to respecting the rights and reputations of others. Though it is certainly true that the government can, and in some cases, must, protect the reputations of individuals within Uganda,¹⁹² doing so does not justify the social media tax.

The social media tax is not necessary to protect the rights and reputations of Ugandan citizens. There is already robust protection against defamation in Uganda,¹⁹³ and the introduction of the social media tax would not add any additional protection, especially due to the fact that anyone with the ability to pay would retain the ability to gossip about others over social media. Moreover, defamation laws are less intrusive than a blanket tax on the use of social media. Accordingly, the social media tax is not necessary nor proportionate to prevent the spread of gossip. A tax on all social media users is both over-inclusive and under-inclusive: the tax would exclude all

191. See *supra* Part I.A.

192. ICCPR, *supra* note 115, art. 17 (binding States to provide statutory protection against “unlawful attacks on [an individual’s] honor and reputation”).

193. See generally PAUL KIMUMWE, MEDIA REGULATION AND PRACTICE IN UGANDA: A JOURNALIST’S HANDBOOK 37–46 (2014).

expression over social media by those who are unable or unwilling to pay the tax but would still allow all expression, including gossip, by those who can afford the tax. In addition, the tax would not prevent the spread of gossip through platforms other than social media. Because of the overbroad reach of the tax, the law would not conform to the standards of necessity or proportionality and would thus be impermissible.

It is likely that President Museveni uses the word gossip to refer to criticism of his regime.¹⁹⁴ The ICCPR places a particularly high value upon “uninhibited expression” regarding public and political figures in a democratic society.¹⁹⁵ States cannot chill public debate by suppressing expression critical of those in power.¹⁹⁶ In *Aduayom et al. v. Togo*, for instance, the Human Rights Committee held that, because open political debate is essential for a well-informed populace, citizens must be free to “criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by Article 19, paragraph 3.”¹⁹⁷ Accordingly, Article 19 precludes restrictions that suppress “advocacy of multiparty democracy, democratic tenets and human rights.”¹⁹⁸ Thus, if President Museveni was attempting to suppress speech critical of the government, the tax would not be permissible. Uganda has a long history of suppressing government dissent under the guise

194. See, e.g., Patience Akumu, *This Tax on Social Media Can't Prevent Ugandans Taunting Their Leaders*, *GUARDIAN* (July 14, 2018), <https://www.theguardian.com/world/2018/jul/14/uganda-tax-social-media-museveni-internet-dissent> (on file with the *Columbia Human Rights Law Review*) (suggesting that the social media tax is meant, at least in part, to silence critics of the Ugandan government).

195. NOWAK, *supra* note 103, at 443; *Zeljko Bodrožić v. Serbia and Montenegro*, Comm. No. 1180/2003, U.N. Doc. CCPR/C/85/D/1180/2003, § 7.2 (Hum. Rts. Comm. 2006).

196. NOWAK, *supra* note 103, at 445 (“States parties may not extend the right of State security so far as to penalize and suppress mere expression of opinions, even though their contents may be highly critical.”); Tomuschat, *supra* note 112, ¶ 20 (“[I]f the limitation clause [of Art. 19(3)] was to have any reasonable meaning it could not be taken to mean that freedom of opinion could be restricted merely because the Government considered it to be a threat to its own stability.”).

197. *Aduayom et al. v. Togo*, *supra* note 112, ¶ 7.4.

198. General Comment 34, *supra* note 105, ¶ 23.

of protecting the reputations of others,¹⁹⁹ and it appears likely that the social media tax is yet another attempt.²⁰⁰

ii. To Help Raise Revenue

The Ugandan government alternatively justified the social media tax as a measure to help balance the nation's budget and reduce its reliance on foreign aid. Three separate justifications related to revenue were given by the Ugandan government: to raise revenue generally, to tax foreign-designed products, and to prevent circumvention of other, already enacted, taxes.

Article 19(3) does not allow for limits on free expression that are enacted to raise revenue under any of its permissible restrictions. It is therefore likely that these justifications would not be acceptable under international law. As noted by the Special Rapporteur:

States enjoy legitimate interests apart from those identified in article 19(3), such as those economic, diplomatic and political. Human rights law does not preclude States from pursuing such objectives. Article 19 merely provides that pursuit of those other objectives must involve measures that do not restrict the exercise of freedom of opinion and expression.²⁰¹

Revenue-raising measures cannot be reasonably justified as a protection of reputation, national security, public order, public health, or public morals. A permissible restriction on expression must be necessary to achieve one of these justifications, and, even if the funds are used to protect national security, public order, or public health, a revenue raising measure that limits expression would not be necessary to achieve that goal.²⁰² It would always be possible to raise funds through means that do not restrict fundamental rights. Raising revenue is of critical importance to the government, especially in a state with the budgetary issues that Uganda faces. Nevertheless, Uganda must raise revenue in ways that do not restrict expression. Generally applicable taxes that incidentally burden speech may be permissible under international law, but a tax that serves as a

199. See *supra* text accompanying notes 69–73.

200. See Akumu, *supra* note 194.

201. Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 28, U.N. Doc. A/71/373 (Sept. 6, 2016).

202. See *supra* Part II.C.

restriction on speech cannot be justified simply as a way to raise revenue.

Further, the argument that the social media tax would help prevent circumvention of the airtime tax would also not justify it under international law. As explained by Mr. Joshua Anywarach, Member of Parliament for Padyere County, the only way to access the OTT services is through service providers, and in order to buy data through service providers in Uganda, one must first buy airtime that can then be converted to data. Therefore, the existing excise tax on airtime already covers internet messaging services, and the social media tax would not be necessary to prevent circumvention of that tax.²⁰³

iii. Social Media Access is a Luxury

The final reason proffered by the government to justify the imposition of the social media tax is that, because access to social media is a luxury rather than a necessity, the tax should be viewed in the same light as a tax on any other luxury good. As mentioned in Part II.B, however, under international law, access to the Internet—and access to social media in particular—are potentially human rights.²⁰⁴ Because the tax would limit access to social media, it would likely be incompatible with international law.

Although the right to universal access to the Internet has not yet been established as a distinct right under international law,²⁰⁵ many U.N. reports, declarations, and agreements have acknowledged a positive obligation on the part of states to ensure universal access to the Internet.²⁰⁶ In addition, several individual states have expressly recognized Internet access as a human right.²⁰⁷

203. Uganda Parl. Deb. 38, *supra* note 31, at 36 (statement of MP Anywarach).

204. *See supra* Part II.B.

205. Special Rapporteur Report August 2011, *supra* note 120, ¶ 61.

206. *See* World Summit on the Information Society, *Declaration of Principles*, ¶ 4, U.N. Doc. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003) (“Everyone, everywhere should have the opportunity to participate [in the Information Society] and no one should be excluded from the benefits the Information Society offers.”); General Comment 34, *supra* note 105, ¶ 15 (calling on states to “take all necessary steps to foster the independence of [the Internet] and to ensure access of individuals thereto”); Special Rapporteur Report May 2011, *supra* note 116, ¶ 85 (highlighting that ensuring universal access to the Internet should be a priority for all States and declaring that “[e]ach State should . . . develop a

Though it is not clear whether states have a positive obligation to ensure universal Internet access,²⁰⁸ there is no doubt that a complete denial of access is considered a restriction on expression, regardless of the justification provided. According to the 2011 Joint Declaration on Freedom of Expression and the Internet, “Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public . . . can never be justified, including on public order or national security grounds.”²⁰⁹ Separately, the Special Rapporteur wrote that the permissibility of a block on websites must be determined by a judicial authority “independent of any political, commercial or other unwarranted influences in order to ensure that blocking is not used as a means of censorship.”²¹⁰ The financial burdens imposed by the social media tax have cut off access to part of the Internet for a portion of the Ugandan population who would otherwise have it. While the tax does not shut down the Internet in the traditional sense, it operates as a restriction on Internet access in much the same way and would therefore be contrary to international law.

The argument that access to social media is a luxury rather than a fundamental right is largely unpersuasive. While universal access to the Internet has not been expressly declared to be a human right, many statements and reports by various U.N. bodies indicate that universal access to information may be a right under international law, and affirmatively blocking Internet access is certainly considered a violation of a fundamental right.

concrete and effective policy . . . to make the Internet widely available, accessible and affordable to all segments of population.”); *Joint Declaration*, *supra* note 139, § 6(a)(e) (“[S]tates are under a positive obligation to facilitate universal access to the Internet [and] giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet.”).

207. Special Rapporteur Report May 2011, *supra* note 116, ¶ 65.

208. During the drafting process for Article 19, a provision was proposed that would have articulated a positive obligation on states to ensure universal access to information. The proposed language stated that “measures shall be taken to promote the freedom of information through the elimination of political, economic, technical, and other obstacles which are likely to hinder the free flow of information.” BOSSUYT, *supra* note 127, at 396–97 (emphasis added). This provision was rejected for the same reason as the proposal that would have allowed states to enact taxes that limited free speech—according to the drafters, the proposal did not deal with the right to freedom of expression itself. *Id.*

209. *Joint Declaration*, *supra* note 139, § 6(b).

210. Special Rapporteur Report August 2011, *supra* note 120, ¶ 82.

3. Necessity and Proportionality under Other Permissible Justifications

Because the Ugandan government did not rely on any other permissible justification for the social media tax, it would not be necessary for a court to examine whether the tax could be justified to protect national security, public order (*ordre public*), public health, or public morals. Nonetheless, assuming *arguendo* that the government *had* attempted to justify the tax as necessary to further one of these state interests, that argument would not succeed.

First, restrictions on expression are permissible to protect national security only in cases of political or military threat to the territorial integrity or political independence of the entire nation.²¹¹ States may not invoke national security concerns to suppress political debate or criticism of the government.²¹² Neither the territorial integrity nor the political independence of Uganda are under imminent threat. Thus, the social media tax could not be justified on this ground.

Second, restrictions are permissible to maintain the public order (*ordre public*). *Ordre public* is a term of art in French civil law that is used the way *public policy* is used in the Anglo-American common law.²¹³ Protection of the public order permits restrictions on specified human rights when necessary for the public welfare and social order of a state.²¹⁴ Because the scope of what could be included within “public order” is so large, scholars have argued for a strict determination of the necessity and proportionality of a restriction that uses this justification.²¹⁵

According to the *travaux préparatoires* of the ICCPR, the licensing of radio and television is permitted to protect the public

211. Kiss, *supra* note 184, at 297; see General Comment 34, *supra* note 105, at ¶ 30; Keun-Tae Kim v. Republic of Korea, Comm. No. 574/1994, U.N. Doc. CCPR/C/64/D/574/1994, ¶ 12.4-5 (Hum. Rts. Comm. Jan. 4, 1999).

212. NOWAK, *supra* note 103, at 445; Tomuschat, *supra* note 112, ¶ 20; Mukong v. Cameroon, Comm. No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, ¶¶ 9.6–9.7 (Hum. Rts. Comm. 1994); see also Castells v. Spain, App. No. 11798/85, 14 Eur. Ct. H. R. 445 ¶ 38 (Apr. 23, 1992).

213. NOWAK, *supra* note 103, at 464–66; Kiss, *supra* note 184, at 300.

214. Kiss, *supra* note 184, at 302.

215. NOWAK, *supra* note 103, at 464–66.

order.²¹⁶ However, registration and licensing can be justified for radio and television because those mediums have limited frequencies. This justification does not extend to licenses on the Internet because the Internet can accommodate an almost unlimited number of points of entry and users.²¹⁷

Protection of the public order has generally been used to justify prohibitions on speech that would incite crime, violence, or mass panic.²¹⁸ There is no indication by the government that the social media tax would promote the public order in this sense.

The final permissible justifications are the protection of public health and morals. The protection of public health appears in all the limitation clauses in the ICCPR, but has limited relevance to freedom of expression.²¹⁹ In the past, protection of the public health has been used to prohibit misleading publications about dangerous substances and limit advertisements for tobacco, alcohol, and drugs.²²⁰ This justification is inapplicable to the social media tax.

Protection of public morals has generally been used to justify restrictions on pornographic materials or, in some circumstances, religiously blasphemous publications.²²¹ Because there is no universal standard for morality, restrictions based on the protection of public morals are generally afforded a substantial degree of deference.²²² Nevertheless, the social media tax is not directed at obscenity or blasphemy, and the protection of public morals justification was never intended to encompass prohibitions placed upon “gossip.”²²³

216. BOSSUYT, *supra* note 127, at 390 (“[D]uring the debate the term ‘public order’ was interpreted as covering the rights of a State to license media . . . information and to regulate the importation of information material.”).

217. Special Rapporteur Report May 2011, *supra* note 116, ¶ 27.

218. *See, e.g.*, NOWAK, *supra* note 103, at 466 (stating that restrictions on prisoners’ freedom of information, for example, could only be permissible when they are “absolutely necessary to prevent crime or disorder in the prison”).

219. NOWAK, *supra* note 103, at 466.

220. *Id.* (outlining restrictions permissible to protect the public health); *see* Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 209, 221 (Louis Henkin ed., 1981).

221. NOWAK, *supra* note 103, at 466–67 (“Typical examples of interference with freedom of expression to protect *public morals* include prohibitions of or restrictions on pornographic or blasphemous publications.”).

222. Hertzberg et al. v. Finland, Comm. No. 61/1979, ¶ 10.3, U.N. Doc. CCPR/C/OP/1 (Hum. Rts. Comm. 1985).

223. *See supra* Part IV.A.2.i.

Thus, the social media tax cannot be justified on public morality grounds.

4. Analysis of Ulterior Motives

Even though the text of the ICCPR does not direct decision-making bodies to look at ulterior motives for restrictions,²²⁴ the Human Rights Committee has stated, “Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”²²⁵ This language is echoed in the Siracusa Principles, a guide to interpretation of the ICCPR.²²⁶ As explained by Frank C. Newman, former associate justice on the Supreme Court of California, and Karel Vasak, the first Secretary-General of the International Institute of Human Rights, “Although no provision [expressly stating that ulterior motives should be considered] is contained in the Covenant . . . there is no doubt that the prohibition against the misuse of power and procedure constitutes a general principle governing the implementation and interpretation of international treaties.”²²⁷

It is a near certainty that the reasons proffered by the Ugandan government for the social media tax were mere pretext and not the actual reasons motivating the government to enact the law. As outlined in Part I, the tax was enacted after Bobi Wine was elected to the Ugandan Parliament and after several protests were organized

224. Several regional conventions, such as the ECHR and the American Convention on Human Rights (ACHR), contain provisions that take into account ulterior motives. For example, Article 18 of the ECHR expressly directs the European Court of Human Rights to consider hidden motives when determining the permissibility of a restriction on human rights—even if the formal reason given for a restriction is permissible under the Convention, it is nevertheless a violation of the Convention if it were enacted for some ulterior purpose. ECHR, *supra* note 131, art. 18 (Nov. 4, 1950); LUKE CLEMENTS, EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 222 (1994). Article 30 of the ACHR mirrors Article 18 of the ECHR. American Convention on Human Rights art. 30, Nov. 21, 1969, 1144 U.N.T.S. 143.

225. General Comment 34, *supra* note 105, ¶ 22.

226. U.N. Comm’n on Human Rights, The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, § I(A)(6), U.N. Doc. E/CN.4/1984/4 (Sept. 28, 1984).

227. Frank C. Newman & Karel Vasak, *Civil and Political Rights, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 135, 160 (Vasak & Alston eds. 1978).

over social media.²²⁸ In addition, it follows in the wake of numerous other attempts by the Ugandan government to restrict the use of social media.²²⁹ Finally, most of the users of social media in Uganda are very young, and younger people in Uganda tend to oppose President Museveni. Therefore, the tax works to deny Museveni's political opponents a platform for expression.²³⁰ Given this reality, the Human Rights Committee, or any other body analyzing the tax would readily be able to look beyond the proffered pretextual reasons for the tax. The actual motivation appears to be a desire to suppress dissent—an illegitimate objective—which cannot justify a restriction on expression.

B. Enforcement of the ICCPR in Uganda

There are considerable doubts and important questions as to whether the ICCPR will be enforced in Uganda. States Parties to the ICCPR are required to domesticate the treaty by adopting “laws or other measures as may be necessary to give effect to the rights recognized in the . . . Covenant.”²³¹ However, even though Uganda has ratified the ICCPR, its Parliament never enacted enabling legislation to domesticate the treaty.²³² That said, in the debates preceding the ratification of the Constitution of Uganda in 1995, the Constitutional Commission and Constituent Assembly both “emphasized that the new Constitution should contain most of the rights included in international human rights instruments to which Uganda was a party at the time.”²³³ The Constitution of Uganda reflects this commitment; every right guaranteed by the ICCPR is likewise guaranteed by the Constitution.²³⁴

In addition, the Supreme Court of Uganda has taken into account the norms of international law when interpreting the Constitution. Unlike the high courts of Malawi and South Africa, the Supreme Court of Uganda is not obligated to take international law into account when interpreting the constitution.²³⁵ Nevertheless, in many decisions, justices have referred not only to treaties to which

228. *See supra* Part I.B.

229. *Id.*

230. *Id.*

231. ICCPR, *supra* note 115, at art. 2(2).

232. Mujuzi, *supra* note 148, at 581.

233. *Id.* at 579.

234. *Id.*

235. *Id.* at 580, 584.

Uganda is a party, but also to U.N. resolutions and the jurisprudence of the Human Rights Committee.²³⁶

For example, in *Charles Onyango Obbo and Anor. v. Attorney General*, the Ugandan Supreme Court struck down § 50 of the Penal Code Act, which criminalized the publication of false news.²³⁷ In doing so, the Court referred to Article 9 of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights' Declaration of Principles on the Freedom of Expression in Africa, as well as Article 19 of the ICCPR.²³⁸ In his opinion, Justice Mulenga wrote that, because the Constitution of Uganda does not define freedom of expression, it is "instructive to look at definitions of the same freedom in international instruments, to which Uganda is party." He then examined the right to free expression as defined by the ICCPR as well as the regional treaties mentioned above.²³⁹ Likewise, Chief Justice Odoki, in a separate opinion, referred to the definition of free expression that is "generally accepted," and again invoked Article 19 of the ICCPR.²⁴⁰ Similarly, in *Attorney-General v. Susan Kigula and 417 Others*, a case in which the Supreme Court upheld the death penalty,²⁴¹ the Court relied in part on the Human Rights Committee's decision in *Ng v. Canada*.²⁴² Thus, even though the Ugandan Supreme Court is not obligated to follow international law, its justices turn to international law, including the ICCPR and the jurisprudence of the Human Rights Committee, for help interpreting the Constitution of Uganda.

Additionally, Uganda ratified the Optional Protocol to the ICCPR in 1995, and in doing so submitted to the jurisdiction of the Human Rights Committee.²⁴³ The Optional Protocol established an individual complaint mechanism, which allows the Committee to receive complaints from persons alleging violations of their rights

236. *Id.* at 584.

237. *Charles Onyango Obbo & Anor v. Attorney Gen.*, Constitutional Appeal No. 02 of 2002 (Uganda Feb. 10, 2004).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Attorney-Gen. v. Susan Kigula & 417 Others*, Constitutional Appeal No. 03 of 2006 (Uganda Jan. 21, 2009).

242. *Id.* at 16.

243. U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (OHCHR), UGANDA AND THE UNITED NATIONS HUMAN RIGHTS MECHANISMS 12, <https://www.ohchr.org/Documents/Countries/PublicationUgandaUNHRMechanisms.pdf> [https://perma.cc/JP2M-7QHZ].

under the ICCPR, as well as a state reporting process, through which the Committee appraises state compliance with the ICCPR.²⁴⁴ It is likely that a person subject to the tax would be able to bring a complaint under the individual complaint mechanism.

Despite the obligations that arise from the ICCPR and the Optional Protocol, many states that have ratified both instruments continue to violate human rights norms.²⁴⁵ As stated by Professor Makau wa Mutua, “joining [the ICCPR and Optional Protocol are] not associated with real cost because of the general impotence of universal supervision or implementation measures. . . . The [Human Rights Committee] has done little to overcome or shake the intransigence of states to comply.”²⁴⁶ One reason for this is that decisions made by the Human Rights Committee are not binding on the parties to the individual complaint.²⁴⁷ The Committee has not received an individual complaint directed toward Uganda, so it is unknown whether Uganda would follow a decision by the Committee.²⁴⁸

In addition to the individual complaint procedure, States Parties are obligated to submit reports on the status of their efforts to promote and protect the rights enshrined in the Covenant.²⁴⁹ Generally, states will submit a report once every four years. In turn, the Human Rights Committee will write concluding observations regarding the state’s implementation of the ICCPR and will offer recommendations and suggestions to the state under review.²⁵⁰ The state reporting mechanism is fundamentally important to the enforcement of the ICCPR because it is the only obligatory procedure for all States Parties to the Covenant.²⁵¹ While the Human Rights Committee cannot ensure that its recommendations are

244. U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, INDIVIDUAL COMPLAINT PROCEDURES UNDER THE UNITED NATIONS HUMAN RIGHTS TREATIES 13 (2013), <https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf> [<https://perma.cc/VYB4-HANC>].

245. Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 220 (1998).

246. *Id.* at 220–21.

247. NOWAK, *supra* note 103, at 894.

248. OHCHR, *supra* note 243, at 11.

249. ICCPR, *supra* note 115, at art. 40.

250. *Id.* art. 40(4).

251. NOWAK, *supra* note 103, at 714.

implemented, other international mechanisms exist which can work to encourage state compliance.

One such mechanism is the Universal Periodic Review (UPR) by the U.N. Human Rights Council. During the UPR, states have the opportunity to publicly comment on and make recommendations regarding the human rights record of the state under review.²⁵² Like the state reporting process of the Human Rights Committee, there is no procedure to ensure that states implement the recommended actions. Nevertheless, recommendations can put pressure on a state to follow human rights norms. According to UPR-Info, an NGO that tracks UPR recommendations, as of November 15, 2019, states have made 142 recommendations asking a state to cooperate with a decision of the Human Rights Committee or to implement a recommendation made by the Committee.²⁵³ As of November 15, 2019, 957 UPR recommendations have been made concerning the ICCPR in general.²⁵⁴ Finally, as of November 15, 2019, twelve recommendations have specifically concerned freedom of expression in Uganda.²⁵⁵ If a state fails to meet its human rights commitments, the Human Rights Council may issue resolutions denouncing the human rights violations, but generally, the UPR process is best thought of as an advocacy tool.

Despite the uncertainty surrounding the enforcement mechanisms of the ICCPR, and, in particular, whether Uganda would obey international norms if pressed, there is reason for optimism. States have generally found it politically difficult to ignore decisions of the Human Rights Committee.²⁵⁶ As Louis Henkin famously noted, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”²⁵⁷ In addition, because the Supreme Court of Uganda relies on international law when interpreting rights provided under the Constitution, it is very possible that, if the social media tax is

252. *Id.*

253. *Database of Recommendations*, UPR-INFO, <https://www.upr-info.org/database/> [<https://perma.cc/XGT6-AWY3>] (follow hyperlink; then search “Human Rights Committee” under keywords).

254. *Id.* (follow hyperlink; then search “ICCPR” under keyword).

255. *Id.* (follow hyperlink; then click “Uganda” under the category of “State under Review” and “Freedom of opinion and expression” under the category of “Issue”).

256. NOWAK, *supra* note 103, at 895.

257. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

considered to be contrary to international law, the Ugandan government would take notice, and potentially amend or repeal the law.

C. Broader Impact of a Determination that the Tax Violates International Law

The Ugandan tax appears to be the start of a region-wide trend. Tanzania has imposed its own financial burden on social media, and several other countries in East Africa are poised to follow suit.²⁵⁸ Therefore, it is of fundamental importance to determine the effect a determination that the social media tax violated international law would have outside of Uganda.

Although the judgments of the Human Rights Committee are not binding upon the states that are party to the dispute, “the Committee’s views in Optional Protocol cases are treated as authoritative interpretation of the Covenant under international law.”²⁵⁹ Further, other international bodies, such as the U.N. General Assembly and the U.N. Economic and Social Council, have relied on the Committee’s decisions when creating resolutions or implementing different measures.²⁶⁰

The interpretation of human rights treaties differs from how other types of treaties are interpreted. For most treaties, States Parties themselves interpret the provisions of the treaty “in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”²⁶¹ However, because state interests could undermine the entire human rights system, human rights treaty bodies, like the Human Rights Committee, are the main source for interpretation of

258. See *supra* Introduction.

259. Martin Sheinin, *The Work of the Human Rights Committee Under the International Covenant on Civil and Political Rights and Its Optional Protocol*, in LEADING CASES OF THE HUMAN RIGHTS COMMITTEE 22 (Hanski & Sheinin eds., 2003); see also U.N. Human Rights Committee, General Comment 33, U.N. Doc. CCPR/C/GC/33, ¶ 13 (Nov. 5, 2008) (“The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument.”).

260. NOWAK, *supra* note 103, at 894–95.

261. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

human rights instruments.²⁶² According to Henry Steiner, professor emeritus at Harvard Law School, decisions reached through the individual complaint mechanism can have two major effects beyond the immediate parties: first, judgments can be used to protect rights through deterrence of other parties, and second, judgments can help “expound, elucidate, interpret, or explain the . . . treaty.”²⁶³ Thus, a decision by the Human Rights Committee with regards to the Ugandan social media tax could reverberate throughout East Africa.

A Committee judgment on the Ugandan tax could elucidate certain aspects of the ICCPR that are currently unclear. First, the Committee could clarify to what extent a financial burden that suppresses speech is a restriction on expression under international law.²⁶⁴ Second, the Committee could determine which, if any, government interests justify a tax of this nature. This analysis could help determine the legality of the laws passed in neighboring states. Tanzania, for example, justified its Electronic and Postal Communications (Online Content) Regulations as an effort to curb hate speech and fake news.²⁶⁵ A decision on the permissibility of Uganda’s social media tax could help determine whether Tanzania’s interests are substantial enough or fit closely enough with the asserted purposes to justify the licensing fees.

Despite the Human Rights Committee’s role as interpreter of the ICCPR, it is not clear to what extent states that are party to the ICCPR, but have not ratified the Optional Protocol, would respect interpretations of the ICCPR made by the Human Rights Committee in a judgment regarding Uganda’s tax. Every state that is currently proposing financial burdens on social media use has ratified the ICCPR.²⁶⁶ However, of those states, only Uganda, the Democratic Republic of the Congo, and Zambia have ratified the First Optional

262. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT’L L. 905, 919–20 (2009).

263. Henry Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 31 (Alston & Crawford eds., 2000).

264. See *supra* Part II.B.

265. Shayera Dark, *Strict New Internet Laws in Tanzania Are Driving Bloggers and Content Creators Offline*, VERGE (July 6, 2018), <https://www.theverge.com/2018/7/6/17536686/tanzania-internet-laws-censorship-uganda-social-media-tax> [https://perma.cc/29UZ-B9CG].

266. *Status of Ratification Interactive Map: International Covenant on Civil and Political Rights*, U.N. OFFICE OF THE HIGH COMMISSIONER OF HUM. RTS., <http://indicators.ohchr.org/> [https://perma.cc/8DQ2-WVBZ].

Protocol to the Convention.²⁶⁷ Thus, many of the East African states are not required to participate in Human Rights Committee procedures. Nonetheless, even though several of these states have not ratified the Optional Protocol, each of these states has an obligation to act in good faith in guaranteeing the rights provided by the ICCPR.²⁶⁸ As such, they may still be obligated to follow the Committee's interpretations of the Covenant because of the Committee's authoritative role in elucidating the meaning of the ICCPR. The moral authority of decisions by the Committee,²⁶⁹ as well as the fact that the judgment would concern a similar tax in a neighboring country, would likely carry substantial weight even in those states that have not ratified the Optional Protocol.

A decision by the Committee may also be relied upon by the judiciaries of states that have imposed, or plan to impose, financial burdens on expression. Like the Supreme Court of Uganda, the high courts of several other East African states rely on international human rights law to help interpret their constitutions. In Tanzania, for example, the Constitution directly mentions that the state is obligated to act in the spirit of the Universal Declaration of Human Rights.²⁷⁰ In addition, the High Court of Tanzania has looked to international human rights treaties, including the ICCPR, when interpreting the rights protected under the Tanzanian Constitution.²⁷¹ Similarly, the High Court of Kenya has also relied on international human rights norms when reversing a decision that would give the Communications Authority of Kenya access to mobile phone subscriber information.²⁷² Because the high courts of both of

267. *Id.*

268. Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

269. NOWAK, *supra* note 103, at 894–95.

270. CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, art. 9(f) (amended 1985).

271. Palamagamba John Kabudi, *The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms*, 24 L. & POL. AFR., ASIA, & LATIN AMERICA 271, 277–78 (1991) (analyzing the decision of the Court in *Director of Public Prosecutions v. Ally Haji Ahmed & 10 Others*, Criminal Appeal Case Nos. 44 and 45 (1985) (Tanz.)).

272. *Kenya Human Rights Commission v. Communications Authority of Kenya* (2018), Case No. 86 of 2017, 19 (C.C.K.) (Kenya), <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2018/05/Judgment-86-of-2017.pdf> [<https://perma.cc/W8E7-QRFA>] (citing to the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, and decisions by the European Court of Human Rights).

these states use international human rights law to determine the constitutionality of domestic laws, a decision by the Human Rights Committee that financial burdens on speech violate international law would likely strengthen domestic challenges to the financial burdens that are in place, or are proposed, in those states.

A determination by the Human Rights Committee that the social media tax is a violation of rights guaranteed by the ICCPR would not have binding authority in Uganda, let alone in any other state. Nevertheless, due to the moral authority of the Committee, the role of the Committee as the interpreter of the ICCPR, and the weight that international human rights norms receive in domestic courts, a determination by the Committee regarding the Ugandan tax could help curb the imposition of financial burdens to suppress speech in states other than Uganda. Further, any analysis of the tax by the Human Rights Committee would be one of the first analyses of a tax on expression under international law and one of the first analyses of the importance of social media. Thus, that analysis would help pave the way for decisions regarding restrictions on the use of social media for years to come.

CONCLUSION

Uganda's tax on social media raises a series of questions regarding the permissibility of financial burdens on speech. First, it is necessary to determine to what extent a tax that touches on speech, incidentally or not, is considered a restriction. Second, it is necessary to discern what government interests could justify this restriction, and whether impermissible ulterior motives should be taken into account in a determination of the legality of the restriction. Financial burdens placed on speech have already been imposed in Uganda and Tanzania, and, considering the proposed legislation across East Africa, it is likely that this mode of suppression will repeat in other countries. Therefore, the legal community must identify the legal constraints that exist under international law and determine how legal mechanisms can be used to curb this trend. This Note represents an early attempt to address these issues.