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REFORMING TELECOMMUNICATIONS IN BURMA

Human Rights and Responsible Investment in Mobile and the Internet



Reforming Telecommunications in Burma

Human Rights and Responsible Investment in Mobile and the Internet

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Summary

In January 2013, the Burmese government announced plans to liberalize the country's telecommunications sector and invited bids for two nationwide telecommunications licenses.¹ Successful bidders will be allowed to provide a range of services, including mobile and Internet services.² The Burmese government has promised to significantly reduce the cost of mobile phones and has set an ambitious goal of 50 percent mobile penetration by 2016, a remarkable increase from current penetration estimated at 5-10 percent.³

Human Rights Watch has long believed that Internet and mobile technologies have an enormous potential to advance human rights. Developing Burma's information and communications technology (ICT) and telecommunications sectors could enhance economic growth and civic participation in a country that has been closed for decades. Email, social media, and cell phones have become essential tools for journalists, human rights defenders, and civil society groups worldwide because these technologies support instant communication, access to information, and effective organization on the ground. However, these benefits may be jeopardized unless governments and corporations safeguard the ability of people to use new technologies freely and without fear of reprisal. Improved telecommunications networks can become powerful tools for censorship and illegal surveillance, absent protections for human rights and other critical measures.

Yet Burma's democratic reforms remain incomplete and the government and its security forces continue to commit serious human rights violations.⁴ Companies entering Burma

¹ See Telecommunication Operator Tender Evaluation and Selection Committee, Republic of the Union of Myanmar, "Invitation to Submit an Expression of Interest (EOI) for Two Telecommunications Service Licences in the Republic of the Union of Myanmar," undated, http://www.mcit.gov.mm/sites/default/files/Expression_of_Interest.pdf (accessed April 8, 2013).

² Telecommunication Operator Tender Evaluation and Selection Committee, Republic of the Union of Myanmar, "Pre-qualification Questions and Answers," March 21, 2013, www.mcit.gov.mm/sites/default/files/pre-qualification_qa_2new.pdf (accessed April 11, 2013), pp. 10, 46, 65.

³ The government initially set a goal of 80 percent penetration rate by 2016, but adjusted this goal to 50 percent in a May press conference. See Jeremy Wagstaff, "Mobile revolution in Myanmar is on the cards, but too slow for many," Reuters, January 20, 2013, http://articles.chicagotribune.com/2013-01-20/news/sns-rt-us-myanmar-telecomsbregoko1y-20130120_1_mobile-penetration-mobile-telephony-mobile-revolution (accessed April 8, 2013); Justin Heifetz, "'Beauty contest' for Myanmar's telecoms bid," *Mizzima*, May 14, 2013, <http://www.mizzima.com/business/investment/9392-beauty-contest-for-myanmars-telecoms-bid.html> (accessed May 14, 2013).

⁴ See "Burma: Rights Abuses Endanger Reform," Human Rights Watch news release, February 1, 2013, <http://www.hrw.org/news/2013/02/01/burma-rights-abuses-endanger-reform>.

face a significant risk of contributing to abuses, particularly in sectors, such as telecommunications and the Internet, that have been linked with past abuses and where rights-based reforms to date have been inadequate. Opening up these sectors to international investment raises the risk that the government may seek to involve technology companies in illegal surveillance, censorship, and other abuses.

In this report, Human Rights Watch has outlined several steps necessary to promote adequate human rights protections for Internet and mobile phone users in Burma, and the actions needed to foster responsible investment in Burma's telecommunications and Internet sectors. Telecommunications and ICT companies should not move forward in Burma until such measures are in place, in view of the human rights risks. The analysis and recommendations contained in this report are based on research conducted from February to April 2013. The report's analysis focuses on laws most relevant to Burma's telecommunications and ICT sectors, and does not provide a comprehensive treatment of Burma's laws, legal system or constitution.

Telecommunications and Internet liberalization could create an opportunity for the government and companies to adopt appropriate standards to safeguard human rights. The Burmese government should expeditiously repeal draconian laws enacted by the former military government that have been used to restrict access to ICTs and mobile phones and prosecute journalists and activists for their peaceful online activity. The government should also enact new legal protections for the rights to freedom of expression, access to information, and privacy, including in a new telecommunications law currently being considered by the Ministry of Communications and Information Technology and the parliament.

Consistent with the internationally recognized responsibility of all business enterprises to respect human rights, as reflected in the United Nations Guiding Principles on Business and Human Rights, companies should act to avoid complicity in human rights violations.⁵

⁵ See UN Human Rights Council, Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc. A/HRC/8/5, April 7 2008, <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed April 10, 2013); UN OHCHR, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Doc. HR/PUB/11/04, 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed April 10, 2013).

To respect the rights of the people of Burma, international telecommunications and ICT companies should take meaningful steps at the outset to assess the human rights impact and address any harm that may result from their operations. They should conduct what is often referred to as “human rights due diligence” and adopt robust safeguards to prevent and address abuses, including with respect to the rights to freedom of expression, access to information, and privacy.⁶

⁶ Ibid.

Recommendations

To Burma's Ministry of Communications and Information Technology and Parliament

- Review all laws in the area of ICT and telecommunications to ensure their compliance with international human rights standards and publicly set a timeline for revision or repeal of each law. In particular, those laws and regulations that have limited individuals' access to technology or have been used in the past to prosecute persons in violation of their fundamental rights should be urgently repealed.
- Repeal the Electronic Transactions Law (2004) and the Computer Science Development Law (1996).
- Ensure the new Telecommunications Law conforms to international human rights law and promotes access to ICTs. In particular:
 - Exclude online service providers and online content providers from telecommunications licensing requirements.
 - Remove cybercrime and content regulation from the Telecommunications Law. To the extent such regulation is required, the government should address these issues in separate legislation.
 - Enact protections for the right to privacy to prevent abuse and arbitrary use of surveillance, national security, and law enforcement powers. Require authorities to obtain a warrant from a court (or other independent authority) to access subscriber information or intercept communications.
 - Provide protections for the rights to freedom of expression and privacy to prevent abuse of emergency powers to shut down networks or intercept communications. Such protections should be implemented in the new Telecommunications Law and in existing Burmese law.
 - Hold public, inclusive, and broad-based consultations on all new legislation, including the Telecommunications Law, to solicit input and expertise before legislation is finalized.

To ICT and Telecommunications Companies Considering Investment in Burma

- Assess human rights risks raised by potential business activity, including risk posed to the rights of freedom of expression, access to information, and privacy.
- Develop strategies to mitigate the risk of abuses linked to business operations, including by incorporating human rights safeguards into operating licenses or other agreements.
- Adopt human rights policies outlining how the company will resist government requests for censorship, illegal surveillance, or network shutdowns, including procedures for how to narrow requests that may be disproportionate or challenge requests not supported by law.
- Ensure transparency by publishing terms of operating agreements and information on consortiums formed to operate in Burma, and by reporting on the number of government requests received for censorship and surveillance and how the company responded.
- Vet potential business partners to ensure they are not implicated in human rights abuses or corruption, and secure a commitment to human rights policies from partners.
- Conduct due diligence to address human rights concerns that may arise from land acquisitions and security arrangements, and disclose plans for consultation for impacted residents, resettlement, and compensation.
- Commit to independent and transparent third-party monitoring to ensure compliance with human rights standards, including by joining a multi-stakeholder initiative like the Global Network Initiative.

To the Governments of the United Kingdom, Norway, Sweden, South Africa, and Other Home Governments of International Telecommunications Firms Bidding for a License in Burma

- Regulate the human rights conduct of companies subject to national jurisdiction operating abroad in Burma, such as requiring companies to respect human rights and undertake human rights due diligence activity to prevent rights abuses and remedy them if they arise.

- Mandate public reporting requirements for companies subject to national jurisdiction permitted to do business in Burma, including the publication of social and environmental impact assessments, full contract transparency, and the timely and detailed disclosure of all payments made to the government of Burma. The United States has drafted a set of public reporting requirements to help the government identify and address human rights issues raised by the operation of US companies in Burma. Other home governments should introduce mandatory disclosure requirements and incorporate elements of the US government's Reporting Requirements on Responsible Investment in Burma at a minimum.
- Prohibit any business engaging directly or indirectly with individuals or entities linked to serious human rights abuses, including the Burmese military and militias, as well as the military's private-sector allies.
- Introduce or implement legal frameworks, such as an independent ombudsperson, that allow government institutions to monitor the human rights performance of companies subject to national jurisdiction when they operate abroad in areas that carry serious human rights risks. Frameworks should include an effective complaints mechanism accessible to individuals and communities in Burma, and those representing them, who allege harmful conduct or impact by companies subject to national jurisdiction doing business in Burma, with findings and decisions binding on companies.
- Communicate an expectation to the government of Burma that companies investing in Burma's telecommunications sector should be able to implement the recommendations to firms outlined above.

Background

The former military government in Burma imposed a range of draconian measures to silence dissent and control the flow of information, including limits on access to technology, harsh penalties for online expression, and a nationwide Internet shutdown during the 2007 popular protests.⁷ During the 2007 shutdown, the government also cut mobile and wired phone service for journalists, politicians, and students.⁸ Fear of surveillance, online and offline, has historically been pervasive in Burmese society, particularly among those who may hold critical political views or engage in activities seen as threatening to military interests. Activists and others who criticized the government were routinely arrested and incarcerated in Burma's prisons for years.⁹

Since the formal end of military rule in 2011, the quasi-civilian government of President Thein Sein has largely stopped online censorship and has taken steps to lower the cost of mobile phones.¹⁰ Mobile phones are likely to become a critical means for individuals in Burma to access the Internet. These actions take place amid a broader set of planned media reforms. While there have been some positive changes, such changes have been incomplete and insufficient. For example, in August 2012, the government abolished pre-publication print media censorship that had been in place nearly 50 years, but still retained 16 guidelines restricting publication of articles critical of the government or related to corruption, illicit drugs, forced labor, and child soldiers.¹¹

In his inaugural speech to parliament on March 30, 2011, President Thein Sein, a former general who previously served as prime minister under the military junta, promised to

⁷ See OpenNet Initiative, "Burma (Myanmar)," August 6, 2012, <https://opennet.net/research/profiles/burma> (accessed April 8, 2013).

⁸ See "Phones Cut at Myanmar Opposition HQ," AP, September 13, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/13/AR2007091301012.html> (accessed April 8, 2013).

⁹ See Human Rights Watch, *Burma's Forgotten Prisoners* (New York: Human Rights Watch, 2009), <http://www.hrw.org/reports/2009/08/08/burma-s-forgotten-prisoners>.

¹⁰ For results of recent testing on Internet filtering conducted by the OpenNet Initiative, see Irene Poetranto, "Update on information controls in Burma," on "OpenNet Initiative Blog" (blog), October 23, 2012, <https://opennet.net/blog/2012/10/update-information-controls-burma> (accessed April 10, 2014).

¹¹ Editors continue to self-censor out of concern for arrest and hesitate to publish stories regarding government abuses. See Human Rights Watch, *World Report 2013* (New York: Human Rights Watch, 2013), Burma chapter, <http://www.hrw.org/world-report/2013/country-chapters/burma>.

“amend and revoke [] existing laws and adopt new laws as necessary to implement [] provisions on fundamental rights of citizens or human rights.”¹² The Office of the President has initiated a number of reforms, but the military still retains ultimate power and control, both in practice and as provided for in the 2008 Constitution.¹³

Harsh ICT laws and regulations enacted by the former military government remain in place, although enforcement of these laws has significantly diminished since the end of direct military rule. For example, it remains a violation of the law to own an unregistered fax machine or modem, to operate an unregistered computer network, and to post anything on the Internet that the government might deem detrimental to the security of the country. Under section 5 of the Emergency Provisions Act, contributing to the diminishment of respect for the military and “spread[ing] false news” is illegal and punishable with up to seven years’ imprisonment.¹⁴

Recent media reports of suspected state-sponsored cyber-attacks on independent media websites and journalists’ email accounts lend further credence to fears about surveillance.¹⁵ In many respects, the framework for repression remains in place, in law and in practice, and human rights violations continue in many areas. Positive changes to date, such as a reduction in censorship, may be reversible since many of these changes

¹² Euro Burma Office, “President Thein Sein’s Inaugural Speech,” EBO Analysis Paper No. 2, 2011, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/601_ebopaper2_/601_ebopaper2_en.pdf (accessed April 18, 2013).

¹³ Under the 2008 Constitution, Burma’s government nominally includes three branches of government, including the executive, a bicameral national parliament, and a fairly weak judiciary. However, the Constitution grants the military exceptionally broad powers. For example, the Constitution reserves a quarter of the seats in both parliamentary chambers for the military. Former generals hold most senior ministerial portfolios and serving generals are constitutionally guaranteed the posts of ministers of defense, home affairs, and border affairs security. Constitution of the Republic of the Union of Myanmar, 2008, http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf (accessed April 5, 2013). For a more detailed discussion of Burma’s current structure of government, see International Bar Association’s Human Rights Institute, “The Rule of Law in Myanmar: Challenges and Prospects,” December 2012, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=65664916-85C3-4B91-9FB1-FF4485EB4F40> (accessed April 1, 2013).

¹⁴ Emergency Provisions Act, No. 17 of 1950, sec. 5, http://www.burmalibrary.org/docs6/Section_5_of_the_Emergency_Provisions_Act-en.pdf (accessed April 5, 2013).

¹⁵ See Thomas Fuller, “E-Mails of Reporters in Myanmar Are Hacked,” *New York Times*, February 10, 2013, <http://www.nytimes.com/2013/02/11/world/asia/journalists-e-mail-accounts-targeted-in-myanmar.html> (accessed April 10, 2013); Shawn Crispin, “Increasing Cyberattacks Threaten Free Press in Burma,” *Public Broadcasting Service, MediaShift*, February 25, 2013, <http://www.pbs.org/mediashift/2013/02/increasing-cyberattacks-threaten-free-press-in-burma056.html> (accessed April 8, 2013).

have not been codified into law. As a result, there is an ongoing risk that the government's commitment to reform may stumble, along with protections for human rights.

For this reason, the government should break from the practices of the previous military government and enact legal protections for the rights to freedom of expression, information, and privacy, including in Internet and telecommunications regulation.

Critical Legal Reforms

The Burmese government has made development of the ICT and telecommunications sectors a priority because it believes it will support economic growth.¹⁶ This represents a rare opportunity to eliminate draconian provisions in some existing Burmese laws while also incorporating an approach to telecommunications regulation that protects human rights. The Burmese government and ICT companies both have a role to play to ensure that the spread of communications technologies improves the ability of Burma's people to enjoy their human rights, rather than reinforcing the tools of repression.

The Burmese government should implement needed reforms expeditiously, including through amendments to the constitution; revisions to relevant telecommunications, national security, and emergency laws; and the enactment of new safeguards for privacy and freedom of expression. While the government has stated it will review all existing laws for the telecommunications and ICT sectors, it has not publicly set a timeline for such evaluation. Before entering the market, companies should press for essential reforms to bring Burma's legal framework up to international human rights standards as reflected in the Universal Declaration of Human Rights and international human rights treaties, particularly as they pertain to the rights to privacy and freedom of expression.¹⁷

Existing ICT Laws

The government should repeal the Electronic Transactions Law (2004)¹⁸ and the Computer Science Development Law (1996).¹⁹ The Electronic Transactions Law has been used in the past to target and punish activists and journalists for their online activities.²⁰

¹⁶ See Martin Petty, "Disconnected for decades, Burma poised for telecoms boom," *Sydney Morning Herald*, September 14, 2012, <http://www.smh.com.au/technology/technology-news/disconnected-for-decades-burma-poised-for-telecoms-boom-20120914-25w00.html> (accessed April 8, 2013).

¹⁷ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), arts. 12 & 19. Although Burma is not a party to relevant international treaties, such as the International Covenant on Civil and Political Rights, Burma can still act to ensure that its laws are consistent with such treaties.

¹⁸ Electronic Transactions Law, No. 5/2004, <http://www.wipo.int/wipolex/en/details.jsp?id=11042> (accessed April 10, 2013).

¹⁹ Computer Science Development Law, No. 10/1996, <http://www.wipo.int/wipolex/en/details.jsp?id=6434> (accessed April 8, 2013).

²⁰ See "Burma: Free Political Prisoners to Show Commitment to Reform," Human Rights Watch news release, September 13, 2011, <http://www.hrw.org/news/2011/09/13/burma-free-political-prisoners-show-commitment-reform>.

Under section 33 of the Electronic Transactions Law, Internet users face prison terms of seven to fifteen years for any act “detrimental to security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture,” or receiving or sending state secrets.

This provision was used to prosecute prominent bloggers Nay Phone Latt and Thin July Kyaw for their work in getting information to the outside world during the 2007 crackdown, and to arrest and convict social satirist and activist Zargana for his criticism of the government’s response to Cyclone Nargis in 2008.²¹ In March 2011, Nay Myo Zin, former army captain and founder of Myanmar Social Development Network, became the first political prisoner to be detained under President Thein Sein.²² Nay Myo Zin was sentenced in August 2011 under the Electronic Transactions Law for an email criticizing the government’s national reconciliation efforts.²³ While authorities conditionally released Nay Myo Zin in January 2012 under a presidential amnesty, officials have since ordered him to serve six years of his original ten-year sentence under the Electronic Transactions Law on May 7, 2013.²⁴ Since November 21, 2012, authorities have charged three journalists under the Electronic Transactions Law.²⁵

In addition, provisions in the Computer Science Development Law require prior permission from the Ministry of Communications, Posts and Telegraphs for importing, keeping, or using computers and related equipment, and for setting up computer networks.²⁶ While actual enforcement may vary, these provisions on their face severely restrict access to basic consumer electronics like personal computers and data-enabled phones necessary for individuals to communicate or access information on the Internet, and impose disproportionately harsh penalties. Such a prior licensing requirement could discourage

²¹ See Human Rights Watch, *Burma’s Forgotten Prisoners*, pp. 9-10, 29. After Cyclone Nargis struck Burma in May 2008, the Burmese government obstructed initial efforts by humanitarian agencies to send in relief and gain access to affected communities.

²² “AAPP-B Condemns the Sentencing of Former Political Prisoner Under Article 401(1),” Assistance Association for Political Prisoners (Burma) press release, May 8, 2013, <http://www.burmapartnership.org/2013/05/aappb-condemns-the-sentencing-of-former-political-prisoner-under-article-401-1/> (accessed May 9, 2013).

²³ See “Burma: Free Political Prisoners to Show Commitment to Reform,” Human Rights Watch news release.

²⁴ Nay Myo Zin was arrested again in January 2013, but was set to be released on May 7, 2013. “AAPP-B Condemns the Sentencing of Former Political Prisoner Under Article 401(1),” Assistance Association for Political Prisoners (Burma) press release, May 8, 2013, <http://www.burmapartnership.org/2013/05/aappb-condemns-the-sentencing-of-former-political-prisoner-under-article-401-1/> (accessed May 9, 2013).

²⁵ Unpublished information received by Human Rights Watch from Assistance Association for Political Prisoners (Burma).

²⁶ Computer Science Development Law, chapter IX. Burma’s Parliament changed the name of the Ministry of Communications, Posts and Telegraphs to the Ministry of Communications and Information Technology in November 2012.

use of these technologies and make individuals who use such technologies to criticize the government highly vulnerable to reprisals through selective enforcement of the law. Finally, section 25 of the Computer Science Development Law replicates section 33 of the Electronic Transactions Law.

Proposed Telecommunications Law

The Ministry of Communications and Information Technology has produced a draft Telecommunications Law, which the government intends to enact by July 2013.²⁷ Based on a draft obtained by Human Rights Watch in March 2013, proposed reforms in the Telecommunications Law could preserve or introduce new mechanisms for surveillance and content restrictions. For example, the draft law could impose licensing requirements for online service providers (for example, webmail, web hosting, or e-commerce service providers) and content providers (for example, blogs, social media services, or news websites). By itself, such a licensing scheme could dramatically reduce the availability of content and online services in Burma, limiting access to information. Without further safeguards, these licensing provisions could also be abused if too much discretion is left to regulators to grant or deny content licenses.²⁸ The government should exclude online service providers and content providers from telecommunications licensing requirements.²⁹

The proposed draft also preserves problematic content restrictions from existing laws that have been used to violate the right to freedom of expression. Section 60 of the draft law simply replicates section 33 of the Electronic Transactions Law. Further, the draft introduces vague new prohibitions on a range of conduct or content sent over a telecommunications network. For example, section 65 penalizes sending or distributing “indecent or undesirable information,” but does not define either term with any precision,

²⁷ Telecommunication Operator Tender Evaluation and Selection Committee, “Pre-qualification Questions and Answers,” pp. 5-7. When enacted, the Telecommunications Law will replace the Myanmar Telegraph Act (1885) and the Wireless Telegraphy Act (1934).

²⁸ The UN Special Rapporteur on freedom of opinion and expression, Frank La Rue has stated that licensing for websites is not justified because the unique technical attributes of the Internet do not make such limitations necessary. UN OHCHR, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, May 16, 2011, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>, para. 27.

²⁹ In the draft law, these entities are referred to as “application services” and “content application services,” respectively.

making it difficult to know what information is prohibited. The government should remove these provisions from the law.³⁰

Finally, the draft law establishes obligations for licensees to cooperate with requests for surveillance in sections 73 and 75 for “security” purposes, and allows authorities to suspend telecommunications services in cases of public emergency in section 74. However, the draft does not provide any protections for privacy or freedom of expression. For example, the draft law fails to require a warrant for interception of communications or any other safeguard that would prevent arbitrary interference with the right to privacy. The draft law also does not give adequate guidance as to what constitutes a legitimate “security” or “public interest” justification that would allow government access to user information. This raises the serious risk that Internet or phone companies could effectively become agents of law enforcement by reporting on user activities or by suspending communications across their networks arbitrarily and without valid justification, in response to or in anticipation of government expectations. The government should enact protections for the rights to freedom of expression and privacy to prevent abuse of surveillance, national security, and emergency powers. It should also ensure a valid and credible means to contest any requests to censor content or monitor individuals who are exercising their rights to free expression and information.

In April 2013, Human Rights Watch directly communicated concerns about the draft law to Burmese officials involved in the telecommunications reform process. Those officials informed Human Rights Watch that a more recent draft of the telecommunications bill addresses many of our concerns and that the law will meet international standards. However, the Burmese government has not released a new draft of the law and Human Rights Watch is unable to confirm stated improvements or other revisions to the draft law. Because the legislative process has not been fully open or transparent, it remains difficult to assess whether the proposed law will adequately protect the rights of Internet and mobile users in Burma.³¹ The Burmese government should hold public, inclusive, and

³⁰ The government should also remove provisions dealing with cybercrime, data protection, and intellectual property (Sections 60, 62, 63, 65, 66, 67, and 68 in Chapter XVIII). If regulation of these matters is required, the Ministry of Communications and Information Technology should instead address such issues through separate legislation instead of the Telecommunications Law.

³¹ An early draft of the bill was made public in November 2012. See “Myanmar Bans Social Media Use Under Telecoms Bill,” *Eleven Myanmar*, November 12, 2012, <http://elevenmyanmar.com/politics/1280-myanmar-bans-social-media-use-under-telecoms-bill>.

broad-based consultations on all new legislation, including the Telecommunications Law, to solicit input and expertise before the legislation is finalized.

A number of critical legal reforms are still necessary to ensure protections for human rights, and also to conform to international best practices regarding human rights and the regulation of the telecommunications and Internet industries. As long as draconian laws passed by the former military government remain in effect, there is risk that the government or military can selectively enforce those laws to silence bloggers and activists, and seek the aid of technology companies to do so.

Responsibilities of Companies Seeking to Enter Burma's Mobile and Internet Sectors

The liberalization of the telecommunications and Internet sectors in Burma means that foreign and Burmese companies will have the principal role of providing telecommunications hardware, software, services, and applications on which individuals will be able to exercise their rights to free expression and information.

Telecommunications operators and online service providers will also collect and store users' personal data, which authorities could then request and obtain. Given the serious human rights risks in Burma, companies should act responsibly to ensure that liberalization of these key sectors does not lead to human rights violations.

Companies have a responsibility to respect human rights. This principle is reflected in the United Nations "Protect, Respect, and Remedy" Framework³² and the UN Guiding Principles on Business and Human Rights,³³ which are widely accepted by companies and governments. This principle is also incorporated into industry-specific human rights initiatives such as the Global Network Initiative, a global multi-stakeholder initiative that aims to ensure technology companies respect the rights to freedom of expression and privacy online.³⁴ The corporate responsibility to respect contemplates that companies should undertake credible human rights due diligence and mitigate human rights risks so that their operations do not facilitate or exacerbate human rights problems.

The US government has issued a set of Reporting Requirements on Responsible Investment in Burma that, once finalized, will oblige US companies who invest more than US\$500,000 in Burma to disclose the following:

³² UN Human Rights Council, Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc. A/HRC/8/5, April 7 2008, <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed April 10, 2013).

³³ UN OHCHR, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Doc. HR/PUB/11/04, 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed April 10, 2013).

³⁴ Global Network Initiative, "Core Commitments," undated, <http://www.globalnetworkinitiative.org/corecommitments/index.php> (accessed April 10, 2013).

- Whether they have undertaken due diligence regarding operational impacts on human rights, worker rights, and the environment in Burma;
- Whether and how they apply due diligence measures to subsidiaries, subcontractors, and other business partners;
- Policies and procedures that address anti-corruption, stakeholder and community engagement, and grievance procedures for employees and affected communities; and
- Information on security arrangements, land acquisitions, payments to government entities, and contacts with Burma’s security forces.³⁵

With some exceptions for particularly sensitive information, disclosures must be made public. While these reporting requirements apply to US companies only, they should be viewed by all companies as defining the basic elements of responsible investment.

Approximately 90 companies submitted formal expressions of interest in Burma’s telecommunications licenses by the February 15, 2013 deadline.³⁶ The government approved 12 applicants on April 11, 2013 to move on to the final stage of the tender process.³⁷ Human Rights Watch has written to the international telecommunications operators listed in the Burmese government’s April 11 announcement and requested that each company publicly report on steps it will take to respect human rights in Burma. These telecommunications firms are based in a range of home countries, including China, France, India, Japan, Malaysia, Norway, Qatar, Singapore, South Africa, the United Kingdom, and Vietnam.

While the tender is aimed at telecommunications operators, development of the sector will also involve a range of network equipment and mobile phone manufacturers. In addition, as more Burmese users begin to access the Internet, a range of Internet companies may offer services and content in local languages tailored for the Burmese market. ICT and

³⁵ See US Department of State, “Reporting Requirements on Responsible Investment in Burma,” February 2, 2013, <http://www.humanrights.gov/2013/02/22/reporting-requirements-on-responsible-investment-in-burma/> (accessed April 8, 2013).

³⁶ See Kyaw Thu and Sharon Chen, “Myanmar Telecom Frontier Draw May Make It Costly: Southeast Asia,” *Bloomberg*, February 17, 2013, <http://www.bloomberg.com/news/2013-02-17/myanmar-telecom-frontier-draw-may-make-it-costly-southeast-asia.htm> (accessed April 8, 2013).

³⁷ Telecommunication Operator Tender Evaluation and Selection Committee, Republic of the Union of Myanmar, “Announcement of Pre-qualification Applicants That May Submit Applications for Two Nationwide Telecommunications Licences in the Republic of the Union of Myanmar,” April 11, 2013, http://www.mcpt.gov.mm/sites/default/files/list_of_pre-qualification_applicants.pdf (accessed April 11, 2013).

telecommunications companies should take the following steps at a minimum to fulfill their human rights responsibilities in Burma.

Due Diligence and Human Rights Risk Assessment

The Burmese government has not yet created a legal framework for the ICT and telecommunications sectors that respects basic human rights. In this context, due diligence is a recognized responsibility for companies and essential so that companies can understand and address any human rights harm that they cause. Telecommunications and ICT companies should conduct human rights impact assessments prior to entering Burma to examine the risk that their prospective activities may contribute to human rights abuses. Assessments should include an analysis of the existing legal framework for telecommunications, including the possibility that the legal framework may not significantly improve to protect human rights. Given Burma's history of selective enforcement of laws to target politically sensitive activity, companies should also examine actual government practices and the availability of remedies through the courts or other mechanisms for harmed individuals. The recommendations in this report also build on principles developed by the Global Network Initiative. The Global Network Initiative has produced specific guidance on impact assessments and due diligence for the ICT and telecommunications sectors, including guidance on how to conduct impact assessments and how to integrate human rights standards into a company's operations.³⁸

These assessments should then inform how companies structure their entry and business partnerships to minimize the risk of contributing to abuses. For example, in negotiating terms of entry (in the form of an operating license or other agreement), companies should incorporate explicit reference to human rights commitments and secure contractual language that sets out safeguards for freedom of expression and privacy. Safeguards could include specifying the procedure that authorities will follow to request access to user data, assistance with real-time surveillance, or limits on information, including a requirement of a written request or court order. Incorporating these safeguards can provide companies a stronger basis for challenging illegal surveillance or improper restrictions on freedom of expression.

³⁸ Global Network Initiative, "Implementation Guidelines," undated, <http://www.globalnetworkinitiative.org/implementationguidelines/index.php> (accessed May 10, 2013).

ICT and telecommunications companies need also to be attuned to changing political, legal or operational circumstances and have mechanisms in place to address new or emerging risks. Assessment and due diligence should continue on an ongoing basis so companies can effectively adjust their policies. For example, when renewing an operating license or business contract, companies should identify provisions that make it more difficult for the company to challenge or narrow government requests for censorship and surveillance, and seek to modify or remove those provisions. Alternatively, companies could establish human rights safeguards through separate agreements with authorities to supplement existing contracts as an interim measure.

Finally, throughout all stages of investment—from conception to implementation—companies should make their home governments aware of issues they confront in Burma and seek a coordinated approach, both within the industry and on the part of their home governments, to press for human rights-compliant practices in the governance of Burma’s ICT and telecommunications sector.

Government Requests for Censorship, Surveillance, and Network Shutdowns

Based on the risks identified in impact assessments, ICT and telecommunications companies should develop internal human rights policies for how the company will respond to government requests to assist with censorship and surveillance. Companies should introduce internal procedures that guide whether and how the company will respond to extralegal or overbroad requests for surveillance or content restrictions, or requests the company suspects may be a prelude to further targeted human rights abuses. “Extralegal” requests include requests that do not follow proper legal channels or go beyond what is allowed in law. In such cases, companies should have policies in place for how they might challenge or resist extralegal requests, including through formal judicial review. In addition, companies should develop policies on how they might narrow overbroad requests for user data, meaning those that seek a disproportionate amount of information. If a company complies with a request, internal human rights policies should require an approach that interprets the request as narrowly as possible, and implements the request in a way that minimizes interference with the rights to freedom of expression and privacy.

Before entering Burma, companies should establish clear procedures for referring government requests that may present risk of human rights harm to appropriately senior levels of management. Companies should also provide training to employees tasked with responding to government requests on relevant policies.

These measures are particularly important during a period when the central government is negotiating ceasefires with over a dozen ethnic armed groups after decades of civil war and there is risk that surveillance powers may be abused to gain advantage.³⁹ Moreover, given the precedent set with the network shutdown in 2007, policies should specifically address how the company will respond to requests to shut down networks during times of unrest. Company policies should take into account current Burmese law, which grants the government broad powers to declare public emergencies, with scant safeguards against misuse of these powers.⁴⁰

Transparency and Monitoring

Telecommunications companies should commit to publishing the terms of any licensing agreement and the payments made to obtain or maintain telecommunication licenses. In addition, companies should publish information on the structure of any joint ventures or investment vehicles formed to operate in Burma.

Disclosure of company actions that directly impact users' rights is also critical. Companies should commit to regular transparency reports on the aggregate number of governmental requests for user data or limitations on expression it receives from the government, and how the company responded.⁴¹

Companies should also commit to notifying affected users in specific cases where they have complied with government requests. For example, if a telecommunications operator

³⁹ See Transnational Institute, *Developing Disparity. Regional Investment in Burma's Borderlands*, Amsterdam, TNI, February 2013.

⁴⁰ State Protection Law, No. 3/1975, http://www.burmalibrary.org/docs6/State_Protection_Law+amendment.pdf (accessed April 8, 2013), chapter II; Constitution of the Republic of the Union of Myanmar, chapter XI.

⁴¹ Several Internet companies report aggregate data on government requests for censorship or surveillance, which may provide useful models for such reporting. See, for example, "Google Transparency Report," Google, accessed April 25, 2013, <http://www.google.com/transparencyreport/>; "Twitter Transparency Report," Twitter, accessed April 25, 2013, <https://transparency.twitter.com/>; "2012 Law Enforcement Requests Report," Microsoft, accessed May 5, 2013, <https://www.microsoft.com/about/corporatecitizenship/en-us/reporting/transparency/>.

is required to limit access to a specific website through blocking or other measures, the company should notify users attempting to access the website that it has been blocked due to a government request. When a company complies with a government request to disclose user data or facilitate interception of communications, the company should commit to notifying affected users to the extent permissible under the law.

Companies should secure the government's agreement to these transparency measures through their operating licenses or other agreements. Such measures will help companies credibly demonstrate their efforts to respect human rights in Burma. They will also discourage extralegal, illegitimate, or overbroad requests from the authorities.

Finally, third-party monitoring of a firm's implementation of human rights standards is crucial to the credibility and effectiveness of those standards and has become an essential part of multi-stakeholder initiatives in several sectors.⁴² Telecommunications and ICT companies operating in Burma should commit to independent, third-party monitoring, ideally as part of their global human rights commitments. The Global Network Initiative provides a mechanism for such monitoring for companies that join the organization.⁴³

Risks of Joint Ventures and Other Business Partnerships

The telecommunications sector often operates through joint ventures or combinations of local and international partners in consortiums. If a company enters Burma with a joint venture partner or business consortium, the company should secure the same commitment to transparency and human rights due diligence from business partners by contractual agreement. Contracts should also include mechanisms for oversight and monitoring of compliance with human rights policies established through such agreements.

In addition, corruption remains a considerable risk, as seen with the former telecommunications minister Thein Tun now the subject of a corruption probe.⁴⁴ Any

⁴² See, for example, Fair Labor Association, "Transparency," undated, <http://www.fairlabor.org/transparency> (accessed May 13, 2013); Extractive Industries Transparency Initiative, "EITI Validation," undated, <http://eiti.org/validation> (accessed May 13, 2013); Global Network Initiative, "Governance, Accountability, and Learning Framework," undated, <http://www.globalnetworkinitiative.org/governanceframework/index.php> (accessed May 10, 2013).

⁴³ Global Network Initiative, "Governance, Accountability, and Learning Framework."

⁴⁴ See Gwen Robinson, "Probe hits opening up of Myanmar telecoms," *Financial Times*, January 28, 2013, www.ft.com/intl/cms/s/o/f80589cc-689b-11e2-9a3f-00144feab49a.html (accessed April 10, 2013).

potential partnerships should be vetted to ensure that the partner is not implicated in human rights abuses or corruption.

Due diligence on local partners is particularly important. In many ways, the people who are best placed to benefit from new foreign investment in Burma are private individuals with close ties to the military. By virtue of these relationships, they have gained access to capital, equipment, government licenses, and experience that, at first glance, may make them appealing business partners. But these individuals and their companies may be associated with alleged corrupt practices, money laundering, and other illicit activities as well as human rights abuses. Foreign business alliances with them would serve to entrench Burma's pro-military business elite rather than help create opportunities for the emergence of new private sector actors that could support broad-based economic development that furthers the economic and social rights of the country's population. Such partnerships could also increase the risk that foreign investors may contribute to human rights abuses.

Land Rights and Security

Development of Burma's telecommunications sector will require investment in physical infrastructure such as cell towers sites and cable, including in rural areas. This raises concerns around land rights and human rights violations related to state security forces that have been enlisted to protect other kinds of infrastructure projects. Illegal land confiscations by the government, the military, and in some cases, private interests are ongoing in Burma, perpetuating patterns of human rights abuses.⁴⁵ Consultation and compensation are frequently absent or inadequate and in many cases the land seizures are arbitrary and not justified by an overriding government interest, nor have they been carried out in accordance with human rights standards. The military also has a track record of engaging in unlawful use of force against local residents, among other serious abuses, in the context of clearing land and providing security for business projects.⁴⁶

⁴⁵ See Htet Naing Zaw and Aye Kyaw Khaing, "Military Involved in Massive Land Grabs: Parliamentary Report," *The Irrawaddy*, March 5, 2013, <http://www.irrawaddy.org/archives/28506> (accessed April 10, 2013); Karen Human Rights Group, "Losing Ground: Land conflicts and collective action in eastern Myanmar," March 5, 2013, <http://www.khrg.org/khrg2013/khrg1301.html> (accessed April 10, 2013).

⁴⁶ See Human Rights Watch, "*Untold Miseries: Wartime Abuses and Forced Displacement in Kachin State*" (New York: Human Rights Watch, 2012), <http://www.hrw.org/reports/2012/03/20/untold-miseries>, pp. 29-33.

Telecommunications companies should conduct due diligence to address these issues, as well as disclose plans for consultation for impacted residents, resettlement, and compensation. Companies should also disclose information on security arrangements, payments to government entities, and contacts with Burma's security forces related to infrastructure development.

Conclusion

The reform of Burma's telecommunications sector offers an important opportunity to eliminate problematic regulations and to incorporate new ones that are more protective of human rights. However, without meaningful legal and policy reforms by the government, coupled with strong adherence to effective human rights policies and procedures by companies seeking to invest in the country, that opportunity could be squandered and telecommunications and ICT companies could be implicated in abuses.

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REFORMING TELECOMMUNICATIONS IN BURMA

Human Rights and Responsible Investment in Mobile and the Internet

In January 2013, the Burmese government opened the country's telecommunications sector to foreign investment, promising to increase the availability of affordable mobile phones in Burma. Yet the government's human rights reforms, including reforms in the internet and telecommunications sectors, so far have been incomplete and inadequate. New digital technologies can become powerful tools for censorship and illegal surveillance, absent protections for rights. In this context, international technology companies risk being linked to abuses if they enter the Burmese market without human rights safeguards and before adequate legal protections are in place.

Reforming Telecommunications in Burma analyzes the current state of legal reform for the Internet and mobile sectors. Harsh laws enacted by the former military government, which were used to limit access to technology and prosecute dissidents for their online activity, remain in place. The use of these laws has significantly diminished since the end of direct military rule. However, as long as they remain in force, there is risk that the government can selectively enforce those laws to silence bloggers and activists, and seek the aid of technology companies to do so.

This report outlines steps necessary to promote adequate protections for Internet and mobile phone users in Burma, and the actions needed to foster responsible investment in Burma's telecommunications and Internet sectors. Human Rights Watch calls on the government to repeal existing draconian laws and enact new legislation for these sectors that protects basic rights. Technology companies entering Burma should adopt human rights safeguards and address harms linked to their operations.



A worker uses a mobile phone in Burma, where the government plans to increase mobile access to 50 percent in three years.

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