

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the « **red button** » **operational protocol for the « Fight Against the Diffusion of Fake News through the Web » (« the Protocol »), announced on 18 January 2018.**

According to the information received:

Following the constitutional referendum campaign in late 2016, Italian political actors and politicians began calling for new regulations to address the proliferation of “fake news” online.

On 15 February 2017, a Member of Parliament introduced a bill proposing fines and criminal penalties for anyone who publishes or spreads “false, exaggerated, or biased” news reports online. The bill did not move forward in Parliament.

On 18 January 2018, the Minister of Interior introduced the “Operating Protocol for the Fight Against the Diffusion of Fake News through the Web on the Occasion of the Election Campaign for the 2018 Political Elections”. General elections were scheduled for 4 March 2018.

The protocol introduced a “red button” reporting service where users “may indicate the existence of a network of content attributable to fake news” (“the portal”). Polizia Postale, a unit of the Italian State Police that investigates cyber-crime, was tasked with reviewing reports and act accordingly.

The Minister of Interior's press release stated that the service intended to “viralize” institutional counter-narratives so citizens can benefit from a more complete description of facts and regain possession of the “freedom of choice that been denied him from tendentiously false or partial information”. The press release also stressed the urgency of these actions due to the upcoming elections.

The press release further stated that the portal would allow users to take advantage of a “simple and immediate web interface, without particular registration procedures to indicate the existence of a network of content attributable to fake news”.

Process for submitting and reviewing complaints concerning “fake news”

The portal will allow users to submit links or web addresses to the content, links to social networks (if they found the content on a social media platform), and further information through a “notes” field. The portal will also require users to provide their e-mail addresses.

The Polizia Postale will then review submissions with the aim of “directing the next activity” for content that is “manifestly unfounded and biased” or “openly defamatory”. They will “carry out in-depth analysis, through the use of specific techniques and software...in order to identify the presence of significant indicators that allow to qualify, with the maximum certainty allowed, the news as fake news (presence of official denials, false content already proven by objective sources; provenance of the alleged fake news from sources not accredited or certified, etc.)”.

The Polizia Postale will also independently collect information “in order to identify early on the network of news markedly characterized by groundlessness and tendency that is openly defamatory.”

After reviewing the information, authorities will pursue legal action if they determine that the content is unlawful. In cases where content is deemed to be false or misleading, but not unlawful, authorities will publish public denials.

Applicable Offences under the Italian Criminal Code

Article 595 of the Italian Criminal Code defines defamation as “injuring the reputation of an absent person via communication with others”, with penalties of up to one year of imprisonment for the general public. “If the act or insult of defamation consists in the allegation of a specific fact, the potential penalty is increased to imprisonment for up to two years or a fine of 2,065 Euros.” If committed by the press, or otherwise publicly, violators face penalties of “at least 516 Euros or imprisonment from six months to three years”. Article 595 also provides for increased penalties for defamation against public officials.

Article 278 of the Code imposes enhanced penalties of one to five years of imprisonment for criminal defamation of the Head of State (or President).

According to an October 2016 report, there are over 5000 criminal libel complaints filed in Italy annually. In 2015, courts convicted 475 journalists on defamation charges, with 320 sentenced to a fine and 155 imprisoned.

Before identifying further concerns raised by the protocol, I would like to note that Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Italy on 15 September 1978, protects everyone’s right to maintain an opinion without interference and to seek, receive and impart information and ideas of all kinds,

regardless of frontiers and through any media. The Human Rights Committee has emphasized that “free communication of information and ideas about public and political issues between 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. Moreover, international human rights law provides States’ responsibility to ensure an environment in which a diverse range of political opinions and ideas can be freely and openly expressed and debated. Freedom of expression also includes sharing one’s beliefs and opinions with others who may have different opinions. In the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, my mandate together with other regional freedom of expression experts stressed that the “human right to impart information and ideas is not limited to “correct” statements, and “protects information and ideas that may shock, offend, and disturb”.

Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be “provided by law”, and necessary for “the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”. Permissible restrictions on the internet are the same as those offline (A/HRC/17/27).

To satisfy the requirements of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Restrictions must additionally be sufficiently clear, accessible and predictable (CCPR/C/GC/34).

The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons”. The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion (A/HRC/29/32). Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result” (CCPR/C/GC/34). The Human Rights Committee has stressed that, in assessing proportionality, the “value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain”.

In light of these standards, the Joint Declaration on Freedom of expression and “Fake News” has concluded that “general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information” are incompatible and should be abolished.

Finally, the Human Rights Committee has urged States parties to “consider the decriminalization of defamation” and stated that, in any case, “the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never and appropriate penalty”. The Committee points out that all defamation laws, “in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of

their nature, subject of verification. In any event, a public interest in the subject matter of the criticism should be recognized as a defence” (CCPR/CGC/34).

I would also like to call your Excellency’s Government’s attention to the concluding observations by the Human Rights Committee regarding Italy, urging your Excellency’s Government to limit sanctions for defamation (under article 595 of the Italian Criminal Code and article 13 of the Press Law) to ensure that they do not exert a chilling effect on freedom of opinion and expression and the right to information (CCPR/C/ITA/CO/6). The Committee further urged your Excellency’s Government to ensure that defamation lawsuits are not used as tools to curtail freedom of expression beyond the narrow restrictions permitted by article 19 of the ICCPR. The aggregate effects of such laws in conjunction with the introduction of the portal could have a particularly strong “chilling effect” on the exercise of the right to freedom of expression as the portal could function as a “pipeline” for criminal prosecutions. Further concern is expressed at the fact that persons found guilty of defamation of Italian public officials, including the Head of State, may face significantly more severe punishments than those who defame any other persons.

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

Based on the above, I am concerned that the Protocol is incompatible with the standards of international human rights law. While I respect your Excellency’s Government’s interest in ensuring the integrity of the country’s electoral processes, I am concerned that the restrictions on “fake news” established by the Protocol are inconsistent with the criteria of legality, necessity and proportionality under article 19(3) of the ICCPR.

The Protocol aims to combat “manifestly unfounded and biased news, or openly defamatory content” – terms that are not defined and therefore raise concerns of vagueness. Although your Excellency’s Government has indicated certain factors it will take into account when reviewing the falsity of content submitted to the portal, these do not address the ambiguity concerning the scope of news content that may be reported and actioned through the Protocol. Furthermore, the Protocol would also tie the review of “fake news” to criminal laws against defamation, which impose significant penalties for “injuring the reputation of an absent person via communication”. I am concerned that this will confer excessively broad discretion on the government to prosecute statements that are critical of public and political figures.

The lack of clarity concerning how the Protocol would operate, coupled with the threat of criminal sanctions, raises the danger that your Excellency’s Government will become arbiters of truth in the public and political domain. Accordingly, I am concerned that the Protocol would disproportionately suppress a wide range of expressive conduct essential to a democratic society, including criticism of the government, news reporting, political campaigning and the expression of unpopular, controversial or minority opinions.

In light of these concerns, I urge your Excellency's Government to consider alternative measures such as the promotion of independent fact-checking mechanisms, State support for independent, diverse and adequate public service media outlets, and public education and media literacy, which have been recognized as less intrusive means to address disinformation and propaganda.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for any additional information and comment you may have on the above.

Finally, we would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>. Your Excellency's Government's response will be made available on the same website page and in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression