



Explanatory Memorandum: Declaration on Media Freedom in the Arab World

On 3 May 2016, the *Declaration on Media Freedom in the Arab World* (Declaration or Arab Declaration) was adopted at a groundbreaking event in Casablanca, Morocco, attended by over 100 delegates representing journalists' unions, human rights campaigners and media groups from across the Arab World. The Declaration is historic for a number of reasons. Firstly, it represents the first comprehensive statement on media freedom rights in the Arab World. Secondly, the values it promotes reflect the highest international standards of media freedom and the protection of journalists' rights. Thirdly and perhaps most importantly, since its adoption, a process has been underway to obtain formal recognition of the Declaration by Arab States, with the result that a growing number of these States are endorsing it.

The Declaration, which includes a Preamble and 16 principles addressing different thematic issues relating to media freedom and the protection of journalists' rights, is clear and self-evident. At the same time, declarations are, by definition, brief, focusing on setting out key principles and standards. This Explanatory Memorandum elaborates on the principles in the Declaration, providing background on the underlying international and regional standards from which they are drawn. As such, it seeks to help interested stakeholders understand and interpret the text of the Declaration, to provide readers with the legal basis for the text, and to avoid any possibility of the Declaration being misunderstood in a way which might undermine or limit media freedom.

History of Developing the Declaration

The Declaration for Media Freedom in the Arab World was first outlined during a consultative meeting held on the margins of the UNESCO's World Press Freedom Day 2014 in Paris, which gathered key representatives of the International Federation of Journalists (IFJ), the Federation of Arab Journalists (FAJ), and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Discussions with key stakeholders in the region were subsequently launched at the IFJ Arab World - Middle East meeting, held in Casablanca from 28-30 October 2014, and titled *Beyond the Arab Spring: New Road Map for Journalists*. Although the Declaration itself had not been drafted at that point, the meeting provided an initial opportunity to discuss the possibility of a regional special mechanism on freedom of the media for the Arab World, and the associated idea of a Declaration on Media Freedom in the Arab World naturally came up.

A first draft of the Declaration was prepared under the auspices of the International Federation of Journalists (IFJ) in July 2015 and was the subject of online consultations with selected experts after that.

A regional Consultative meeting on the mandate of a Special Rapporteur for Media Freedom (SRMF) in the Arab World and a Draft Arab Declaration of Media Freedom Principles (DMFP), held in Amman from 9-10 September 2015, brought together experts from different human rights bodies – including national human rights commissions, the Arab Human Rights Committee, the Arab Network for National Human Rights Institutions and UNESCO – as well as a number of leading experts and journalists from around the region. Following this, a series of national consultations were held in several countries, including Tunisia, Morocco, Palestine and Lebanon.

In February and March 2016, with the support of the EU-funded MedMedia programme, the IFJ launched a Public consultation online, inviting a wide range of institutions, media networks, civil society organisations, and experts to comment on the draft Declaration and Technical proposal for the Special rapporteur for media freedom.

A major regional consultation was held again in Casablanca in May 2016 to obtain final feedback on the draft Declaration. The meeting – the culmination of a 20-month consultative process involving technical experts and media stakeholders, journalists’ unions, press freedom organisations, editors, media, human rights and civil society groups – finalised and endorsed the document. It also called on governments and inter-governmental organisations in the region to sign the Declaration and commit to practical ways of establishing and implementing an independent mechanism to support the media. As of April 2018, the Declaration has been signed by heads of state, key media stakeholders and media communities in six countries across the region: Palestine, Tunisia, Jordan, Sudan, Morocco and Mauritania. Wider support is currently being garnered for the Declaration in other countries of the region.

Understanding the Overall Scheme of the Declaration

The Declaration is organised into a Preamble and three parts, namely: Part I: General Principles; Part II: Restrictions on Content; and Part III: Regulation of the Means of Communication. The purpose of the Preamble is to set the scene for the rest of the Declaration. It focuses on the guarantee of freedom of expression, including media freedom in international and regional instruments, as well as national constitutions, and the importance of respect for this right both for its direct value and as an underpinning of democracy and respect for other rights. It recognises the important roles of both the legacy and new media in giving effect to this right. It also refers to various mechanisms in the Arab World for promoting respect for human rights, and welcomes recent reforms relating to media freedom and independent journalism, while noting that much remains to be done to bring laws and practices in the region into line with international standards.

The first substantive part of the Declaration outlines general standards relating to the right to freedom of expression. This shows both the limited nature of exceptions and the positive obligations on States to create a positive environment for this right, as well as the included right

to information (or to access information held by public authorities). It also focuses on the importance of protection and addressing impunity for those who are attacked for exercising their right to freedom of expression, and the role of different players in this regard.

The second substantive part of the Declaration focuses on the important issue of ensuring that restrictions on the content of what may be disseminated are limited in nature. This, in turn, is broken down into four key areas – namely criminal restrictions, protecting reputations (defamation law), privacy and hate speech – with each one setting out clear standards for limiting the scope of restrictions in the relevant area.

The fourth and last part of the Declaration outlines standards for regulating the means of communication. The first principle here stresses the need for regulatory bodies to be independent of government, as well as the positive obligations of States in this area. The following five principles focus on five different types of communications actors – namely journalists, the public media, the print media, broadcasters and the Internet – outlining tailored regulatory standards for each sector. Finally, Part III addresses the issues of complaints against unprofessionalism in the media and the need for equality – most especially between women and men but also for minorities and marginalised groups – in terms of access to media positions, working conditions and safe working environments.

Commentary on the Preamble and Principles of the Declaration

Preamble

Reaffirming that freedom of expression, which includes media freedom, is a fundamental human right which finds protection in international and regional human rights instruments, including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Arab Charter on Human Rights* and the *Sana'a Declaration on Promoting Independent and Pluralistic Arab Media*, as well as almost every national constitution;

Supporting the aspirations of the people living in the Arab World to the full enjoyment of their democratic and human rights;

Noting that there are various mechanisms in the Arab World which have a mandate to promote respect for human rights, including media freedom, such as the Permanent Arab Commission on Human Rights of the League of Arab States, the Arab Human Rights Committee, created by the *Arab Charter on Human Rights*, the Arab Inter-parliamentary Union and the Arab Network for National Human Rights Institutions;

Mindful of the positive role played by special international mandates on freedom of expression or media freedom that exist at the global level and in several regions of the world, and of the useful role that such a mechanism could play within the Arab World if it was independent and was empowered to undertake similar activities to these other mandates;

Emphasising that media freedom and independent journalism is important in its own right, and also as a core underpinning of democracy and an indispensable means of ensuring respect for other human

rights;

Welcoming the reforms that have been introduced in a number of Arab countries in recent years which enhance respect for media freedom and independent journalism, while also noting that much remains to be done to ensure robust respect for this right in many countries in the Arab World and to align laws and practices in Arab countries with international standards;

Believing that respect for media freedom, independent journalism and the right to information will foster public participation and good governance, as well as sustainable development and economic growth, and noting that the UN Sustainable Development Goals 2030 reflect this by including a target on ensuring public access to information and protecting fundamental freedoms;

Aware of the key role which the print, broadcast and online media can play in giving effect to the wider right to freedom of expression, in ensuring that people have access to both the information they need and opportunities to voice their views and concerns, in exposing corruption and other forms of wrongdoing, in promoting democracy and good governance, and in combating all forms of hatred and discrimination;

Stressing the significant changes to the communications environment brought about by constantly evolving digital information and communication technologies and the potential of these technologies to democratise communications and to prevent the control of information by the powerful;

With the goal of enhancing respect for media freedom and independent journalism in the Arab World;

We, media stakeholders (media, journalists, civil society and human rights organizations, states and intergovernmental organizations), adopt this Declaration on Media Freedom in the Arab World.

Authoritative international statements on freedom of expression and media freedom abound with language about how important these rights are. For example, in 2011, the UN Human Rights Committee, the body of experts that is tasked with overseeing compliance with the *International Covenant on Civil and Political Rights* (ICCPR),¹ adopted General Comment No. 34 on Article 19: Freedoms of opinion and expression.² The second and third paragraphs of this General Comment highlight the overriding importance of freedom of expression:

2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.³

¹ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. As of June 2017, the ICCPR had been ratified by 119 States including 17 from the Arab World, namely Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Palestine, Somalia, Sudan, Syria, Tunisia and Yemen. See: <http://indicators.ohchr.org>.

² General Comment No. 34, 12 September 2011, CCPR/C/GC/34. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

³ In general, internal cites and references have been removed from the quotations in this Explanatory Memorandum.

Another important source of international standards on freedom of expression are the Joint Declarations that have been adopted annually since 1999 by the four (originally three) special international mandates, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.⁴ In their first Joint Declaration the mandates stated:

We recall that freedom of expression is a fundamental international human right and a basic component of a civil society based on democratic principles.⁵

Yet another important source of standards is the declarations, along the lines of the current Arab Declaration, that have been adopted in the African, European and Inter-American systems for the protection of human rights, including the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration),⁶ the *Declaration on the Freedom of Expression and Information* (Council of Europe Declaration),⁷ and the *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration).⁸

These declarations support many of the statements in the Preamble. The preamble of the African Declaration notes, “the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy.” For its part, clause 5 of the Council of Europe Declaration recognises, “that the continued development of information and communication technology should serve to further the right, regardless of frontiers, to express, to seek, to receive and to impart information and ideas, whatever their source”. Finally, the preamble to the Inter-American Declaration stresses that, “the right to freedom of expression is not a concession by the States but a fundamental right”.

Another important source of international human rights standards is the regional courts which are associated with the regional systems noted above, namely the African Court on Human and Peoples' Rights,⁹ the European Court of Human Rights¹⁰ and the Inter-American Court of Human Rights.¹¹ Two very relevant statements from these courts, which are also reflected in the Preamble of the Arab Declaration, are:

⁴ All of the Joint Declarations are available at: <http://www.osce.org/fom/66176>.

⁵ Adopted 26 November 1999.

⁶ Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002. Available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Standards.aspx>.

⁷ Adopted by the Committee of Ministers of the Council of Europe at its 70th Session, on 29 April 1982. Available at: http://www.right2info.org/resources/publications/instruments-and-standards/coe_decl-on-foe-and-foi_1982.

⁸ Adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000. Available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>.

⁹ The decisions of this Court are available at: <http://en.african-court.org/index.php/cases>.

¹⁰ The decisions of this Court are available at: [http://hudoc.echr.coe.int/eng#{"documentcollectionid2":\["CHAMBER"\]}](http://hudoc.echr.coe.int/eng#{).

¹¹ The decisions of this Court are available at: <http://www.corteidh.or.cr/CF/Jurisprudencia2/index.cfm?lang=en>.

It is the mass media that make the exercise of freedom of expression a reality.¹²

[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.¹³

Part I: General Principles

Principle 1: Scope and Nature of the Right to Freedom of Expression

- a. Freedom of expression, including media freedom, is a fundamental human right which includes the right to seek, receive and impart information and ideas of all kinds, through any means of communication, including across frontiers.
- b. Freedom of expression both limits the power of States to restrict media freedom and places a positive obligation on States to create an environment in which the free flow of information and ideas can flourish (including media diversity).
- c. Freedom of expression is not an absolute right, but any restriction on this right shall conform to the following three-part test:
 - i. provided for by a clear, precise and accessible law;
 - ii. serve to protect one of the following interests: the rights or reputations of others, national security, public order (*ordre public*), public health or public morals; and
 - iii. be necessary in the sense that it serves a pressing social need, it is the least intrusive measure which will be effective in protecting that interest, it is not overbroad and it is proportionate.

Principle 1 of the Declaration is essentially a restatement of the basic guarantee of freedom of expression as found in international law. It follows closely Articles 19(2) and (3) of the ICCPR, which state:

- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights and reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

We thus see Principle 1(a) closely reflecting Article 19(2), while the three-part test for restrictions, set out in Principle 1(c), closely parallels Article 19(3), including the ideas that restrictions must be provided for by law, and be necessary to protect one of the interests listed (which are the same in both provisions).

While freedom of expression means that States should not interfere with freedom of expression, true realisation of this right also requires States to take positive steps to promote media diversity

¹² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Advisory Opinion OC-5/85, Series A, No. 5, para. 34 (Inter-American Court of Human Rights).

¹³ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17202/90, para. 38 (European Court of Human Rights).

and otherwise create a positive environment for freedom of expression (for example by protecting those exercising this right against retaliation). This is reflected in Principle III of the African Declaration, which states, in part:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity...¹⁴

The need for diversity to be promoted was also highlighted by the UN Human Rights Committee in General Comment No. 34:

As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.¹⁵

The title of the 2007 Joint Declaration of the special mandates is Joint Declaration on Diversity in Broadcasting, and the text of the Declaration outlines a number of positive steps that States should take, via independent regulators, to promote diversity.¹⁶

In terms of the first part of the test for restrictions on freedom of expression, it is not enough for States to pass a law containing the restriction. The law must meet certain minimum standards. These were outlined clearly in paragraph 25 of General Comment No. 34, as follows:

For the purposes of paragraph 3 [of Article 19 of the ICCPR], a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. ... Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.¹⁷

The second part of the test contains a list of those interests which are deemed sufficiently important to potentially justify a restriction on freedom of expression. The list in Principle 1(c)(2) of the Declaration is identical to the list in Article 19(3) of the ICCPR.

Principle 1(c)(iii) of the Declaration seeks to elaborate on the meaning of the term “necessity” in Article 19(3) of the ICCPR. Once again, this finds strong support in international standards. The best sources for elaboration of the meaning of ‘necessity’ is in the decisions of international courts. The European Court of Human Rights, for example, often repeats the following statement in its cases:

The test of “necessity in a democratic society” requires the Court to determine whether the interference corresponded to a pressing social need ... the Court must determine whether the reasons adduced by the national authorities to justify the interference were relevant and sufficient and whether the measure taken was proportionate.¹⁸

¹⁴ Note 6.

¹⁵ Note 2, para. 14.

¹⁶ Adopted 12 December 2007. Available at: <http://www.osce.org/fom/66176>.

¹⁷ Note 2.

¹⁸ *Kasabova v. Bulgaria*, 19 April 2011, Application No. 22385/03, para. 54.

Using slightly different language, the Inter-American Court of Human Rights has imposed a similar test:

[T]he “necessity” ... of restrictions ... on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. ... Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.¹⁹

Principle 2: The Right to Information

- a. The right to information – the right to access information held by public authorities – is an integral part of the right to freedom of expression and an important complement to media freedom.
- b. This right should be guaranteed as a constitutional right and given effect through legislation which is in line with the following principles:
 - i. Everyone has a right to access information held by all public authorities, broadly defined to include all three branches of government, statutory bodies, bodies which are owned, controlled or substantially financed by public bodies, and bodies which undertake public functions.
 - ii. Clear procedures should be put in place for the making and processing of requests for information which do not create undue barriers to requests, and which require the timely provision of information and do not impose unreasonable charges for providing information.
 - iii. Public authorities should be required to publish a wide range of information of public interest on a proactive basis.
 - iv. Exceptions should be clearly and narrowly defined, and apply only where release of the information would pose a definite risk of harm which outweighs the overall public interest in accessing the information. Where there is a conflict between the right to information law and a secrecy law, the former should prevail.
 - v. Any refusal to disclose information should be subject to appeal before an independent administrative body and then before the courts.
 - vi. There should be sanctions for officials who wilfully obstruct access to information.
- c. Individuals who expose wrongdoing, serious maladministration or other threats to public interests should be protected against sanction as long as they reasonably believed that the information was true and exposed wrongdoing.
- d. Secrecy laws should be amended as needed to bring them into line with the standards on exceptions set out in Principle 2(b)(iv).

It is well established that the right to information is protected as part of the wider right to freedom of expression, most importantly as part of the right to “seek” and “receive” information and ideas which are included in this right. This idea has been upheld by various international courts and in numerous authoritative statements. For example, General Comment No. 34 states:

¹⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 46.

Article 19, paragraph 2 embraces a right of access to information held by public bodies.²⁰

Perhaps the most compendious wider statement of the content of this right can be found in the 2004 Joint Declaration of the special mandates, which highlights nine key attributes of this right, including most of those highlighted in Principle 2, including the need for proactive disclosure of information, for a limited regime of exceptions, for the right to information law to prevail over inconsistent secrecy laws, for sanctions for those who obstruct access, for an independent system of appeals and for secrecy laws to be reviewed and amended, as necessary. On Exceptions, the Joint Declaration states, in part:

Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.²¹

Another important statement about the content of the right to information is the *Principles on the Right of Access to Information*, adopted by the Inter-American Juridical Committee in 2008.²² These Principles reiterate many of the standards in the 2004 Joint Declaration, stressing, among other things, that the right should apply to all information and all public authorities, and that clear procedures should be put in place for the processing of requests. Within the Council of Europe, an entire recommendation has been adopted on the right to information, setting out in some detail the relevant standards.²³ Principle IV of the African Declaration also elaborates on the nature of the right.

In terms of whistleblowers, one of the clearest brief statements is again found in a Joint Declaration, in this case the 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, which states:

Individuals who expose wrongdoing, serious maladministration, a breach of human rights, humanitarian law violations or other threats to the overall public interest, for example in terms of safety or the environment, should be protected against legal, administrative or employment-related sanction, even if they have otherwise acted in breach of a binding rule or contract, as long as at the time of the disclosure they had reasonable grounds to believe that the information disclosed was substantially true and exposed wrongdoing or the other threats noted above.²⁴

This espouses a very similar standard to the one found in Principle 2(d) of the Arab Declaration, albeit elaborating in a bit more detail on what sorts of wrongdoing are covered.

Principle 3: Safety

a. Different stakeholders have a role to play in ensuring the safety of those exercising their right to

²⁰ Note 2, paragraph 18. See also *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151 (Inter-American Court of Human Rights) and *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05 (European Court of Human Rights).

²¹ Adopted 6 December 2004. Available at: <http://www.osce.org/fom/66176>.

²² Adopted at its 73rd Regular Session on 7 August 2008 in Rio de Janeiro, Brazil, OAS/Ser.Q, CJI/RES.147 (LXXIII-O/08). Available at: <https://www.article19.org/data/files/pdfs/igo-documents/principles-on-the-right-of-access-to-information.pdf>.

²³ Recommendation No. R(2002)2 on access to official documents, 21 February 2002. Available at: <https://rm.coe.int/16804c6fcc>.

²⁴ Adopted 4 May 2015, clause 5(b). Available at: <http://www.osce.org/fom/66176>.

media freedom, including citizen journalists and bloggers, as recognised in the UN Plan of Action on the Safety of Journalists and the Issue of Impunity.

- b. States have the following obligations:
 - i. To provide protection to those who are at risk of being attacked, whether directly or indirectly, in retaliation for exercising their right to freedom of expression or in the context of reporting in dangerous situations, such as demonstrations or conflict zones.
 - ii. To ensure that rapid and effective investigations take place when attacks do occur or are threatened, so as to be able to bring the perpetrators to justice, as part of their efforts to combat impunity.
 - iii. To provide compensation to the victims in appropriate cases.
 - iv. To provide training to police and other security personnel on the standards which apply regarding media coverage of demonstrations and other potentially dangerous public events.
- c. Other actors – including media outlets and journalists’ unions – have a role to play in ensuring that journalists receive appropriate training and equipment to enhance their ability to protect themselves in dangerous situations.
- d. Safety goes beyond physical safety and relevant actors should take steps to ensure that media workers benefit from adequate wages and social security benefits.

Attacks aimed at curtailing the exercise of the right to freedom of expression are a particularly insidious means of breaching this fundamental right. As the special mandates noted in their 2012 Joint Declaration on Crimes Against Freedom of Expression:

Noting that violence and other crimes against those exercising their right to freedom of expression ... have a chilling effect on the free flow of information and ideas in society (‘censorship by killing’), and thus represent attacks not only on the victims but on freedom of expression itself, and on the right of everyone to seek and receive information and ideas.²⁵

Both the Inter-American Court of Human Rights²⁶ and the European Court of Human Rights²⁷ have held that States are under a positive obligation both to provide protection to those who are under attack for exercising their right to freedom of expression and to investigate and prosecute those responsible for such attacks when they do occur. In the *Özgür Gündem v. Turkey* case, the European Court noted that the government believed that the newspaper in question, which had suffered repeated attacks, acted as a propaganda tool for a terrorist organisation. However, the Court still held that the State was responsible for failing to provide appropriate protection to the newspaper, stating:

This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.²⁸

This issue is so serious that the UN, in 2012, adopted the UN Plan of Action on the Safety of Journalists and the Issue of Impunity.²⁹ Although this is primarily directed at UN actors, it does

²⁵ Adopted 25 June 2012, preamble. Available at: <http://www.osce.org/fom/66176>.

²⁶ See, for example, *Ríos et al. v. Venezuela*, 28 January 2009, Series C, No. 194.

²⁷ See, for example, *Özgür Gündem v. Turkey*, 16 March 2000, Application no. 23144/93.

²⁸ Note 27, para. 45.

²⁹ Adopted 12 April 2012. Available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/un-plan-of-action/>.

outline, in the section on Cooperating with Member States, the need to encourage States to take strong prevention measures, as well as to combat impunity.³⁰ Indeed, even the UN Security Council has gotten involved, adopting Resolutions 1738 of 23 December 2006 and 2222 of 27 May 2015 on this issue.³¹ One of the key problems is the extremely high rate of impunity in cases of attacks on freedom of expression, encouraging the perpetrators to continue their deadly activities.

The 2012 Joint Declaration is perhaps the most detailed statement on this issue, although Principle IX of the African Declaration also addresses it while, once again, the Committee of Ministers of the Council of Europe has adopted an entire statement on it.³² For its part, the Joint Declaration has dedicated sections looking at the Obligation to Prevent and Prohibit –which calls for a range of legal and non-legal measures, including training for law enforcement officials – the Obligation to Protect, the need for Independent, Speedy and Effective Investigations – which is very detailed and includes sub-sections on each of the terms in the title – and Redress for Victims – including compensation for victims in appropriate cases. The Joint Declaration also recognises the role of other players – including donors, media outlets and civil society organisations – in providing protection and combating impunity.

Principle 4: Awareness

- a. Measures should be taken to ensure that adequate educational and training opportunities are available for both male and female media workers.
- b. Efforts should be made to promote media and information literacy among the general public, including in relation to social media.

The importance of proper educational and training opportunities for both male and female media workers is at some level a matter of common sense. Essentially, without such opportunities, the quality of media reporting, and hence the media's ability to serve the important social roles associated with a strong media sector, cannot be guaranteed.

Perhaps the most detailed standards relating to media education and training are found in UNESCO's Media Development Indicators (MDIs),³³ which provides a comprehensive framework for assessing the contemporary media landscape in any country at any given time. The MDIs are broken down into five main categories, of which the fourth is:

³⁰ See paras. 5.6-5.11.

³¹ Available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Civilians%20SRES1738.pdf> and http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2222.pdf.

³² Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, 30 April 2014. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c5e9d.

³³ Adopted by UNESCO's International Programme for the Development of Communication (IPDC) at its 26th session (26-28 March 2008). Available in various languages, including Arabic, at: <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/media-development-indicators-a-framework-for-assessing-media-development/>.

Professional capacity building and supporting institutions that underpin freedom of expression, pluralism and diversity

This, in turn, is broken down into Indicators, of which the most important for present purposes are:

- 4.1 Media professionals can access training appropriate to their needs
- 4.2 Media managers, including business managers can access training appropriate to their needs
- 4.3 Training equips media professionals to understand democracy and development
- 4.4 Academic courses accessible to wide range of students
- 4.5 Academic courses equip students with skills and knowledge related to democratic development

Several of the Joint Declarations refer to the idea of media, information and/or digital literacy. One of the more important of these statements is found in the 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, which highlights measures States should take to counter the growing problem of disinformation. On literacy, the Declaration states:

States should take measures to promote media and digital literacy, including by covering these topics as part of the regular school curriculum and by engaging with civil society and other stakeholders to raise awareness about these issues.³⁴

Another important statement on this issue is found in the 2007 Joint Declaration on Diversity in Broadcasting, which stipulates:

Broad public education and other efforts should be undertaken to promote media literacy and to ensure that all members of society can understand and take advantage of new technologies with a view to bridging the digital divide.³⁵

Part II: Restrictions on Content

Principle 5: Criminal Measures

- a. States should not establish new criminal restrictions on content unless these can be shown to be genuinely necessary as defined in Principle 1(c)(3), and should exercise careful restraint in applying any restrictions which are in place.
- b. States should repeal or amend any criminal restrictions on content which do not conform to the three-part test for restrictions on freedom of expression noted in Principle 1(c); any special criminal content restrictions for the media, such as those found in some press and broadcasting laws, should be repealed.
- c. Restrictions which are justified on the grounds of protecting national security should be drafted in a clear and narrow manner so as to apply only to expression which poses a real risk of harm to the ability of the State to defend itself from attack.

The first parts of both Principle 5(a) and 5(b) of the Declaration essentially flow logically from Principle 1(c), as well as directly from international law. If a restriction is not necessary, it cannot

³⁴ Adopted 3 March 2017, clause 3(e). Available at: <http://www.osce.org/fom/66176>.

³⁵ Note 16.

be justified in the first place and States should not be adopting it. Unfortunately, despite the clear logic of that position, States both in the Arab World and more widely around the globe often do adopt new criminal restrictions on content which cannot be justified as necessary.

Furthermore, any restriction which does not conform to all of the three parts of the test outlined in Principle 1(c) is not legitimate under international law and should not remain in force (i.e. it should be repealed). A particular problem in many countries in the Arab World is criminal restrictions which are drafted in vague or unduly broad terms. In many instances, this sort of ‘flexible’ language has been used purposefully to allow the provisions to be applied in a wide variety of situations. This is precisely the problem that the international law requirement of clarity and precision for restrictions on freedom of expression is designed to address.

The second part of Principle 5(a) is perhaps a bit more contentious. In theory, States have the power to apply otherwise legitimate restrictions every time someone breaches them. However, where there is a serious problem of restrictions not being legitimate, at least from the perspective of international law, then it follows that they should be applied with restraint, and only in situations where the speech in question clearly falls outside of the protection of international human rights guarantees.

The second part of Principle 5(b) reflects the idea that there is no need for additional criminal content restrictions specifically targeting the media. That is because if an expressive activity is serious enough to warrant a criminal response, it should be prohibited regardless of how the expression is disseminated. In other words, the really harmful expressions that warrant a criminal response should be found in laws of general application, rather than in media specific laws. Looked at from another perspective, criminal restrictions in media laws almost always duplicate restrictions in general laws and are hence unnecessary.

These ideas are reflected in the following statement from the 2003 Joint Declaration, which focused on regulation of the media and journalists:

Content restrictions are problematical. Media-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse. Content rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.³⁶

The special focus on one type of criminal content restriction in Principle 5(c) – namely rules which purport to protect national security – reflects the widespread abuse of this sort of restriction in the Arab World, as in many countries around the world. A particular problem is that these sorts of laws are often applied in situations which bear little resemblance to genuine national security threats. The problem of overreach of national security rules was also addressed in *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted in 1995 by a group of experts on national security, access to information and freedom of expression issues.³⁷ Principle 2(a) defines a legitimate national security interest as being to “protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force”, while Principle 2(b) identifies a

³⁶ Adopted 18 December 2003. Available at: <http://www.osce.org/fom/66176>.

³⁷ Available at: <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>.

number of interests which should not be included because they are not linked to national security, such as “to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest”.

In General Comment No. 34, the UN Human Rights Committee focused specifically on the need for national security laws to respond to a real threat to security, noting that it was not “generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress”.³⁸

When deciding cases based on national security, international courts have insisted on there being a close connection between the impugned expression and a genuine threat to national security, such that the statement qualifies as incitement. Thus, in the case of *Sürek v. Turkey (No. 4)*, the European Court of Human Rights found a breach of the right to freedom of expression even though the statements in question were very strongly worded, stating:

It is true also that the impugned interview (see paragraph 13 above) contained hard-hitting criticism of the Turkish authorities such as the statement that “the real terrorist is the Republic of Turkey”. For the Court, however, this is more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence. ... On the whole, the content of the articles cannot be construed as being capable of inciting to further violence.³⁹

Thus, the real test is whether the statements incited to further violence, not whether or not they were justified or sagely worded.

In their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the special mandates reflected a similar idea, stating:

In particular, States should refrain from applying restrictions relating to ‘terrorism’ in an unduly broad manner. Criminal responsibility for expression relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as glorifying’, ‘justifying’ or ‘encouraging’ terrorism should not be used.⁴⁰

Once again we see a focus on the idea of incitement at the centre of the standard being proposed.⁴¹

Principle 6: Protecting Reputations

Laws which are designed to protect reputations should conform to the following principles:

- i. They should be civil rather than criminal in nature.
- ii. They should protect individuals and private parties, and not State or public institutions.
- iii. There should be adequate defences to an allegation of defamation, including that the

³⁸ Note 2, para. 30.

³⁹ 8 July 1999, Application No. 24762/94, para. 58.

⁴⁰ Note 24, clause 3(b).

⁴¹ A similar idea is found in Principle 15 of *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, which focuses on the likelihood of harm to a legitimate national security interest.

statement was true or that the statement related to a matter of public concern which it was, in all of the circumstances, reasonable to make.

- iv. Politicians and other public figures should be required to tolerate a greater degree of criticism than ordinary citizens, including by having to prove that any allegations about them regarding matters of public concern are false.
- v. Sanctions for defamation should never be disproportionate to the harm done.

Providing appropriate protection for reputations is one of the most challenging issues in the area of content restrictions. In many countries, a large percentage of the legal cases involving freedom of expression are based on laws protecting reputations, broadly referred to as defamation laws, while a majority of all of the cases involving freedom of expression before international human rights courts involve defamation laws in one way or another.

The special mandates have stated clearly that defamation laws should be civil and not criminal in nature on a number of occasions, most recently in their 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, which included the following statement:

Criminal defamation laws are unduly restrictive and should be abolished.⁴²

In their 2010 Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, the special mandates identified criminal defamation as one of the leading threats to free speech.⁴³

General Comment No. 34 did not go quite that far but it did note:

States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.⁴⁴

In practice, this amounts to almost the same thing in the Arab World since all or virtually all of the criminal defamation laws in the region provide for imprisonment.

As noted above, there is an enormous amount of jurisprudence from international courts on freedom of expression and protection of reputations. A few years ago, the Council of Europe published a handbook on the jurisprudence of the European Court of Human Rights, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, which has a significant section on Reputation.⁴⁵

An important part of this section focuses on the appropriate defences to defamation which, over a number of cases, the Court has established should include proof of the truth of the statement. If

⁴² Note 34, clause 2(b).

⁴³ 3 February 2010, clause 2. Available at: <http://www.osce.org/fom/66176>.

⁴⁴ Note 2, para. 47.

⁴⁵ Toby Mendel (2012, Strasbourg, Council of Europe), pages 56-66. Available at: <https://rm.coe.int/16806f5bb3>.

the statement is true, no case in defamation should lie against the person who made it. Put differently, one cannot defend a reputation against a true statement.

Another defence which has been recognised in the jurisprudence is proof that it was “reasonable” to make the statement. This includes the idea that public figures need to tolerate a higher degree of criticism than other people, because they have voluntarily taken on powerful public roles. Furthermore, the media has an obligation to publish information of public interest in a timely fashion and it is inevitable that mistakes will occasionally be made. Liability for errors should follow only where the journalist or media outlet in question did not behave reasonably or professionally in publishing the information, looking at all of the circumstances. The UN Human Rights Committee has in this regard noted: “In any event, a public interest in the subject matter of the criticism should be recognized as a defence.”⁴⁶ The Inter-American Declaration is quite clear on this issue, stating:

Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “desacato laws,” restrict freedom of expression and the right to information.⁴⁷

The European Court has also held clearly that excessive sanctions for defamation, on their own (i.e. even if it is established that the statements were defamatory), can represent a breach of the right to freedom of expression. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, which involved an extremely high award of damages, the Court stated: “the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression.”⁴⁸ This was the case even though it was agreed that the statements were highly defamatory. The same idea was recognised by the UN Human Rights Committee in General Comment No. 34.⁴⁹

A number of other authoritative statements on defamation can be found in the African Declaration,⁵⁰ the Inter-American Declaration,⁵¹ the Council of Europe’s Declaration on freedom of political debate in the media,⁵² and a number of Joint Declarations, especially the 2000 Joint Declaration.⁵³

Principle 7: Protecting Privacy

Laws should be in place to protect privacy which are in line with the following principles:

- i. They provide adequate protection to, among other things, communications privacy.
- ii. Mass surveillance of communications and the mass retention of personal data for law

⁴⁶ General Comment No. 34, note 2, para. 47.

⁴⁷ Note 8, para. 11.

⁴⁸ 13 July 1995, Application No. 18139/91, para. 35.

⁴⁹ Note 2, para. 47.

⁵⁰ Note 6, Principle XII.

⁵¹ Note 8, paragraphs 10 and 11.

⁵² Adopted by the Committee of Ministers on 12 February 2004. Available at: <https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl-12.02.2004&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75&direct=true>.

⁵³ Adopted 30 November 2000. Available at: <http://www.osce.org/fom/66176>.

enforcement or security purposes are inherently disproportionate; surveillance and data retention should be conducted only on a case-by-case basis, as justified by a law enforcement or security need.

- iii. Conflicts between privacy and freedom of expression should be resolved by applying an overall public interest balancing test.

There is a complex relationship between protection of privacy and the right to freedom of expression. The positive aspect of the relationship has long been recognised, for example in strict limits on the power of State actors to conduct surveillance over communications. One of the more comprehensive recent reports on this was the 2013 Report of the Special Rapporteur to the Human Rights Council on the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression,⁵⁴ which was a timely precursor to the Snowden leaks, which themselves demonstrated in a clear, practical way the threat from surveillance.⁵⁵

As far as communications go, international courts have upheld in a large number of cases that interception or surveillance activities represent an interference with privacy.⁵⁶ To justify such an interference, which by definition takes place in secrecy, there must be a particularly clear legal framework governing it. Thus, in the case of *Escher et al. v. Brazil*, the Inter-American Court of Human Rights noted that, given the intrusive nature of telephone interception:

[T]his measure must be based on a law that must be precise and indicate the corresponding clear and detailed rules, such as the circumstances in which this measure can be adopted, the persons authorised to request it, to order it and to carry it out, and the procedure to be followed.⁵⁷

In the case of *Malone v. United Kingdom*, the European Court examined the practice of 'metering' of phone calls (i.e. recording the numbers called and length of the calls), which is clearly less intrusive than actual (substantive) interception of calls. However, that was also an interference with private life. In that case, since the Post Office voluntarily provided the information to the police upon request, there was no proper legal framework for the interference and it was therefore not legitimate.⁵⁸

In a very significant judgment in 2014,⁵⁹ a Grand Chamber of the European Court of Justice struck down what was commonly referred to as the European Data Retention Directive,⁶⁰ which

⁵⁴ A/HRC/23/40, 17 April 2013. Available in various languages, including Arabic, at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/40.

⁵⁵ Another important piece on this is Toby Mendel, Andrew Puddephatt, Ben Wagner, Dixie Hawtin and Natalia Torres, *Global Survey on Internet Privacy and Freedom of Expression* (2012, Paris, UNESCO). Available in Arabic, English and French at: <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/global-survey-on-internet-privacy-and-freedom-of-expression/>.

⁵⁶ See, for example, *Iordachi And Others v. Moldova*, 10 February 2009, Application No. 25198/02, para. 29 (European Court of Human Rights).

⁵⁷ 6 July 2009, Series C, No. 200, para. 131.

⁵⁸ *Malone v. United Kingdom*, 2 August 1984, Application No. 8691/79, paras. 83-86.

⁵⁹ *Digital Rights Ireland Ltd. (C-293/12) v. Minister for Communications, Marine and Natural Resources*, 8 April 2014. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0293&rid=1>.

⁶⁰ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services

required all telecommunications services providers to retain metadata on communications for periods of at least six months. The judgment was founded on the idea that this requirement was an indiscriminate breach of privacy.

In their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the special mandates both supported this idea and also applied the same idea to surveillance, saying that it should also be conducted only on a limited and targeted basis. Specifically, they stated:

- a. Conflict situations should not be used to justify an increase in surveillance by State actors given that surveillance represents an invasion of privacy and a restriction on freedom of expression. In accordance with the three-part test for restrictions on freedom of expression and, in particular, the necessity part of that test, surveillance should be conducted only on a limited and targeted basis and in a manner which represents an appropriate balance between law enforcement and security needs, on the one hand, and the rights to freedom of expression and privacy, on the other. Untargeted or “mass” surveillance is inherently disproportionate and is a violation of the rights to privacy and freedom of expression.
- b. Similarly, requirements to retain or practices of retaining personal data on an indiscriminate basis for law enforcement or security purposes are not legitimate. Instead, personal data should be retained for law enforcement or security purposes only on a limited and targeted basis and in a manner which represents an appropriate balance between law enforcement and security needs and the rights to freedom of expression and privacy.⁶¹

The last standard in Principle 7 of the Declaration, that conflicts between freedom of expression and privacy need to be settled by reference to the overall public interest, is well established under international law. In the two leading cases on this at the European Court of Human Rights, *Von Hannover v. Germany*⁶² and *Von Hannover v. Germany (No. 2)*,⁶³ the Court reiterated this test and set out a number of factors to be considered in conducting this balancing, of which the first was described as follows:

An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest.⁶⁴

Principle 8: Hate Speech and Intolerance

- a. States should put in place laws which prohibit the dissemination of statements which represent “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” in accordance with Article 20(2) of the *International Covenant on Civil and Political Rights*.
- b. The media has a professional, ethical and social responsibility to combat hatred, intolerance and sectarianism, including through accurate, objective reporting.

or of Public Communications Networks and Amending Directive 2002/58/EC, 2006 O.J. (L 105) 54. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF>.

⁶¹ Note 24, clauses 8(a) and (b).

⁶² 24 June 2004, Application No. 59320/00.

⁶³ 7 February 2012, Applications Nos. 40660/08 and 60641/08.

⁶⁴ *Ibid.*, para. 109. See also paras. 110-113.

Principle 8(a) is drawn directly from Article 20(2) of the ICCPR, which states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

There are four main elements of this definition. First, the statement must constitute “advocacy”, which essentially means that it is intentional in nature in the sense that the speaker intends to incite others. Second, it must advocate in favour of national, racial or religious hatred. In many national constitutions, further grounds are specified, such as hatred on the basis of ethnicity or gender. Third, it must constitute “incitement”. The precise implications of this will depend on all of the circumstances, but it essentially speaks to the need for a close, causal relationship between the statement and its effect. Finally, the incitement must be directed towards causing discrimination, hostility or violence. Discrimination and violence are clear legal concepts which are prohibited in most legal systems. Hostility, on the other hand, is merely a state of mind or an attitude. It is clear, however, that it represents a very strong emotion, which goes well beyond a simple prejudice or stereotype.

The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence⁶⁵ was the result of a long process of consultation and discussion globally, which took place over 2011 and 2012, about how to address the issue of hate speech. The Rabat Plan of Action reiterates many of the points made above. It also makes it clear that hate speech laws must still meet the three-part test for restrictions on freedom of expression as set out in Article 19(3) of the ICCPR.⁶⁶

Principle 8(b) is a professional rather than a legal obligation on the media. These ideas are, therefore, reflected in Principle 7 of the International Federation of Journalists’ *Declaration of Principles on the Conduct of Journalists*, which states

The journalist shall be aware of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on, among other things, race, sex, sexual orientation, language, religion, political or other opinions, and national or social origins.⁶⁷

A reference to this idea is also found in the 2006 Joint Declaration, which states:

The exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences. High profile instances of the media and others exacerbating social tensions tend to obscure this fact.⁶⁸

Part III: Regulation of the Means of Communication

⁶⁵ See A/HRC/22/17/Add.4, 11 January 2013. Available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

⁶⁶ See Rabat Plan of Action, note 65, paras. 18 and 22. See also the UN Human Rights Committee decision in *Ross v. Canada*, 18 October 2000, Communication No. 736/1997, para. 11.1.

⁶⁷ Adopted by the 1954 World Congress of the International Federation of Journalists and amended by the 1986 World Congress. Available at: <http://www.ifj.org/about-ifj/ifj-code-of-principles/>.

⁶⁸ 19 December 2006. Available at: <http://www.osce.org/fom/66176>.

Principle 9: Roles of Different Actors

- a. The exercise of regulatory powers over the means of communication – including the print and broadcast media, and online communications – should be exercised only by bodies which are protected against interference of a political or economic nature, including through the manner in which members of the governing boards of these bodies are appointed.
- b. States should promote a general economic environment in which the media can flourish, and adopt clear rules on public transparency in relation to ownership of the media.
- c. There should be clear criteria for the placement of public advertising and public authorities should never use their power over this as a means to influence media content.

International standards make it quite clear that regulatory bodies need to be independent of government. The reasons for this are fairly obvious. While the government retains the power to set policy, if it applies that policy in a regulatory manner to individual media outlets, this will give it the power to interfere in the way those outlets operate, and such interference will inevitably be political in nature.

In its 2011 General Comment, the UN Human Rights Committee set out this principle clearly in relation to the broadcast media, presumably on the basis that it did not consider it necessary or appropriate to have a special regulatory body for the print media:

It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.⁶⁹

The idea is expressed more broadly, to apply to all media regulators, in the 2003 Joint Declaration of the special mandates:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁷⁰

A very similar idea is expressed in Principle VII(1) of the African Declaration.⁷¹ As in other cases, the Council of Europe has adopted an entire recommendation on this issue, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector.⁷² The first substantive clause of the Recommendation refers to the need for broadcast regulators to be independent, while the rest of the Recommendation elaborates on how to ensure this in practice.

The idea of transparency of media ownership is also well established in international law. This is important for various reasons, including so that consumers know the source of what they are

⁶⁹ Note 2, para. 39.

⁷⁰ Adopted 18 December 2003. Available at: <http://www.osce.org/fom/66176>.

⁷¹ Note 6. See also para. 13 of the Inter-American Declaration, note 8.

⁷² Adopted by the Committee of Ministers of the Council of Europe on 20 December 2000. Available at” [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75&direct=true).

reading, listening to or viewing, and so that regulators can apply anti-concentration rules effectively. In this respect, the 2007 Joint Declaration on Diversity in Broadcasting of the special mandates stated:

Transparency should be a hallmark of public policy efforts in the area of broadcasting. This should apply to regulation, ownership, public subsidy schemes and other policy initiatives. ... In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical. Such measures should involve stringent requirements of transparency of media ownership at all levels.⁷³

Once again, the Council of Europe has a whole recommendation devoted to this issue, Recommendation No. R(94)13 of the Committee of Ministers on measures to promote media transparency.⁷⁴ This calls on States to adopt effective measures to promote transparency of ownership and highlights various means of doing so.⁷⁵

There are also clear statements calling for measures to prevent public authorities from abusing their power to place advertising as a way of controlling the media. In General Comment No. 34, the UN Human Rights Committee stated:

Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisements are not employed to the effect of impeding freedom of expression.⁷⁶

The Inter-American Declaration is even more precise on this issue:

The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans ... with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.⁷⁷

Principle 10: Journalists

- a. It is not for governments to decide who is and who is not a journalist and there should be no formal, legal restrictions on who may practise journalism.
- b. Freedom of association is a fundamental human right and journalists have the right to choose freely which associations, syndicates or unions they belong to and should not be required to belong to any particular association or union, noting that the experience of the international trade union movement shows that its strength lies in its unity and solidarity.
- c. Journalists have the right to protect the secrecy of their confidential sources of information.
- d. Systems for issuing professional or press cards to or accrediting journalists should not be used to limit access to the profession.

⁷³ Note 16.

⁷⁴ 22 November 1994. Available at: <https://rm.coe.int/16804c1bdf>.

⁷⁵ See also Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007, clause II. Available at: http://www.mediainitiatives.am/sites/default/files/Council%20of%20Europe%20Recommendation%20R_2007_2%20on%20Media%20Pluralism%20and%20Diversity%20of%20Media%20Content_EN.pdf.

⁷⁶ Note 2, para. 41.

⁷⁷ Note 8, paragraph 13. See also Principle XIV(2) of the African Declaration.

Many countries in the Arab World regulate access to the profession of journalism in much the same way that most States regulate the legal or medical profession. Looking at journalism as a profession, this may seem reasonable enough. However, there is an important difference between journalism and professions like law or medicine, inasmuch as the very subject matter of what journalists do – namely disseminate content to the public – falls within the scope of the human right to freedom of expression.

This issue was the direct subject matter of a 1985 Advisory Opinion of the Inter-American Court of Human Rights, in a case referred to it by Costa Rica.⁷⁸ The issue before the Court was the legitimacy of a mandatory licensing system whereby journalists were required to belong to a specific association, which imposed substantive conditions of membership, including minimum requirements regarding age and education.

As regards the key issue of regulating access to the profession, the Court stated:

The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees. ... This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine – that is to say, the things that lawyers or physicians do – is not an activity specifically guaranteed by the Convention. ... The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of [the right to freedom of expression].⁷⁹

This was later recognised in the Inter-American Declaration, as follows:

Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.⁸⁰

More recently, the 2011 General Comment by the UN Human Rights Committee focused on the changing nature of journalism, and the fact that it is no longer realistic to think of it as being limited to a select group of individuals, stating:

Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are

⁷⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

⁷⁹ Paras. 72-76.

⁸⁰ Note 8, paragraph 6. Very detailed statements about the appropriate standards in this area are found in the Workshop Statement from a regional workshop, *Media Regulatory Reform in the Middle East and North Africa: The Regulation of the Profession of Journalists*, 12 March 2015. Available at: <https://www.law-democracy.org/live/statement-on-regulation-of-journalists-in-the-arab-world/>.

incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events.⁸¹

This statement makes it clear that while accreditation may be needed in certain circumstances, to provide privileged access to places or events, it should also not be abused as a means to control access to the profession.⁸² In the case of *Gauthier v. Canada*, the UN Human Rights Committee held that accreditation schemes had to be run in a way that was “necessary and proportionate to the goal in question and not arbitrary ... The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent.”⁸³

Principle 10(b) of the Declaration flows directly from Article 22(1) of the ICCPR, which states:

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

This recognises and protects the right of individuals to choose freely what professional and union bodies they may wish to belong to. At the same time, as a practical matter, it is very important for journalists, as for all workers, to belong to strong, central unions which are able to advocate effectively on their behalf.

The right of journalists to protect their confidential sources of information is key to the effective realisation of freedom of expression. Without such protection, sources will not have the confidence to provide information on key issues of public importance to journalists, who will then be unable to provide that information to the public. This, then, speaks to the underlying rationale for protection of sources, which is to ensure a free flow of information to the public. This was set out very clearly by the European Court of Human Rights, in the case of *Goodwin v. United Kingdom*:

Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁸⁴

The African Declaration contains a particularly clear and detailed statement of the standards for protection of sources, at Principle XV, titled Protection of Sources and other journalistic material, which reads as follows:

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

⁸¹ Note 2, para. 44.

⁸² See also the 2003 Joint Declaration of the special mandates, note 36.

⁸³ 7 April 1999, Communication No. 633/1995, para. 13.6.

⁸⁴ 27 March 1996, Application No. 17488/90, para. 39. See also General Comment No. 34, note 2, para. 45, para. 8 of the Inter-American Declaration, note 8, and Principle XV of the African Declaration, note 6.

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court, after a full hearing.⁸⁵

Principle 11: Public Media

- a. All publicly-owned media should be protected against political interference, enjoy editorial, as well as managerial and financial, independence, and be accountable to the public rather than to the government or any other political actor. This should be achieved, among other things, by vesting overall oversight of these media in an independent governing board, while leaving editorial decisions in the hands of the employees.
- b. Publicly-owned media should have a formal mandate to operate in the public interest, and serve all segments of society, including women, youth and marginalised groups, and benefit from sufficient public funding to be able to discharge that mandate effectively, provided in a manner which does not allow for interference in their operations.

Politicians sometimes believe that, because they are publicly owned, public service broadcasters must serve the interests of the government of the day. But international standards take the very opposite approach, holding that because these entities are owned and (normally) funded by the public, they should be accountable to the public as a whole, and not just to the political party which happens to control the government at any particular time. This is not just a question of respect for freedom of expression. If the government controls the often very powerful public broadcasting system, this creates a very unlevel playing field for elections, and undermines democracy as a whole.

This approach in international law is clearly reflected in the following statement from the UN Human Rights Committee:

States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.⁸⁶

Perhaps not surprisingly, given that it was the birthplace of public service broadcasting, some of the strongest statements about the importance of independence for these broadcasters come from European sources. In a key case decided in 2009, *Manole and others v. Moldova*, the European Court of Human Rights held that States are obliged to respect principles of independence and balance in relation to public broadcasters:

Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial,

⁸⁵ Note 6.

⁸⁶ General Comment No. 34, note 2, para. 16.

independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.⁸⁷

The Council of Europe has also adopted a number of statements on public service broadcasting which highlight the need for independence, as well as adequate funding, including Recommendation (1996)10 on the Guarantee of the Independence of Public Service Broadcasting⁸⁸ and the 2006 Declaration of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting in the member states.⁸⁹ These statements highlight a number of key features of public service broadcasting, including the need for independence (which is even included in the titles of these statements), the need for them to have a clear public service remit defined in law, the need for editorial independence (i.e. the idea that editorial decisions should be taken internally rather than by the governing board), and the need for adequate funding to be provided to them.

In terms of mandate, the Appendix to the 2006 Declaration notes that some States have clearly defined mandates, but also indicates:

[I]n some member states, the remit of public service media is unclear or difficult to apply. This has not paved the way to offering quality services of public interest (for example, balanced/impartial news programmes; education and learning; investigative journalism; ensuring pluralism and diversity in the media; minority and local/community programmes; offering quality entertainment; and promoting creativity) which have traditionally distinguished public service broadcasting organisations from commercial ones.⁹⁰

Principle 12: Regulation of the Print Media

Print media should not be required to obtain a licence to operate and any registration system for the print media should not allow for political or other forms of interference, or impose undue barriers, including excessive fees, to establishing a print media outlet.

It is clear under international law that the system of regulation of the print needs to be tailored to the specific circumstances of that sector, and to this extent it will be different from how broadcasters are regulated. This flows directly from the ‘necessity’ requirement for restrictions on freedom of expression because what is necessary in relation to broadcasters may not be necessary for the print media based on the fundamental differences in their mode of operation. It is also clear from the following statement by the UN Human Rights Committee:

Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge.⁹¹

⁸⁷ 17 September 2009, Application no. 13936/02, para. 101.

⁸⁸ Adopted by the Committee of Ministers on 11 September 1996. Available at: <https://rm.coe.int/168050c770>.

⁸⁹ Adopted by the Committee of Ministers on 27 September 2006. Available at:

<https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl-27.09.2006&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75&direct=true>.

⁹⁰ *Ibid.*, para. 9.

⁹¹ General Comment No. 34, note 2, para. 39.

International law makes it clear that it is not legitimate to impose a licensing regime on the print media. Unlike broadcasters, which at least traditionally have relied on a limited public resource, the airwaves, for distribution, neither scarcity of this sort nor reliance on a public resource apply to the print media. In this regard, the UN Human Rights Committee has noted:

It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3.⁹²

The special mandates even more clearly ruled out licensing systems – which automatically involve discretion to refuse to issue a licence – for the print media in their 2003 Joint Declaration:

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.⁹³

This also makes it clear that it is better practice not to impose any system of registration – and that is the practice in many democracies – while any system of registration that is in place must not be onerous or impose substantive conditions on the media, or allow for government interference. In the case of *Gaweda v. Poland*, the European Court of Human Rights held that the refusal to register two periodicals on the basis that their titles were “in conflict with reality” was a substantive condition that was inconsistent with the right to freedom of expression.⁹⁴

Principle 13: Regulation of Broadcasters

- a. States have an obligation to promote a diverse broadcasting sector, including through an equitable allocation of licences and frequencies to the three types of broadcasters – public, commercial and community – and by putting in place rules to prevent undue concentration of ownership of the media.
- b. Licensing processes should be fair, including by not imposing excessive fees, and transparent and should, among other things, promote diversity in broadcasting. Applicants should have a right to appeal to the courts against any refusal to grant a broadcasting licence.

In contrast to the print media sector, licensing of broadcasters is recognised not only as being legitimate but also necessary to promote a diverse broadcasting sector, which is a key freedom of expression value. As a Grand Chamber⁹⁵ of the European Court of Human Rights noted in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*:

The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of

⁹² General Comment No. 34, note 2, para. 39.

⁹³ Note 36. See also the African Declaration, note 6, Principle VIII(1).

⁹⁴ 14 March 2002, Application No. 26229/95, para. 43. One of the titles was *Germany – a Thousand-year-old Enemy of Poland*.

⁹⁵ Grand Chamber decisions are made by a larger number of judges, representing a wider cross-section of European countries, and are thus considered to be of greater importance.

democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.⁹⁶

Three key aspects of diversity in relation to broadcasting have been identified, namely: diversity of content, or a wide range of different types of content; outlet diversity, or the presence of different types of broadcasters and, specifically, public service, commercial and community broadcasters; and source diversity, or ensuring that measures are taken to prevent undue concentration of media ownership.⁹⁷ Addressing all three is needed to ensure proper diversity of the media.

Licensing processes can contribute to all three types of diversity. They can be used to ensure that licences are directed at broadcasters which offer more diverse content. Licences can be required to be allocated to all three types of broadcasters. And the rules can prohibit licences from being given to owners who already control too many broadcasters. At the same time, it is very important to ensure that licensing processes are fair and transparent, and that they do not impose an unreasonable burden on broadcasters. Many of these ideas are wrapped up in the following statement by the UN Human Rights Committee:

States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters.⁹⁸

The idea of allocating frequencies to all three types of broadcasters is repeated in the 2007 Joint Declaration on Diversity in Broadcasting of the special mandates, which states: “Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms.”⁹⁹ Similarly, the African Declaration calls specifically for an “equitable allocation of frequencies between private broadcasting uses, both commercial and community” and for “community broadcasting [to] be promoted given its potential to broaden access by poor and rural communities to the airwaves”.¹⁰⁰ This reflects the need for particular attention to be given to the promotion of community broadcasters, given that they normally face greater establishment and sustainability challenges. The same idea is reflected in Council of Europe Recommendation to member states on media pluralism and diversity of media content, which calls on States to encourage media “capable of making a contribution to pluralism and diversity and providing a space for dialogue. These media could, for example, take the form of community, local, minority or social media.”¹⁰¹

⁹⁶ 7 June 2012, Application no. 38433/09, para. 129.

⁹⁷ See the 2007 Joint Declaration on Diversity in Broadcasting of the special mandates, note 16.

⁹⁸ General Comment No. 34, note 2, para. 39.

⁹⁹ Note 16. The same ideas are reflected in the special mandates 2013 Joint Declaration on the Protection of Freedom of Expression and Diversity in the Digital Terrestrial Transition, 3 May 2013. Available at: <http://www.osce.org/fom/66176>.

¹⁰⁰ Note 6, Principle V(2).

¹⁰¹ Recommendation CM/Rec(2007)2 of the Committee of Ministers, 31 January 2007, Clause I(4). Available at: <https://www.bundeskanzleramt.at/DocView.axd?CobId=23746>.

There are numerous international statements about the need to control undue concentration of media ownership.¹⁰² In General Comment No. 34, the UN Human Rights Committee stated:

Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.¹⁰³

Another strong statement along these lines is found in the Inter-American Declaration, which states:

Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information.¹⁰⁴

The statements about conditions on licensing processes in General Comment No. 34 are also supported in the African Declaration, which states: “[L]icensing processes shall be fair and transparent”.¹⁰⁵

Principle 14: Regulation of the Internet

- a. The Internet should not be subject to special forms of regulation beyond those which otherwise apply, for example to telecommunications companies providing Internet access.
- b. Great caution should be exercised when establishing new crimes relating to the Internet. These should not duplicate laws of general application – for example relating to defamation – and should only be introduced to address new crimes which are specially enabled by the Internet (such as cybercrime).
- c. The Internet should never be subject to general filtering or blocking measures or other forms of State censorship.
- d. Everyone, including journalists, should have the right to use encryption tools to protect the privacy of their communications.
- e. States have a positive obligation to promote greater access to the Internet including for poor and marginalised communities, and access to the Internet should never be cut off for whole populations or segments of the public (shutting down the Internet).

It is clear from the very text of Article 19 of the ICCPR – which refers to “any other media of his choice” – that its protections apply to the Internet, as they do to any other system of disseminating expressions.¹⁰⁶ Indeed, in the modern era, the Internet is the most powerful form of communication. For this very reason, some States have sought to impose unreasonable

¹⁰² For an in-depth analysis of international standards on this see Toby Mendel, Ángel Garcia Castillejo and Gustavo Gómez, *Concentration of Ownership and Freedom of Expression: Global Standards and Implications for the Americas* (2017, Montevideo, UNESCO). Available at: http://www.unesco.org/new/en/member-states/single-view/news/unesco_launches_publication_on_international_standards_of_me/.

¹⁰³ Note 2, para. 40.

¹⁰⁴ Note 8, para. 12. In *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 78, para. 34, the Inter-American Court of Human Rights called for the “barring of all monopolies [of ownership of the means of communication], in whatever form”. See also Principle XIV(3) of the African Declaration, note 6.

¹⁰⁵ Note 6, Principle V(2).

¹⁰⁶ See also General Comment No. 34, note 2, para. 12.

constraints on its use while, at the same time, it has been used in powerful ways for criminal, as well as more positive, activities.

It is clear that systems of regulation that are designed for other forms of communication cannot simply be applied to the Internet. As the UN Human Rights Committee said in General Comment No. 34: “Regulatory systems should take into account the differences between the print and broadcast sectors and the internet”.¹⁰⁷ The Human Rights Committee has also made it clear that the regulatory rules governing the Internet must be compatible with international law, stating:

Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3.¹⁰⁸

In their 2005 Joint Declaration, the special mandates went even further, noting:

No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.¹⁰⁹

This is supported by the Council of Europe’s leading statement on this issue, the Declaration on Freedom of Communication on the Internet, which states:

The provision of services via the Internet should not be made subject to specific authorisation schemes on the sole grounds of the means of transmission used.¹¹⁰

These statements align closely with Principle 14(a) of the Declaration, which rules out special licensing processes for Internet service providers.

Some of the standards in this Principle flow from common sense and logical extrapolation from the requirement that restrictions must be necessary. It is obvious, for example, that there is no need to duplicate laws of general application which already apply to online speech and that new crimes relating to the Internet should be restricted to activities which have been specially enabled by the Internet, such as hacking and spamming. This is also reflected in Principle 1 of the Council of Europe’s Declaration on Freedom of Communication on the Internet, which states: “Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.”¹¹¹

Numerous international statements call on States not to engage in general filtering, blocking or shut-downs of the Internet, all of which have been an issue in different Arab States. For example,

¹⁰⁷ Note 2, para. 39. See also clause 1(c) of the Joint Declaration on Freedom of Expression and the Internet of the special mandates, 1 June 2011. Available at: <http://www.osce.org/fom/66176>.

¹⁰⁸ General Comment No. 34, note 2, para. 43.

¹⁰⁹ 21 December 2005. Available at: <http://www.osce.org/fom/66176>.

¹¹⁰ Adopted by the Committee of Ministers on 28 May 2003, Principle 5. Available at: <https://rm.coe.int/16805dfbd5>.

¹¹¹ Note 110.

in their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the special mandates stated:

Filtering of content on the Internet, using communications ‘kill switches’ (i.e. shutting down entire parts of communications systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law.¹¹²

A similar idea is expressed in the Council of Europe’s Declaration on Freedom of Communication on the Internet:

Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.¹¹³

Two tools which have significantly empowered journalists and others in their use of the Internet are encryption and anonymity. As with surveillance, discussed above, international law does not allow for general measures to control the use of encryption and anonymisation tools, and instead calls for these to be applied on a case-by-case basis. This is reflected in the following statement in the 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations of the special mandates:

Encryption and anonymity online enable the free exercise of the rights to freedom of opinion and expression and, as such, may not be prohibited or obstructed and may only be subject to restriction in strict compliance with the three-part test under human rights law.¹¹⁴

This does not, however, prevent targeted police actions against criminal suspects, and this is reflected in the position taken on this issue in the Declaration on Freedom of Communication on the Internet:

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.¹¹⁵

The Internet is an amazingly powerful communications and access to information tool, but only for those who have access to it, which is just above 50 percent for the Middle East region.¹¹⁶ Because of its importance as a communications medium, international commentators are increasingly insisting that States have an obligation to make an effort to expand access to the Internet. One of the clearest calls for this came in the 2011 Joint Declaration on Freedom of Expression and the Internet, clause 6(a) of which states:

¹¹² Note 24, clause 4(c). See also the 2005 Joint Declaration, note 109, the 2011 Joint Declaration, note 107, clauses 3 and 6(b), and the 2017 Joint Declaration, note 34, clauses 1(f) and (g).

¹¹³ Note 110, Principle 3.

¹¹⁴ Note 24, clause 8(e).

¹¹⁵ Note 110, Principle 7.

¹¹⁶ See <http://www.internetworldstats.com/stats.htm>.

Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections.¹¹⁷

The rest of clause 6 elaborates on the exact content of this obligation. This idea is also supported in General Comment No. 34 of the UN Human Rights Committee, which states:

States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.¹¹⁸

Principle 15: Complaints and Self-Regulation

- a. Members of the public should have access to a system of complaints regarding the print and broadcast media.
- b. Different types of complaints systems – including self-regulatory, co-regulatory and statutory systems – may be legitimate, depending on the situation and the type of media, but self-regulatory systems, run by independent sector bodies, are the best approach where they exist and are effective, and complaints systems should never be overseen by the executive or bodies which are subject to executive control.
- c. Complaints should be assessed based on pre-established codes of conduct, which have been developed after consultation with all interested stakeholders.
- d. Complaints systems should aim to protect the public and to promote professionalism rather than to punish media outlets and, to this end, sanctions for breach of the rules should always be proportionate.

There are a number of benefits to providing members of the public with access to a system of complaints for the print and broadcast media. For members of the public, it allows them to access a system of redress because the vast majority of individuals simply cannot afford to take a case to court. Furthermore, the long delays in processing cases through the courts mean that – in accordance with the aphorism “justice delayed is justice denied” – this is not an effective remedy. For the media, complaints mechanisms provide a quick, simple and light – in the sense of the remedies envisaged, which are normally limited to things like apologies and requirements to carry a statement – system for resolving problems relating to professionalism. Complaints systems are also often more sensitive to the operating realities of the media, which means that decisions are similarly more appropriately tailored.

There are, roughly, three types of complaints systems. Purely self-regulatory systems are those which lack any statutory basis and which, instead, are established by the media on a voluntary basis. Co-regulatory systems involve an underlying legislative basis for the body, but they are characterised by the media playing a dominant or at least very significant role. Statutory systems, finally, are established by law and do not afford a dominant role to the media. In practice, again

¹¹⁷ Note 107. See also the 2005 Joint Declaration, note 109, the 2014 Joint Declaration on Universality and the Right to Freedom of Expression, 6 May 2014, clause 1(h)(iii), and Principle 4 of the Council of Europe’s Declaration on Freedom of Communication on the Internet, note 110.

¹¹⁸ Note 2, para. 15.

speaking roughly, in democracies complaints systems for the print media are either self- or co-regulatory, while systems for broadcasters are either co-regulatory or statutory.

The need for regulatory bodies to be independent of the executive falls within the stipulation in Principle 9(a) of the Declaration, and the basis for that is set out under that Principle in this Explanatory Memorandum. The African Declaration states unequivocally, in Principle IX(3), its preference for self-regulatory systems:

Effective self-regulation is the best system for promoting high standards in the media.¹¹⁹

In their 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, the special mandates also imply a preference for a self-regulatory approach:

2017: 5(a): The media and journalists should, as appropriate, support effective systems of self regulation whether at the level of specific media sectors (such as press complaints bodies) or at the level of individual media outlets (ombudsmen or public editors) which include standards on striving for accuracy in the news, including by offering a right of correction and/or reply to address inaccurate statements in the media.¹²⁰

A number of bodies have highlighted the particular importance of self-regulation in the context of Internet content. Thus, the Council of Europe’s Declaration on Freedom of Communication on the Internet states:

Member states should encourage self-regulation or co-regulation regarding content disseminated on the Internet.¹²¹

The 2011 Joint Declaration, which focuses on the Internet, similarly states: “Self-regulation can be an effective tool in redressing harmful speech, and should be promoted.”¹²²

Beyond that, the clearest official statements on how complaints systems should be run are found in the African Declaration, which states:

1. A public complaints system for print or broadcasting should be available in accordance with the following principles:
 - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and
 - the complaints system shall be widely accessible.
2. Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.¹²³

To a large extent the first of these conditions follows from both common sense and standards regarding freedom of expression. It is not appropriate just to assess complaints in the air, as it were; a solid set of standards against which to assess them is needed. From a freedom of

¹¹⁹ Note 6.

¹²⁰ Note 34, clause 5(a). See also the 2006 Joint Declaration, note 68.

¹²¹ Note 110, Principle 2.

¹²² Note 107, clause 1(e).

¹²³ Note 6, Principle IX.

expression perspective, restrictions must be set out clearly, and a code of conduct can serve this purpose.

Principle 16: Equality

Equality between men and women, as well as for minorities and marginalised groups, is a fundamental principle that should be supported in media workplaces in the following ways:

- i. Through legal guarantees for equal pay for equal work and equal access to employment opportunities, including promotion to senior decision-making positions.
- ii. Through collective contracts that offer flexible working hours and adequate parental leave.
- iii. Through media outlets providing safe working environments for women and protection to women journalists against sexual harassment, intimidation, bullying and violence.

This Principle reflects basic standards regarding equality and non-discrimination both generally and specifically in relation to women. The two main conventions which are applicable here are the *International Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),¹²⁴ and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).¹²⁵ Both conventions broadly rule out any kind of discrimination, in the first case, against women, and, in the second case, based on race, colour, descent, or national or ethnic origin (Article 1).

A key relevant provision here in CEDAW is Article 11(1), which states, in part:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- ...
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

In an analogous fashion, Article 5 of CERD provides, in part:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

¹²⁴ UN General Assembly Resolution 34/180, adopted 18 December 1979, in force 3 September 1981. Available at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>.

¹²⁵ UN General Assembly Resolution 2106 (XX), adopted 21 December 1965, in force 4 January 1969. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

- ...
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - ...
 - (iv) The right to public health, medical care, social security and social services;

A number of conventions adopted by the International Labour Organization support and elaborate on the nature of these obligations. Article 2 of ILO Convention No. 111, for example, reiterates the need for policies to promote equality in respect of employment and occupation.¹²⁶ Article 2(1) of ILO Convention 100 reiterates the requirement of equal pay for work of equal value, in the following terms:

Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.¹²⁷

ILO Convention 156 addresses the issue of workers with families, stating:

With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken--

- (a) to enable workers with family responsibilities to exercise their right to free choice of employment; and
- (b) to take account of their needs in terms and conditions of employment and in social security.¹²⁸

In terms of safety, the Security Council itself has recognised the special risks faced by women journalists, stating:

Further acknowledging the specific risks faced by women journalists, media professionals and associated personnel in conduct of their work, and underlining in this context the importance of considering the gender dimension of measures to address their safety in situations of armed conflict.¹²⁹

¹²⁶ Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, adopted at the 42nd ILC session, 25 June 1958, in force 15 Jun 1960. Available at: http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

¹²⁷ Convention No. 100 on Equal Remuneration, adopted at the 34th ILC session, 29 June 1951, in force 23 May 1953. Available at: http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100.

¹²⁸ Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, adopted at the 67th ILC session, 23 June 1981, in force 11 Aug 1983, Article 4. See also Article 3(1). Available at: http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156.

¹²⁹ Resolution 2222 (2015), adopted 27 May 2015, preamble. Available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2222.pdf. See also Human Rights Council Resolution 33/2, 29 September 2016, The safety of journalists, para. 2. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/226/24/PDF/G1622624.pdf?OpenElement>.