Freedom of Expression and the New Iraqi Constitution

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Executive Summary

A new constitution is currently being prepared by the government and citizens of Iraq which will, like all constitutions, establish the basic democratic structure of the country and guarantee a range of fundamental human rights. Freedom of expression is a key human right, recognised in international law and almost every national constitution. Freedom of expression is a fundamental underpinning of democracy, is key to the protection of all human rights and is central to human dignity in its own right. As a result, it is of the greatest importance that the new constitution provides an effective guarantee for this right.

This Study aims to help inform and stimulate the debate around the new Iraqi constitutional provisions on freedom of expression by outlining key issues relating to this right, which should be considered during the drafting process. It provides an analysis of relevant international and comparative constitutional law, with a view to ensuring that the drafters of the new Iraqi constitution, as well as those called upon to promote public debate on it, have as wide an understanding of the issues and options as possible.

This Study also makes a number of specific recommendations for the constitutional protection of the right to freedom of expression. Based on international and comparative standards, as well as an assessment of the key priorities for Iraq, our main recommendations are as follows:

The Scope of the Guarantee of Freedom of Expression:

- The constitution should define freedom of expression broadly to include the right to seek, receive and impart information and ideas, to cover all types of expression and modes of communication, and to grant this right to every person.
- The right to hold opinions without restriction should be specifically protected in the constitution.

Protection for Freedom of Information:

- The constitution should protect the right of access to information held by or on behalf of a public body, as well as access to information held by private persons necessary to enforce a right.

Specific Protection for the Media and Journalists:

- The new Constitution should provide explicit protection to freedom of the media, and consideration should be given to protecting the following elements of media freedom:
  - There should be no prior censorship.
  - There should be no licensing or registration system for the print media.
  - There should be no licensing of individual journalists or entry requirements for practising the profession.
  - The independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be guaranteed.
  - The right of journalists to protect their confidential sources of information should be guaranteed.
  - Journalists should be free to associate in professional bodies of their choice.

Permissible Limitations on Freedom of Expression:

- The Constitution should permit restrictions on the right to freedom of expression only where these:
  - are provided by law;
  - pursue a list of legitimate aims which is provided in the Constitution; and
  - have been shown by the authorities to be necessary in a democratic society.

Enforcing the Right to Freedom of Expression:

- The constitutional guarantee of freedom of expression should be directly enforceable, against State as well as private bodies, and it should take precedence over domestic legislation that is incompatible with it to the extent of that incompatibility.
- Consideration should be given to a constitutional provision explicitly incorporating rights granted in international treaties into Iraqi law.

1. Introduction

A new constitution is currently being developed which is scheduled to be put to a vote by the people of Iraq in October 2005. This will be the first time in their history that Iraqis will be able to decide for themselves on the fundamental matters which constitutions around the world determine: what sort of democratic structure their country will have and how fundamental rights will be guaranteed. Unlike the current arrangement, the new constitution will be permanent and, like all constitutions, will be the cornerstone of the new legal framework.

It is of the greatest importance that the right to freedom of expression enjoys strong protection in the new constitution for several reasons. First, the right to freedom of expression is a fundamental underpinning of democracy. If people are not free to say what they want, to disseminate information and express their opinion on matters of political interest, and to receive information and ideas from a variety of sources, then they will not be able to cast an informed vote or to participate in governance in other ways. Second, the right to freedom of expression is a key element in any system for protecting and promoting the enjoyment of all human rights. Human rights violations thrive in a climate of secrecy while freedom of expression helps combat violations by empowering journalists and others to investigate and report on violations and by opening up government institutions to public scrutiny. Third, freedom of expression has a wider importance in its own right: the idea that everyone should be able to speak their mind freely on matters of concern to them is central to human dignity. A person who is not free to speak their mind is not truly free. In this sense, the right to freedom of expression extends beyond the political arena, and finds its roots in people as social beings, relating and interacting at a multiplicity of levels through their ability to express themselves.

In addition to protecting the right to impart information and ideas, the right to freedom of expression also protects the right to receive information. This fulfils an important social function, recognising that individuals not only have a right to speak, but that society at large also has a right to listen to what others have to say. In broadcasting, for example, the right to freedom of expression protects both the right of the broadcaster to disseminate programmes as well as the right of the audience to receive them. In this sense, the right to freedom of expression is a broad guarantee of the free flow of information and ideas in society.

For all these reasons, freedom of expression enjoys prominent protection in all major international human rights treaties as well as in nearly all of the world's constitutions. It is so fundamental that in some countries which lack constitutional bills of rights, it has been found to be inherent in the general constitutional guarantees of democracy.[1] We note that freedom of expression enjoyed protection under Iraq's previous constitutions, as well as in the current Transitional Administrative Law.[2] The new Constitution will also protect the right to freedom of expression; we urge that the level of protection be both detailed and carefully tailored to the needs of the new Iraq.

[1] This is the case, for example, in Australia where the High Court has found that freedom of expression is implied as an essential requirement of democratic and representative government (see *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106).
[2] See, for example, Article 12 of the 1925 Constitution and Article 13 of the 2004 Law of Administration for the State of Iraq for the Transitional Period.

The right to freedom of expression is not absolute and every country imposes some limited restrictions on this right to protect certain overriding public and private interests such as national security and protection of reputations. One of the important roles of constitutional guarantees of freedom of expression is to mediate between these competing interests, providing a legal framework within which the legitimacy of any restrictions may be assessed. The constitution should also, however, play a key role in spelling out certain key elements of the right to freedom of expression. These should include the right of journalists to protect their sources, the right to access information held by public bodies, the absence of censorship, the right to start a print or Internet media outlet without needing a licence, the independence of publicly owned or funded media, and the principle that any bodies with regulatory powers over the media should be independent.

This Study aims to help inform and stimulate the debate around the new Iraqi constitutional provisions on freedom of expression by outlining the key issues which should be considered and by providing an analysis of relevant international and comparative constitutional law. Chapter 2 provides some background on international human rights law and its relevance to constitution drafting. Chapter 3 discusses issues relating to the scope of the right to freedom of expression, such as the types of expression and modes of communication covered. Chapter 4 discusses the need for explicit protection for the right to access information held by public bodies, while Chapter 5 presents certain specific protections relevant to the media and journalists. Chapter 6 discusses the manner in which the constitution should address the difficult issue of restrictions on freedom of expression. Chapter 7, finally, notes various options for enforcement, in particular the status of international guarantees within the Iraqi legal system and the need for effective remedies.

In terms of structure, each chapter refers to both the decisions of international human rights courts and to comparative constitutional law. A separate section at the end of chapters three to seven provides specific examples of constitutional provisions in a range of other countries that the drafters of the new Iraqi constitution may wish to take inspiration from.

2. International and Comparative Human Rights Law

International human rights law is an established body of law setting out minimum standards which all States should respect. To the extent that this is legally binding, for example through a treaty that has been signed,[3] Iraq is formally bound to comply with these standards in its own law and practice. One of the best ways of doing this is to ensure that the constitution reflects these international standards. Iraqis have an excellent opportunity, given that they are drafting a completely new constitution, to ensure that it does indeed reflect international standards.

This Study seeks to elaborate international standards in a number of different areas, with a view to informing better the constitutional drafting process for Iraq. It also makes extensive reference to comparative national constitutional text and law. These are provided for several reasons. First, they provide support for international law, showing that States recognise their international obligations in practice. Second, constitutions do not set out in detail every single obligation; rather, they provide a framework for more detailed elaboration of rights by courts and other actors. Comparative practice provides guidance as to what issues other States have found it important to include in their own constitutions and what they have not. Third, comparative constitutional materials provide Iraq's constitution drafters with suggestions as to how they may translate human rights principles into concrete drafting language. Fourth, as noted above, international law sets minimum standards: a threshold of respect for human rights below which no State should fall. However, it is open to States to provide greater protection for rights than is required under international law. The comparative constitutional materials provide some examples of where this has been done.

2.1 International Human Rights Law

International human rights law is a subset of the body of rules known as international law, which has traditionally been defined as the set of binding rules that applies between States. Traced back to the ideas of such people as Grotius in the 17th century, it helped define the rules of conduct between States.[4] Initially, this body of law contained little that was of direct legal relevance for individuals; it was a system of treaties and unspoken rules and customs between sovereign States covering matters such as the delineation of borders and ceding of territory. As such, although binding on States, it had only indirect implications for the ordinary person in the street.[5]

By the end of the 19th century, however, anti-slavery conventions and treaties designed to minimise human suffering in times of warfare were beginning to be concluded. This marked the start of the growth and formalisation of what we now refer to as international human rights law: the set of treaties and international customs that define the rights of individual

[3] Iraq has ratified a number of international human rights conventions, including the *International Covenant on Civil and Political Rights*.
[4] See, in particular, his *De Jure Belli ac Pacis (On the Law of War and Peace)*, published in 1625.
[5] Unless the city or country they happened to live in was 'sold' to another nation or otherwise changed hands. This happened not infrequently: in 1890, for example, the inhabitants of Heligoland, a small former British island in the North Sea, were sold together with their island to Germany in return for recognition of British rights over the African island of Zanzibar. After a bombing raid in April 1945 all islanders were evacuated and in 1947, under temporary British rule, the British Royal Navy detonated 6800 tonnes of explosives in an attempt to destroy the islands. They were unsuccessful. The islands came under German rule again in 1952. All houses were rebuilt and the population returned. The islands are now a holiday resort and enjoy tax-exempt status.

human beings. This body of law is of great relevance to ordinary individuals, in particular inasmuch as it seeks to limit how States can treat people under their jurisdiction. Taking as its starting point the belief that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world",[6] this set of rights includes such things as the right to life, liberty, freedom from torture, fair trial, food, shelter and housing, as well as the right to freedom of expression.[7]

International human rights law began to develop in earnest after the Second World War. The atrocities committed before and during that war under the Nazi regime prompted the drafting of the *Universal Declaration of Human Rights* (UDHR),[8] the flagship statement of international human rights drawn up under the auspices of the United Nations and adopted in 1948. This was followed by binding treaties such as the *International Covenant on Civil and Political Rights* (ICCPR),[9] as well as regional treaties such as the *European Convention on Human Rights* (ECHR),[10] the *American Convention on Human Rights* (ACHR)[11] and the *African Declaration on Human and Peoples' Rights* (ACHPR).[12] Crucially, all of these treaties provide for implementation mechanisms, independent bodies of experts and/or courts who are responsible for ensuring that their provisions are observed. Among other things, these bodies have the power to hear and decide upon complaints from individuals who believe their rights have been breached. These bodies play an important role in interpreting and developing the rights guaranteed by their founding treaties.

In addition to treaties concluded between States, three further important sources of international law are "international custom", as evidence of a general practice accepted as law; "the general principles of law recognized by civilized nations"; and, as a subsidiary means for the determination of rules of law, "judicial decisions and the teachings of the most highly qualified publicists of the various nations".[13] This means that, in addition to formally binding decisions of courts, declarations and interpretations provided by authoritative bodies are also relevant. These include the numerous monitoring mechanisms which have been established under the auspices of the United Nations and the regional systems such as the UN Human Rights Commission and Special Rapporteur on Freedom of Opinion and Expression, the Council of Europe and the American Commission on Human Rights. The custom and constitutional practice of individual countries is also relevant in establishing the general principles of law recognised by civilised nations.

[6] Preamble of the *Universal Declaration of Human Rights*, note 8.
[7] See Articles 3, 5, 10, 19 and 25 of the *Universal Declaration of Human Rights*, note 8.
[8] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[9] General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. Iraq ratified the ICCPR on 25 January 1971. Although adopted relatively late, and after the European Convention on Human Rights, negotiations on the ICCPR were begun immediately following the adoption of the Universal Declaration of Human Rights, in 1948.
[10] Adopted 4 November 1950, in force 3 September 1953.
[11] Adopted 22 November 1969, in force 18 July 1978.
[12] Adopted 26 June 1981, in force 21 October 1986.
[13] Article 38, Statute of the International Court of Justice. This provision lists the 'rules' applied by the International Court of Justice, the primary inter-State court in the world, and as such lays down the technical 'sources' of international law.

2.2 Freedom of Expression Under International Law

The right to freedom of expression enjoys very strong protection under international law. Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This provision has now passed into what is known as customary international law, the body of law that is considered binding on all States as a matter of international custom.[14] Freedom of expression finds further protection in a number of international treaties – legal instruments that States have signed up to and are legally bound to protect. For Iraq, the most important of these is the ICCPR, an international treaty ratified by 154 States as of June 2005, including Iraq. Article 19 of the ICCPR states:

> 1. Everyone shall have the right to freedom of opinion.
> 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.

Reflecting its global recognition, the right to freedom of expression is also protected in the three other regional human rights instruments, at Article 13 of the ACHR, at Article 10 of the ECHR and at Article 9 of the ACHPR. The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although not directly binding on Iraq, judgments and decisions issued by courts under these regional mechanisms offer authoritative interpretations of freedom of expression principles in various different contexts.

2.3 The Importance of Freedom of Expression

Freedom of expression is a key human right. Not only is it a fundamental human value in and of itself, freedom of expression also provides a key underpinning for democracy – there can be no democracy if people are not free to say what they want and do not receive sufficient information to cast an informed vote – and it is key to enforcing other rights. This has been recognised by international courts and bodies worldwide. It is worth recalling that at its very first session, in 1946, the UN General Assembly adopted Resolution 59(I), in which it refers to 'freedom of information' in its widest sense as "a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[15] The UN Human Rights Committee has reiterated these sentiments, stating:

> The right to freedom of expression is of paramount importance in any democratic society.[16]

[14] For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); and *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27.

[15] 14 December 1946. "Freedom of information" is referred to in the broad sense of the free circulation of information and ideas.

[16] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

This has been echoed by human rights courts around the world. The European Court of Human Rights, a court that has been set up to supervise the implementation of the ECHR and which over the years has built up a rich and instructive jurisprudence, has also elaborated on the importance of freedom of expression:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[17]

The guarantee of freedom of expression applies with particular force to the media. The European Court of Human Rights has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law." [18] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[19]

And, as the UN Human Rights Committee has stressed, a free media is essential in the political process:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[20]

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[21] The media as a whole merit special protection, in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[22]

[17] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[18] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[19] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[20] UN Human Rights Committee General Comment 25, issued 12 July 1996.
[21] *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. 34.
[22] *Thorgeirson v. Iceland*, note 18, para. 63.

3. The Scope of Freedom of Expression

Recommendations:

- The constitution should define freedom of expression broadly to include the right to seek, receive and impart information and ideas, to cover all types of expression and modes of communication, and to grant this right to every person.
- The right to hold opinions without restriction should be specifically protected in the constitution.

The starting point for any constitutional guarantee of freedom of expression is a consideration of who and what should be protected. While this may at first appear obvious – everyone and all expression should be protected – in fact it is more complicated than it seems and this has potential implications for constitutional drafting. For example, questions may arise as to whether false statements are protected, whether wearing a certain style of clothing, or even engaging in violent but expressive acts, are covered, whether expression via the Internet is included, or whether listening is also within the scope of the guarantee.

Not all of these questions will necessarily be dealt with explicitly in the constitution – some constitutional guarantees are very brief – but this should be carefully considered and an understanding of the proper scope of the guarantee should inform the drafting process. This chapter addresses five key questions:

- Which individuals should be protected by constitutional guarantees of freedom of expression, everyone or just citizens or residents?
- Does the right to freedom of expression include the right to hold opinions?
- What types of expressions are protected? Is factually incorrect 'information' or information which is socially unpopular or even 'offensive' covered?
- What modes of communication are covered by the constitutional guarantee?
- Does the constitution protect seeking and receiving, as well as imparting, information and ideas?

3.1 Everyone Has the Right to Freedom of Expression

Under international law, everyone has the right to freedom of expression, regardless of nationality, residential or any other status. Article 19 of the UDHR provides: "*Everyone* has the right to freedom of … expression" [emphasis added] and Article 19 of the International Covenant on Civil and Political Rights similarly applies to 'everyone'. Equally importantly, Article 2 of the ICCPR requires States to ensure respect for the rights guaranteed by it for all persons "within its territory and subject to its jurisdiction", without distinction of any kind, including on the basis of national origin. This would, therefore, apply to every person physically on the territory of a State, as well as to persons under its jurisdiction, for example on a State-owned vessel or on territory under the effective control of the State although not belonging to it.

The purpose of this is fairly evident. If someone is subject to the jurisdiction of a State, that State is the only one that can, as a practical matter, ensure respect for that person's rights. Effective application, as well as principles of equality, demands that States respect everyone's

right to freedom of expression. It would seriously undermine the right if one were to lose it simply as a result of travelling to a country of which one was not a citizen.

3.2 Opinions

International law, and almost every national constitution, protects the right to hold opinions.[23] Indeed, unlike the guarantee of freedom of expression, the right to hold opinions is absolute under international law, in recognition of the illegitimacy of the State trying either to prohibit certain opinions or to force individuals to adopt certain opinions.[24]

Technically, holding an opinion is different from expressing it; one may, for example, hold opinions that are never expressed or express opinions that one does not hold (such as the opinions of others). However, given the close relationship between opinions and expression, they are often guaranteed in the same constitutional or international law provision. This may either be in a separate clause of the same article or be in the same clause that guarantees freedom of expression. Neither of these approaches is inherently superior but if, as should be the case, opinions benefit from absolute protection, it may make more sense to protect it separately. Examples of both approaches are illustrated below in the section on Comparative Constitutional Examples.

3.3 Types of Expression Protected

The scope of the right to freedom of expression under international law, and under most constitutions, in terms of the types of expression which are protected, is very broad and extends to almost everything intended to convey meaning. The ICCPR, for example, refers to "information and ideas of all kinds".

This does not mean that these expressions may not be restricted but simply that they are included within the scope of the right to freedom of expression and that any restriction must be justified by reference to the three-part test for restrictions (see Chapter 6 of this Study). Activities that do not fall within the scope of the term 'expression' may be restricted without reference to this test, so the limits of the definition are important. Given that freedom of expression may be restricted to protect important public and private interests, and given the need for broad protection for this fundamental right, it is appropriate to define its scope broadly and then leave competing interests to be addressed under the three-part test. However, consistent with the underlying rationale for protecting freedom of expression, the scope of the guarantee is limited to activities that attempt to convey meaning.

In practice, most constitutions, in common with international law, do not address this matter explicitly, leaving it to common sense and judicial interpretation to address in any particular context.

While there may be borderline cases, it is understood that the right should be interpreted very broadly and so the issue does not commonly arise in the case law. In one of its earliest cases on freedom of expression, the European Court of Human Rights had to determine whether material deemed by the national courts to be obscene was protected by the right to freedom of expression. In finding that it was, the Court stated:

[23] Article 19(1) of the ICCPR.
[24] Article 19(1) of the ICCPR explicitly grants the right to hold opinions "without interference".

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". [25]

At the same time the Court held that the restriction imposed by the State was legitimate, so there had been no breach of the right to freedom of expression in this instance. This illustrates the difference between the very broad definition of expression and the rather narrower category of expression which States are required to permit.

The Supreme Court of Canada, when called upon to determine whether or not advertising was protected under the guarantee of freedom of expression, had this to say about the scope of the right:

> [I]f the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.… It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(*b*) challenge would proceed.[26]

The Court went on to note, however, that violence, even if it did convey meaning, would not be covered by the right to freedom of expression. Needless to say, the Court found that advertising was, *prima facie*, protected speech. However, in the circumstances of the case, the restriction, which prohibited advertising directed at young children, was, as in the preceding case, deemed legitimate.

When the issue arises in cases, courts almost always hold that expressive activity is covered by the guarantee of freedom of expression. For example, in striking down a law that prohibited the dissemination of false news, the Supreme Court of Zimbabwe held that even false statements were clearly covered by the guarantee of freedom of expression, stating:

> Mere content, no matter how offensive (save where the expression is communicated in a physically violent form), cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression.[27]

3.4 Modes of Communication Covered

As with types of expression, international law and most constitutional systems define the modes of expression extremely broadly. Indeed, these ideas are closely related, as the example provided above from the Canadian Supreme Court, involving parking, clearly illustrates. As with types of expression, the rationale for protecting practically any mode of

[25] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[26] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.
[27] *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000.

communication, save perhaps violent ones, is the purposive one of ensuring effective protection for rights, along with the fact that the guarantee allows for the protection of important public and private interests pursuant to legislative restrictions and so there is no need to define this narrowly. Again, only modes of communication that attempt to convey meaning would be covered.

International law and many national constitutions explicit protect all modes of communication. Article 19 of the ICCPR, for example, protects expression made "orally, in writing or in print, in the form of art or through any other media of his choice." (see the examples provided below under Comparative Constitutional Examples)

When these issues are raised in contentious cases before courts, they are almost always decided in favour of inclusion. For example, in a case before the European Court of Human Rights, Switzerland argued that prohibiting the re-broadcasting of radio programmes did not raise a freedom of expression issue. Among other things, the Swiss argument was based on the fact that the guarantee of freedom of expression in the ECHR states specifically that it shall not be understood as preventing States from licensing broadcasters. The Court rejected the argument, noting that cable re-transmission was clearly a protected form of expression and that while broadcast regulation was permitted, any specific restriction needed to be justified by reference to the three-part test for restrictions on freedom of expression.[28] In a similar vein, the Internet is accepted by courts around the world to be a protected mode of communication under the guarantee of freedom of expression.[29]

The right to freedom of expression under international law also explicitly applies "regardless of frontiers". People have the right to communicate with each other across boundaries. In the era of the Internet and satellite radio and television, this aspect of the right to freedom of expression is assuming ever greater importance.

3.5 Seeking and Receiving Information and Ideas

The most obvious aspect of the right to freedom of expression is the right to impart information and ideas, the right to speak. However, the right to freedom of expression, as guaranteed internationally and in many constitutions, also protects the right to seek and receive information and ideas, the right to hear. Article 19 of the ICCPR specifically protects the right "to seek, receive and impart information and ideas". These aspects of the right underpin the right to access information held by public bodies (see Chapter 4).

Although, as noted, people tend to think of freedom of expression primarily as the right to impart information, in fact the right to receive information is at least as important. This becomes clear, for example, if one thinks about elections. Obviously it is of the greatest importance that candidates can present their views to the public but, ultimately, elections are about the electorate exercising their vote freely. They cannot do this unless they are properly

[28] *Groppera Radio AG v. Switzerland*, 28 March 1990, Application No. 10890/84.
[29] See, for example, *The People v. Felix Somm*, 17 November 1999, File no. 20 Ns 465 Js 173158/95 (Munich Regional Court); *Belgacom Skynet v. IFPI*, 13 February 2001, File no. A.R. Nr.1999/AR/3372 (Brussels Court of Appeal*); Citron v. Zündel*, 18 January 2002, TD 1/02 (Canadian Human Rights Tribunal); Arret n˚6374 du 16 octobre 2001, Cour de cassation, Chambre criminelle (France); *Scientology v. XS4ALL and others*, 9 June 1999, IER 1999, 47 (District Court The Hague); and *Reno v. ACLU*, 521 US 844 (1997); 26 June 1997, No. 96-511 (United States Supreme Court).

informed about the positions of the parties and their electoral options. Their right to receive this information is central to the legitimacy of the election.

Furthermore, the right to receive information is not just the flip side of the right to impart it. Rather, the former can be seen as a right of the public at large. On this view, freedom of expression has both an individual dimension, guaranteeing every person the right to impart information and ideas, as well as a collective dimension, guaranteeing the people at large to receive information that others wish to impart to them. The Inter-American Court of Human Rights has expounded on this at some length in its jurisprudence, stating:

> [F]reedom of expression has both an individual and a social dimension: it requires that, on the one hand, no one may be arbitrarily harmed or impeded from expressing his own thought and therefore represents a right of each individual; but it also implies, on the other hand, a collective right to receive any information and to know the expression of the thought of others … These two dimensions must be guaranteed simultaneously.[30]

And in another case, the same Court noted:

> In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.[31]

Finally, international courts and bodies have affirmed that the right to 'seek and receive' information implies a right of access to information held by or on behalf of the State. For example, the UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws;[32] while the UN Special Rapporteur on Freedom of Expression has stated that "the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems."[33] We will elaborate on this aspect of the right to freedom of expression in Chapter 4 of this Memorandum, below.

3.6 Comparative Constitutional Examples

Egypt Article 47 of the Egyptian Constitution provides, in part: Every individual shall have the right to express his opinion and to publicise it verbally, in writing, by photography, or by other means of expression…

Fiji Article 30(1) of the Constitution of Fiji provides:

[30] *Ivcher Bronstein Case v. Peru*, 6 February 2001, Series C, No. 74, para. 146.
[31] *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. 32.
[32] See, for example, its 1994 Concluding Observations on the implementation of the ICCPR in Azerbaijan, in which the Committee recommended that Azerbaijan "should introduce legislation guaranteeing freedom of information": UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations".
[33] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 14.

(1) Every person has the right to freedom of speech and expression, including:
(a) freedom to seek, receive and impart information and ideas; and
(b) freedom of the press and other media.

Kuwait
Article 36 of the Constitution of Kuwait provides, in part:
Every person has the right to express and propagate his opinion verbally, in writing, or otherwise …

Cyprus
Article 19 of the Constitution of Cyprus provides:
1. Every person has the right to freedom of speech and expression in any form.
2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.

South Africa
Section 16(1) of the South African Constitution provides:
Everyone has the right to freedom of expression, which includes -
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

Canada
Section 2(b) of the Canadian Charter of Rights and Freedoms provides:
Everyone has the following fundamental freedoms: … freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Bahrain
The Constitution of Bahrain provides:
Article 22:
Freedom of conscience is absolute …
Article 23
Freedom of opinion and scientific research is guaranteed. Everyone has the right to express his opinion and publish it by word of mouth, in writing or otherwise …

Armenia
Article 24 of the Constitution of Armenia provides:
Everyone is entitled to assert his or her opinion. No one shall be forced to retract or change his or her opinion.
Everyone is entitled to freedom of speech, including the freedom to seek, receive and disseminate information and ideas through any medium of information, regardless of state borders.

Estonia
Article 41 of the Constitution of Estonia provides:
(1) Everyone shall have the right to hold his or her opinions and persuasions. No one may be coerced to change them.
(3) No one may be legally charged because of his or her persuasions.

4. Protection for Freedom of Information

Recommendation:

- The constitution should protect the right to access to information held by or on behalf of a public body, as well as access to information held by private persons necessary to enforce a right.

4.1 The Right to Access Information

As indicated in Section 3.5, the right to access information held by or on behalf of public bodies, often referred to as 'freedom of information', is a crucially important aspect of the right to freedom of expression. In what is now an oft-quoted phrase, ARTICLE 19 noted in 1999 that "information is the oxygen of democracy"[34] and the specialist international bodies protecting freedom of expression are agreed that "[t]he right to access information held by public authorities is a fundamental human right".[35] Like freedom of expression, freedom of information is important not only as a fundamental right in its own regard, but also as key to the enforcement of other rights, including economic and social rights, as well as to the functioning of democracy. Without freedom of information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news'. In such a climate, corruption thrives and human rights violations can remain unchecked.

The importance of the right to freedom of information in the fight against corruption is also reflected in several international treaties on this subject. The UN Anti-Corruption Convention, for example, explicitly requires States to implement freedom of information legislation,[36] while the Inter-American Convention against corruption places the right to freedom of information in the wider context of enabling civil society to monitor the activities of public bodies.[37]

Although in international human rights law, freedom of information is understood to be part and parcel of the right to freedom of expression, recent constitutional practice has been to provide explicit protection to it. This sends a strong signal to public bodies that they are expected to operate transparently, moving away from the culture of secrecy that often pervades these bodies. The need for this has been highlighted by international bodies, such as the UN, Organization of American States (OAS) and Organization for Security and Cooperation in Europe (OSCE) special mandates on freedom of expression. Following several separate statements on the importance of the right to receive information, in December 2004, these bodies adopted a Joint Declaration which included the following statement:

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[34] ARTICLE 19, *The Public's Rights to Know* (London: 1999), Preamble.

[35] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004, online at http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.

[36] UN Convention against Corruption, adopted by UN General Assembly resolution 58/4 of 31 October 2003. Article 13 provides that States should "[ensure] that the public has effective access to information".

[37] Inter-American Convention against Corruption, 29 March 1996. Article 3 requires States to take 'preventive measures' in the fight against corruption, including mechanisms that allow civil society monitoring. 'Access to information' has been adopted by the Committee of Experts as one of the indicators in this regard (see http://www.oas.org/juridico/english/followup.htm).

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[38]

They made it clear that such a law should have constitutional status and prevail over other, inconsistent, legislation:

> The access to information law should, to the extent of any inconsistency, prevail over other legislation.[39]

A rapidly growing number of States have now recognised the importance of freedom of information. In the last fifteen years, a range of countries including Pakistan, India, Israel, Mexico, South Africa, South Korea, Thailand, Trinidad and Tobago, Norway, Peru, the United Kingdom and most East and Central European States have adopted freedom of information laws. In doing so, they join the more than 60 countries that recognise and protect the right of access to information and which include Sweden, Colombia, Japan, the United States, Finland, Norway, the Netherlands, Australia and Canada.

A large number of the constitutions adopted in recent times provide explicit protection for the right to access information held by public bodies. Some older constitutions are also being revised with this in mind. The new Norwegian constitution is instructive on the need for explicit constitutional protection of access to information held by public bodies. Although its 1814 Constitution protected freedom of expression and freedom of the press, this was revised in 2004 specifically to protect freedom of information. The government explained the need for amendment, saying: "The new Article 100 is … a significantly more complete provision in the sense that it covers all the basic aspects of the right to freedom of expression. The previous provision did not cover … the right to access to information held by public authorities [which is an] important part of the new Article 100."[40] In tandem with this new provision, the Norwegian Parliament is currently considering a revised and improved Freedom of Information Act.

The new South African Constitution is also worth examining. It goes beyond providing the 'traditional' right of access to information held by public bodies and grants a right of access to information held by a private body where this is necessary to enforce a right. This reflects the idea that in today's society, private bodies hold much information that is necessary to enforce rights and that it is reasonable to expect private bodies to grant access to that information. South Africa's constitution is furthermore unique in that it not only guarantees the right to access information but also requires the government to pass a law giving effect to that right within three years of its coming into force.[41]

4.2 Comparative Constitutional Examples

South Africa

[38] 6 December 2004: http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.
[39] *Ibid*.
[40] As quoted in Norway's fifth periodic report on the implementation of the International Covenant on Civil and Political Rights, November 2004: http://odin.dep.no/ud/norsk/dok/andre_dok/rapporter/032201-220007/ind-bu.html, para. 192.
[41] Article 32(2) and Schedule 6, item 23 of the 1996 Constitution.

Article 32(1) of the South African Constitution provides, in part:
Everyone has the right of access to -
1. any information held by the state; and
2. any information that is held by another person and that is required for the exercise or protection of any rights.

Schedule 6, item 23 of the Constitution further provides:
National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

Finland
Article 12 of the Constitution of Finland provides, in part:
Documents and recordings in the possession of the authorities are public … Everyone has the right of access to public documents and recordings

Norway
Article 100 of the Constitution of Norway provides, in part:
Everyone has a right of access to the documents of the State and of the municipal administration and a right to be present at sittings of the courts and elected assemblies … It is a duty of the State authorities to facilitate an open and enlightened public dialogue.

Bulgaria
Article 41(2) of the Constitution of Bulgaria provides:
Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.

Philippines
Article 3(7) of the Constitution of the Philippines provides:
The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

Brazil
Article 33 of the Constitution of Brazil provides:
All persons are entitled to receive from government agencies information of private interest to such persons or of collective or general interest which shall be provided within the period established by law, subject to liability, with the exception of information whose secrecy is vital to the security of society and of the State.

Colombia
Article 74 of the Constitution of Colombia provides:
Every person has a right to access to public documents except in cases established by law.

Mexico
Article 6 of the Constitution of Mexico provides, in part:
[T]he right of information is guaranteed by the state.

Thailand
Article 48 of the Constitution of Thailand provides:
A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other

persons which shall be protected as provided by law.

5. Specific Protection for the Media and Journalists

Recommendations:

- The new constitution should provide explicit protection for freedom of the media, and consideration should be given to protecting the following elements of media freedom:
  - There should be no prior censorship.
  - There should be no licensing or registration system for the print media.
  - There should be no licensing of individual journalists or entry requirements for practising the profession.
  - The independence of all bodies with regulatory powers over the media, including governing bodies of public media, should be guaranteed.
  - The right of journalists to protect their confidential sources of information should be guaranteed.
  - Journalists should be free to associate in professional bodies of their choice.

International human rights law recognises that the guarantee of freedom of expression applies with particular force to the media, including the print, broadcast and new media. This is primarily because of the role played by the media in a democracy. International courts have often emphasised the "pre-eminent role of the press in a State governed by the rule of law"[42] and statements along the following lines can be found in the case law of all major international human rights courts:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[43]

As the UN Human Rights Committee has stressed, a free media is essential in the political process:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[44]

In addition, the media are the embodiment of the very principles behind the right to freedom of expression. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[45] It is the duty of the media to report on all matters of public interest, whether they relate to the functioning of democracy directly or to broader concerns. The European Court of Human Rights has emphasised:

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[42] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, (European Court of Human Rights), para. 63.
[43] *Castells v. Spain*, 24 April 1992, Application No. 11798/85 (European Court of Human Rights), para. 43.
[44] General Comment 25, *The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7.
[45] *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. 34.

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] … it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would by unable to play its vital role of "public watchdog".[46]

In order for the media to be able to play this role, a number of explicit guarantees are needed. First, there should be an explicit statement protecting freedom of the media as a whole. Such statements can be found in the constitutions of numerous countries around the world (see Comparative Constitutional Examples, below). However, in order to strengthen protection of freedom of the media, an explicit guarantee of the following of its constituent elements is of great value:

- there should be no prior censorship;
- any bodies with regulatory powers over the media, including governing bodies of public media, should be independent from political, economic or other undue influences;
- the right of journalists to protect their confidential sources should be guaranteed;
- there should be no licensing of print media outlets;
- there should be no licensing of individual journalists; and
- journalists should be guaranteed the right to associate freely.

The following paragraphs deal with these issues in detail.

5.1 No Prior Censorship

No person or media outlet should have to ask the permission of a State body before publishing. This mans that no media – be it a newspaper, television programme or any other form of publication – should be required to submit to a State censorship body prior to dissemination. This is a fundamental tenet of international law that is reflected in many constitutions as well as in international human rights treaties. Article 13(2) of the ACHR, for example, states:

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship.

The European Court of Human Rights, although it has refused to rule out prior restraint altogether, for example in the context of providing ratings for films, has said that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny".[47] Although it has not addressed the issue directly, it is clear from its case law that the European Court would not contemplate a system of prior censorship of the media.

Explicit prohibitions on censorship can be found in a number of national constitutions (see Comparative Constitutional Examples, below).

[46] See *Castells v. Spain*, note 43, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.
[47] *Observer and Guardian v. the United Kingdom*, 24 October 1991, Application No. 13585/88, para. 60.

5.2 Independence of Media Bodies

In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently from government control. This helps safeguard the media's role as public watchdog and the public's access to a wide range of opinions, especially on matters of public interest. It follows that any bodies with regulatory or governing powers over either public or private broadcasters should be independent and be protected against political interference. This relates to two main categories of institutions: bodies which license broadcasters and governing boards of public media outlets.

Regulatory Bodies

The need for regulatory bodies to be independent is recognised under international law. In a Joint Declaration of 2003, the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression stated:

> 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.[48]

Regional bodies, including the Council of Europe and the African Commission on Human and Peoples' Rights, have also made it clear that the independence of regulatory authorities is fundamentally important. The latter has adopted a *Declaration of Principles on Freedom of Expression in Africa*, which includes the following statement of principle:

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.[49]

The Committee of Ministers of the Council of Europe has adopted a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, which states in a pre-ambular paragraph:

> [T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector…specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.[50]

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities and which clearly affirms and protects their independence.[51] The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.[52]

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[48] Joint Declaration of 18 December 2003. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument
[49] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.
[50] Recommendation No. R(2000) 23, adopted 20 December 2000.
[51] *Ibid.*, Guideline 1.
[52] *Ibid.*, Guideline 5.

A number of national constitutions include explicit guarantees for the independence of media regulatory bodies. The recently adopted South African Constitution is often given as an example; Article 192 guarantees the independence of the broadcast regulator.

Public Media

The same underlying reasons for independence of regulatory bodies also apply to public broadcasters and, again, this principle finds strong support in both international and national law. Principle VI of the African Declaration, for example, states, in part:

> State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:
>
> - public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
> - the editorial independence of public service broadcasters should be guaranteed;

A whole Recommendation of the Committee of Ministers of the Council of Europe provides for the independence of public broadcasters.[53] This Recommendation states, among other things: "The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy".[54]

The same principle finds support in national case law. For example, the Supreme Court of Ghana has noted: "[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."[55]

5.3 Protection of Sources

Journalists routinely depend on contacts outside the media for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to stimulate public debate or to expose wrongdoing. In many instances, anonymity is the precondition upon which the information is provided to the journalist by the source; this may be motivated by fear of repercussions which might adversely affect their job security or even physical safety.

In recognition of the importance of this flow of information, both national and international courts have recognised that the media enjoy a special privilege allowing them not to reveal confidential sources of information unless certain stringent conditions are met. In the seminal case of *Goodwin v. United Kingdom*, the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his right to freedom of expression. In its decision, the Court emphasised the importance of affording safeguards to the press generally and of protecting journalists' sources, in particular. It held:

> 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

[53] Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to member states on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.
[54] Principle 1.
[55] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

> 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.[56]

Several international bodies have issued statements to this effect. In 1993, the European Parliament adopted a Resolution affirming journalists' right to protect their sources,[57] and the Concluding Document of the OSCE's 1986-1989 Vienna Follow-Up Meeting states:

> [J]ournalists … are free to seek access to and maintain contacts with, public and private sources of information and that their need for professional confidentiality is respected.[58]

The *Declaration of Principles on Freedom of Expression* adopted by the Inter-American Commission on Human Rights states:

> Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.[59]

And the African Commission's *Declaration of Principles on Freedom of Expression in Africa* states:

> 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:
> - 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.[60]

The Council of Europe's Committee of Ministers has issued an entire Recommendation on the protection of journalists' sources,[61] outlining the circumstances under which disclosure may be considered 'necessary' and setting out procedural safeguards for journalists. The Recommendation's Explanatory Memorandum makes it clear that the privilege of confidentiality of sources is a very strong one which can be overcome only in "exceptional circumstances where vital public or individual interests are at stake and can be convincingly established."[62] This echoes the European Court of Human Rights' strong concern that

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[56] *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights), para. 39.
[57] Report No. A3-0434/93, published 18 January 1994, OJ C 44, p. 34.
[58] Conference for Security and Co-operation in Europe, Follow-up Meeting 1986-1989, Vienna, 4 November 1986 to 19 January 1989, Concluding Document, para. 40.
[59] Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.
[60] Note 49.
[61] Recommendation No. R(2000)7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted 8 March 2000.
[62] Council of Europe Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, para. 28.

> [L]imitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.[63]

The Group of Specialists that prepared the Recommendation considered that the privilege of confidentiality could be overcome only when the information would be necessary to protect human life, to prevent major crime or in the defence of a person accused of having committed a major crime.[64] The Recommendation itself states that the principle of confidentiality can never be outweighed in defamation proceedings.

It is also important to highlight Principle 2 of the Council of Europe's Recommendation, under which, in addition to the journalist who has direct contact with the source, persons such as editors or secretarial staff benefit from the protection.[65]

In a number of countries, sources are protected explicitly in the constitution. In other countries, the general constitutional guarantee of freedom of expression has been interpreted to include the right to protect sources.[66] Many countries either with our without constitutional guarantees have laws protecting source confidentiality.[67] Although legislation on this is always useful, there are a number of advantages to having it specifically spelt out in the constitution. These include the overriding status of constitutional guarantees and the fact that this clearly identifies it as a right, as opposed simply to a legislative privilege.

5.4 Licensing and Registration

It is well-established in international law that any licensing requirement for the print media, or for journalists as individuals, is incompatible with the right to freedom of expression, although licensing of the broadcast media or cinema enterprises may be legitimate.

Journalists

The seminal case on the licensing or mandatory registration of individual journalists is the 1985 Inter-American Court of Human Rights' decision in a case brought by Costa Rica, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*.[68] The Court ruled unanimously that a licensing or registration requirement for all

[63] *Goodwin v. United Kingdom*, note 56, para. 40.
[64] As quoted in the Explanatory Memorandum, note 62, paras. 37-41.
[65] See also *De Haes and Gijsels v. Belgium*, 24 February 1997, Application No. 19983/92 (European Court of Human Rights) in which the the right not to disclose information identifying a source was extended to both an editor and a journalist (para. 55).
[66] In Germany, the Constitutional court has recognised the principle as inherent in the protection of freedom of the press: BverfGE 64, 108. In Japan, the Supreme Court upheld a ruling by the Sapporo District Court that, when giving evidence, journalists may refuse to divulge information about a source unless the information is necessary to safeguard the fairness of a criminal trial: Sasaki v. The Hokkaido News, Inc., 930 Hanrei Jihô 44, Sapporo District Court, 30 May 1979; affirmed 937 Hanrei Jihô 16, Sapporo High Court, 31 Aug. 1979; affirmed 30 Minshû 403, S. Ct (Third Petty Bench), 8 March 1980. The Norwegian Supreme Court has also upheld this right. See *Edderkopp case*, 15 January 1992, LNR 10/1992, JNR 34/1991.
[67] See, for example, Article 11 of the Mass Media Law of Azerbaijan, adopted 7 December 1999, amended 28 December 2001; Articles 1 and 4, Indonesian Press Law, Law No. 40 of 1999; Article 6, Jordanian Press and Publications Law of 1998, as published in the Official Gazette on 1 September 1998; Article 46, Press Act of Malta (1974, as last amended in 2000); Article 31 of the Austrian Media Act 1981. See also several of the laws of the German States (*Länder*), for example, paragraph 24(1) of North Rhine Westphalia's Press Law.
[68] *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.

journalists, effected through compulsory membership of a professional association, constituted a violation of the right to freedom of expression. It had been argued before the Court that the licensing of journalists was necessary for three different reasons. First, compulsory licensing was necessary for public order and the 'normal' way to organize the practice of the profession in many different countries. Second, the compulsory licensing scheme sought to achieve higher professional and ethical standards, which would benefit society at large and secure the right of the public to receive full and truthful information. Finally, licensing schemes would guarantee the independence of journalists in relation to their employers.

The court accepted none of these arguments. Examining the first argument, the Court accepted that ensuring "the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles" was a legitimate aim. However, the Court also observed that public order depends in many ways on respect for freedom of expression:

> Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard….[69]

While the Court agreed that many other professions are regulated through entry requirements, such as law or medicine, it pointed out that journalism is a fundamentally different activity:

> [J]ournalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional 'colegio'. The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom "to seek, receive, and impart information and ideas of all kinds ... either orally, in writing, in print...." 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.[70]

The Court rejected, therefore, that public order arguments could legitimately be invoked to justify the licensing of individual journalists.

The Court similarly dismissed the argument that licensing schemes are necessary to fulfil the public's right to be informed by raising professional standards:

> In principle, it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. A system that controls the right of expression in the name of a supposed guarantee of

[69] *Ibid.*, para. 69.
[70] *Ibid.*, paras. 71-72.

> the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.[71]

Turning, finally, to the argument that a licensing scheme would strengthen the profession and thereby help protect media workers against their employers, the Court noted that it would be perfectly possible to do this without licensing journalists.

Other courts, national as well as international, have also held licensing requirements or requirements to join some form of national association as a prerequisite to becoming a journalist to constitute a violation of the right to freedom of expression. The High Court of Zambia, in a decision released in August 1997, struck down an attempt to establish a statutory body to regulate journalists.[72] The Court stressed that statutory licensing of journalists, as proposed in the legislation, would breach the rights to freedom of expression and association.

The principle that the journalistic profession should not be licensed also finds support in several international declarations. The African Commission on Human and Peoples' Rights sees licensing requirements as a restriction on entry into the profession and it has stated, in its *Declaration of Principles on Freedom of Expression in Africa*:

> The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.[73]

The Inter-American Commission on Human Rights, following the Inter-American Court's judgment, has issued a Declaration stating:

> Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.[74]

Within Europe, a *Declaration on the Freedom of Expression and Information* was adopted in 1982 by the Committee of Ministers of the Council of Europe. Principle II states that the Member States:

> Declare that in the field of information and mass media they seek to achieve the following objectives:
> (…)
> b) absence of censorship or any arbitrary controls or constraints on participants in the information process….

A Joint Declaration by the UN, OAS and OSCE special mandates on freedom of expression stated simply, "Individual journalists should not be required to be licensed or to register."[75]

A number of national constitutions explicitly prohibit licensing requirements for journalists (see Comparative Constitutional Examples, below). This has the advantage of making it absolutely clear that licensing should not be imposed and is, therefore, to be recommended.

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[71] *Ibid.*, para. 77.
[72] *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59.
[73] Note 49, (Principle X(2)).
[74] Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.
[75] Note 48.

Print Media

Purely technical registration systems, pursuant to which print media outlets are required to provide certain information to the authorities, may be legitimate but only if they allow no discretion to the authorities to refuse registration. In this case, registration is not used as a mechanism of censorship but rather as a source of information on ownership. In the UK, for example, the Newspaper Libel and Registration Act 1881 required registration – which the authorities cannot refuse to grant – primarily to trace the owners in case of defamation actions against them. Registration under this Act is not necessary if the publication is owned by a company that is incorporated under corporate law, if the publication is distributed free of charge or if it is published at intervals exceeding 26 days.[76] In Sweden, the registration requirement is not enforced but an owner who does not register will be personally liable for any offences committed by the publication.[77]

However, even apparently 'benign' registration regimes can be problematic and there is always a danger of abuse; licensing systems are even more problematic and a clear breach of the right to freedom of expression. As a result, the UN, OAS and OSCE special mandates on freedom of expression stated, in a Joint Declaration of 2003:

> 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.[78]

The UN Human Rights Committee has frequently expressed concern about registration or licensing systems for the print media. In 1999, for example, the Committee noted, in respect of Lesotho's media regulatory system:

> 23. The Committee is concerned that the relevant authority under the Printing and Publishing Act has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of article 19 of the Covenant.[79]

The same year, the Committee expressed concern about the newspaper licensing laws in Cambodia, stating, "The Committee is concerned at … the Press Laws which impose license requirements…."[80]

A March 2000 case before the Committee involving Belarus provides a good example of the potential for abuse of registration systems. The applicant had been sanctioned for failure to register a pamphlet of which he had printed just 200 copies and the pamphlets had been confiscated. In its analysis of the complaint, the Committee first clarified that the registration requirement in itself constitutes a clear interference with the right to freedom of expression, which therefore needs to be justified:

> The Committee notes that … publishers of periodicals … are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing

[76] Companies Act 1985.
[77] Freedom of the Press Act, Chapter 5.
[78] Note 48.
[79] Concluding Observations on Lesotho's Initial Report, 8 April 1999, CCPR/C/79/Add.106, para. 23.
[80] Concluding Observations on Cambodia's Initial Report, 27 July 1999, CCPR/C/79/Add.108, para. 18.

> these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to impart information.[81]

The Committee rejected the State's claim that the registration requirement was necessary to protect public order or the rights of others and held the sanction and confiscation to be a breach of the applicant's right to freedom of expression.

The European Court of Human Rights has similarly warned of abusive registration laws. In *Gaweda v. Poland*, it criticised a law that allowed registration to be refused if the proposed name of the publication was "inconsistent with the real state of affairs." The Court held that it is not a permissible function of registration systems to impose requirements relating to the names of publications:

> [To] require of a title of a magazine that it embody truthful information, is … inappropriate from the standpoint of freedom of the press. A title of a periodical is not a statement as such, since its function essentially is to identify the given periodical on the press market for its actual and prospective readers.[82]

While the Court appreciated that in the Polish system, the registration procedure was administered by an independent body whose decisions could be appealed to the courts, it observed that the procedure, though admirable from the point of view of process, had still resulted in a decision that violated the right to freedom of expression.[83]

A number of national courts have also held registration systems to be illegitimate. As early as 1892, for example, the Netherlands Supreme Court declared unconstitutional all forms of administrative licensing requirements affecting the dissemination of printed matter.[84]

A number of constitutions specifically rule out registration or licensing of the print media. In other cases, constitutions put this more positively, stating that everyone has the right to establish a media outlet.

5.5 Freedom of Association

The right of everyone to join in associations and trade unions is a separate human right recognised in the UDHR and the ICCPR. Article 20(1) of the UDHR provides: "Everyone has the right to freedom of peaceful assembly and association." Article 20(2) states: "No one may be compelled to belong to an association." The right to freedom of association is enshrined in Article 22 of the ICCPR:

> 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.

These rights are also enshrined in the main regional human rights treaties.[85]

[81] *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997, para. 8.1.
[82] *Gaweda v. Poland*, 14 March 2002, Application No. 26229/95, para. 43.
[83] *Ibid.*, para. 47.
[84] HR 7 November 1892, W 625.9. This is now reflected in Article 7 the Netherlands Constitution.
[85] See Article 11 of the ECHR, Article 16 of the ACHR and Article 10 of the ACHPR. See also the African Commission's *Declaration of Principles on Freedom of Expression in Africa*, note 49, Principle X.

The right to freedom of association may be subject to similar restrictions as the right to freedom of expression. Any interferences with the right, therefore, have to pass the strict three-part test outlined in Chapter 6.

Freedom of association is of particular importance to journalists as a means through which to strengthen their independence and professionalism. Through an association, journalists can be empowered to criticise the authorities and they are also more likely to fight for editorial independence in the media.

Several international courts and tribunals have elaborated on the parameters of the right to freedom of association. In *Wilson and National Union of Journalists v. the United Kingdom*,[86] a case involving the de-recognition of trade union at a national newspaper which resulted in the collapse of existing collective bargaining arrangements, the European Court delivered a strong ruling stating that trade union activism is at the core of the right to freedom of association. This case followed earlier case law in which it was established that States have a strong positive obligation to ensure that the actions of a private, non-State, employer do not infringe the right to freedom of association. In *Young, James and Webster v. the United Kingdom*, the European Court held:

> Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained.[87]

Courts have also stressed that the right to freedom of association means that no one can be forced to join an association. The Inter-American Court of Human Rights, in an Advisory Opinion, held that while compulsory membership in a professional association may be acceptable in the case of lawyers and doctors, similar requirements cannot be placed on journalists without violating the right to freedom of expression.[88]

5.6 Comparative Constitutional Examples

Lebanon
Article 13 of the Constitution provides:
The freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association are guaranteed within the limits established by law.

Turkey
Article 28(1) of the Constitution provides:
The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee.

South Africa
Article 16(1) of the South African Constitution provides:
Everyone has the right to freedom of expression, which includes -
1. freedom of the press and other media;
2. freedom to receive or impart information or ideas;

[86] 2 July 2002, Application Nos. 30668/96, 30671/96 and 30678/96.
[87] 13 August 1981, Application Nos. 7601/76, 7806/77, para. 49.
[88] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 68. See also *Sigurjonsson v. Iceland*, 30 June 1993, Application No. 16130/90 (European Court of Human Rights).

3. freedom of artistic creativity; and
4. academic freedom and freedom of scientific research.

Article 192 provides:
National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

Canada
Article 2(b) of the Canadian Charter of Rights and Freedoms provides:
Everyone has the following fundamental freedoms:
…
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Colombia
Article 20 of the Constitution of Colombia provides:
Every individual is guaranteed the freedom to express and diffuse his/her thoughts and opinions, to transmit and receive information that is true and impartial, and to establish mass communications media.

The mass media are free and have a social responsibility. The right of rectification under equitable conditions is guaranteed. There will be no censorship.

Austria
Article 13(2) of the Austrian Basic Law provides:
The press may be neither subjected to censorship nor restricted by the licensing system.

Switzerland
Article 17 of the Swiss Constitution provides:
(1) The freedom of the press, radio and television as well as all other forms of public broadcasting of productions and information is guaranteed.
(2) Censorship is prohibited.
(3) Editorial secrecy is guaranteed.

South Korea
Article 21 of the Constitution of South Korea provides:
(1) All citizens enjoy the freedom of speech and the press, and of assembly and association.
(2) Licensing or censorship of speech and the press, and licensing of assembly and association may not be recognized.

Portugal
Article 38 of the Constitution of Portugal provides:
(1) Freedom of the press is safeguarded.
(2) Freedom of the press includes:
a) The freedom of expression and creativeness for journalists and literary collaborators as well as a role for the former in giving editorial direction to the concerned mass media, save where the latter belong to the State or have a doctrinal or denominational character;
b) The journalists' right of access to the sources of information, protection of their professional independence and secrecy, and election of editorial councils, in accordance with the law;
c) The right to start newspapers and any other publication regardless of any prior administrative authorization, deposit, or qualification.
3. The law shall require, in general terms, the disclosure of the ownership, and the means of financing, of the mass media.
4. The State shall guarantee the freedom and independence of the mass media from political and economic powers; it shall impose the principle of speciality upon companies that own general information media; it shall treat and support those companies in a non-discriminatory

manner and shall prevent their concentration, in particular through multiple or inter-locking financial interests.
5. The state shall guarantee the existence and operation of a public radio and television service.
6. The mass media in the public sector shall be so structured and operated as to be independent of the Government, the Public Service and other public bodies, and to guarantee opportunities for the expression of, and challenge to, different lines of opinion.
7. Radio and television stations shall operate only under a licence granted for the purpose after a public competition, in accordance with the law.

Article 39 provides:
1. The High Authority for the Mass Media shall guarantee the right to information, the freedom of the press, the independence of the mass media from political and economic powers, opportunities for expression of, and challenges to, different lines of opinion, and the exercise of the right to broadcasting time, the right of reply and the right of political argument.
2. The law shall determine all other functions and competence of the High Authority for the Mass Media and shall regulate its functioning.
3. The High Authority for the Mass Media shall be an independent body, composed, in accordance with the law, of 11 members, as follows:
a) One judge appointed by the Superior Council for the Judiciary, who shall preside;
b) 5 members elected by the Assembly of the Republic by a system of proportional representation and the Hondt highest average method;
c) 1 member appointed by the Government;
d) 4 members representing public opinion, the mass media and the arts.
4. The High Authority for the Mass Media shall participate in the procedures for licensing of radio and television channels, in accordance with the law.
5. The High Authority shall participate in the appointment and dismissal of directors of the public mass media, in accordance with the law.

Paraguay
The Constitution of Paraguay contains several provisions that are relevant to the protection of media freedom:

Article 26(1)
Free expression and the freedom of the press, as well as the dissemination of thoughts and opinions, without any type of censorship, and with no more limitations than the ones established by this Constitution, are hereby guaranteed…

Article 27(1)
The operation of mass communication media organizations is of public interest; therefore, they cannot be closed or suspended.

Article 29
(1) The practice of journalism, in all its forms, is free and is not subject to prior authorization. In performing of their duties, journalists of mass communication media organizations will not be forced to act against the dictates of their conscience or to reveal their sources of information.
(2) A columnist has the right to publish his opinion uncensored in the newspaper for which he works as long as his work bears his signature. The newspaper management may exempt itself from any responsibility by stating its disagreement with the columnist.
(3) The journalist's right of authorship to the product of his intellectual, artistic, or photographic work, no matter what is its techniques, is hereby recognized under the terms of the law.

Thailand
Section 39 of the Thai Constitution provides:
A person shall enjoy the liberty to express his or her opinion, make speeches, write, print, publicize, and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the deterioration of the mind or health of the public.

The closure of a pressing house or a radio or television station in deprivation of the liberty under this section shall not be made.

The censorship by a competent official of news or articles before their publication in a newspaper, printed matter or radio or television broadcasting shall not be made except during the time when the country is in a state of war or armed conflict; provided that it must be made by virtue of the law enacted under the provisions of paragraph two.

The owner of a newspaper or other mass media business shall be a Thai national as provided by law.

No grant of money or other properties shall be made by the State as subsidies to private newspapers or other mass media.

Section 40 provides:
Transmission frequencies for radio or television broadcasting and radio telecommunication are national communication resources for public interest.

There shall be an independent regulatory body having the duty to distribute the frequencies under paragraph one and supervise radio or television broadcasting and telecommunication businesses as provided by law.

In carrying out the act under paragraph two, regard shall be had to utmost public benefit at national and local levels in education, culture, State security, and other public interests including fair and free competition.

Brazil
Article 5 of the Constitution of Brazil provides, in part:
IX. the expression of intellectual, artistic, scientific and communications activities is free, without any censorship or licence;
XIV. access to information is ensured to everyone and confidentiality of the source is protected whenever necessary for the professional activity;

Article 220 provides:
(0) Expression of thought, creation, speech, and information, in any of their forms, processes or media, shall not be subject to any restriction, with due regard for the provisions of this Constitution.
(1) No law shall contain any provision which may represent an impediment to full freedom of press information in any social communication medium, with due regard for the provisions of Article 5 IV, V, X, XII, and XIV.
(2) Any and all censorship of a political, ideological, and artistic nature shall be forbidden.
…
(6) The publication of printed communication media shall not require any official license.

Macedonia
Article 16 of the Constitution of the Former Yugoslav Republic of Macedonia provides:
…
(2) The freedom of speech, public address, public information and the establishment of institutions for public information is guaranteed.
(3) Free access to information and the freedom of reception and transmission of information are guaranteed.
…

(6) The right to protect a source of information in the mass media is guaranteed.
(7) Censorship is prohibited.

Haiti
Article 28(2) of the Constitution of Haiti provides:
Journalists may not be compelled to reveal their sources. However, it is their duty to verify the authenticity and accuracy of information. It is also their obligation to respect the ethics of their profession.

Mozambique
Article 73(3) of the Constitution of Mozambique provides:
Freedom of the press shall include in particular the freedom of journalistic expression and creativity, access to sources of information, protection of professional independence and confidentiality, and the right to publish newspapers and other publications.

Japan
Article 21 of the Constitution of Japan provides:
(1) Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed.
(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Afghanistan
Article 34(3) of the Constitution of Afghanistan provides:
Every Afghan has the right to print or publish topics without prior submission to the state authorities …

Norway
Article 100 of the Constitution of Norway provides, in part:
There shall be freedom of expression.
No one may be held liable at law, except on the basis of contract or other private legal basis, for having conveyed or received information, ideas or messages unless such liability can be justified in consideration of the reasons for the right to freedom of expression namely the search for truth, democracy and the individual's free formation of opinions. Such legal responsibility must be clearly prescribed by law.
Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Only clearly defined limitations to this right may be set, when justified by particularly weighty considerations that outbalance the reasons for the right to freedom of expression.
Prior censorship and other preventive measures may not be used unless it is necessary to protect children and young people from harmful influence of moving pictures. Censorship of letters may only be implemented in institutions.
…
It is a duty of the State authorities to facilitate an open and enlightened public dialogue.

The Netherlands
Article 7 of the Netherlands Constitution provides:
1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law …

6. Permissible Limitations on Freedom of Expression

Recommendation:

- The Constitution should permit restrictions on the right to freedom of expression only where these:
  - are provided by law;
  - pursue a list of legitimate aims which is provided in the Constitution; and
  - have been shown by the authorities to be necessary in a democratic society.

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, the constitution should set out strictly defined parameters within which any limitations must remain. Article 19(3) of the ICCPR lays down the conditions under international law pursuant to which the right to freedom of expression may be restricted:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Similar formulations can be found in the ECHR and in the ACHR. These have been interpreted as requiring restrictions to meet a strict three-part test:[89]

1. the restriction must be provided by law;
2. the restriction must pursue one of the legitimate aims listed in Article 19(3) of the ICCPR; and
3. the restriction must be "necessary".

In order for a restriction on freedom of expression to be considered 'legitimate' under international law, all three of these hurdles must be overcome. It is not sufficient that a restriction is simply 'provided by law', for example: it must also be demonstrated to pursue a legitimate aim *and* be 'necessary' for that purpose.

Courts around the world have analysed each of the three parts of this test. We will elaborate on them in the following paragraphs.

6.1 Prescribed by Law

International law and most constitutions only permit restrictions on the right to freedom of expression that are set out in law. The purpose of this requirement is twofold. First, it prevents freedom of expression from being limited at the discretion of officials. It is only legitimate to restrict a fundamental right where legislators have specifically weighed the competing interests and decided that some other public or private interest overrides the right to freedom of expression. To put it another way, if officials can restrict rights at will, rights have very

[89] See *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee). See also *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45 (European Court of Human Rights).

little meaning. Second, it means that individuals will be able to be aware of the limits to their right to freedom of expression and act accordingly.

Practically all of the nations in the Middle East region only allow restrictions that are provided by law. Article 13 of the Lebanese Constitution is typical, providing:

> The freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association are guaranteed within the limits established by law.

In accordance with the basic rationale for this part of the test, it imposes some conditions on laws which restrict freedom of expression. First, the law has to meet certain standards of clarity and accessibility so that individuals can foresee what is prohibited and so that officials cannot abuse the law for purposes for which it is not intended. The European Court of Human Rights has elaborated on this requirement under the ECHR:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[90]

This is akin to the "void for vagueness" doctrine established by the US Supreme Court, which is also found in constitutional doctrine in other countries. The US Supreme Court has explained why loosely worded or vague laws may not be used to restrict freedom of expression:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (references omitted)[91]

Second, the "provided by law" part of the test for restrictions means that laws should not grant authorities excessively broad discretionary powers to limit expression. This would again undermine one of the main purposes of this limitation on restrictions. The UN Human Rights Committee has repeatedly expressed concern about excessive official discretion in the context of media regulation. For example, in 2000, it expressed concern, "about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters."[92] National courts have expressed the same concern.[93]

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[90] *The Sunday Times v. United Kingdom*, note 89, para.49.
[91] *Grayned v. City of Rockford*, 408 U.S. 104, pp. 108-9.
[92] Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 21. See also its Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para. 23.
[93] See *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983) 31 O.R. (2d) 583 (Ont. H.C.), where the Ontario High Court struck down a law giving film censors wide powers to approve or

6.2 Legitimate Aim

International law and most constitutions only permit restrictions on freedom of expression to serve certain limited overriding public and private interests. The purpose of this part of the test is to prevent abuse of the power to restrict freedom of expression by ensuring that this may be done to protect only very important interests.

Different constitutions and international treaties approach this issue in two main ways. Some, like the ICCPR, provide a full and exhaustive list of the legitimate aims that may justify a restriction on freedom of expression. In the case of the ICCPR, it is clear from both the wording of Article 19(3) and the views of the UN Human Rights Committee that the list is exclusive; restrictions that do not serve one of the legitimate aims listed constitute a violation of the right to freedom of expression.[94] This is also the position under the ECHR and ACHR.[95] The other approach, exemplified, for example, by Canada (see box below), is not to provide a list of aims but, rather, to leave it up to the courts to determine whether or not a particular aim is of sufficient importance to warrant overriding a constitutionally protected right.

The advantages of the first approach, whereby a clear list is provided, are fairly obvious. It ensures clarity and consistency regarding the grounds for restricting freedom of expression rather than leaving this up to courts, which may come to different conclusions, particularly in a civil law system like that of Iraq. It also takes this very important matter out of the hands of judges, leaving it, instead, to the constitution, which is surely more appropriate.

As with the first part of the test for restrictions on freedom of expression, this part of the test involves certain conditions. A restriction must actually be designed to protect one of the legitimate aims; it is illegitimate to invoke a legitimate aim as an excuse to pursue a political or other illegitimate agenda.[96]

The restriction cannot have a merely incidental effect on the legitimate aim; it must be primarily directed at it. The Indian Supreme Court has noted:

> So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.[97]

In assessing the legitimate aim, courts go beyond the general aim the law serves and look at its specific objectives. The Canadian Supreme Court has noted:

> Justification … requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.[98]

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deny films.

[94] See, for example, *Mukong v. Cameroon*, note 89, para. 9.7.

[95] See, for example, *Sunday Times v. the United Kingdom*, note 89, paras. 54-57 (European Court of Human Rights); and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 31, (Inter-American Court of Human Rights).

[96] See Article 18 of the ECHR. See also *Benjamin and Others v. Minister of Information and Broadcasting*, 14 February 2(1), Privy Council Appeal No. 2 of 1999 (Judicial Committee of the Privy Council).

[97] *Thappar v. State of Madras*, (1950) SCR 594, p. 603.

[98] *R. v. Zundel*, (1992) 2 SCR 731, p. 733.

Regard must be had to both the purpose and effect of the restriction. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld:

> [B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.[99]

6.3 Necessary in a Democratic Society

The third part of the test for restrictions on freedom of expression, also found in international law and most constitutions, is that the restriction must be necessary to protect the legitimate aim. This part of the test is the most critical element and the basis upon which the vast majority of international and national cases are decided. It ensures that the restriction really does serve to protect the legitimate aim and that it does so in a targeted way whose impact is limited to the harmful speech. In the absence of this requirement, even a clumsy, broadly worded and ineffective measure which had a seriously detrimental effect on freedom of expression would be permitted.

Different constitutions and treaties use different terms to describe this part of the test; treaties normally permit only restrictions which are 'necessary' or 'necessary in a democratic society' while national constitutions use a range of terms including 'reasonably justifiable in a democratic society', 'reasonably required in a democratic society' and various other related combinations. The advantage of adding 'in a democratic society' to the test is that it incorporates by reference the full range of democratic values, ensuring the analysis of what is necessary is based on these democratic values. What may be considered necessary in a dictatorship may not pass muster in a democracy.

The South African Constitution goes a step further than most constitutions by providing an explicit list of factors to be taken into account when assessing the necessity of a restriction (see box below). This gives valuable guidance to both courts and legislators and helps ensure consistency of interpretation and implementation.

Regardless of the exact wording of the national constitutional provisions, this part of the test presents a high standard to be overcome by the State seeking to justify a restriction on freedom of expression. The use of the word "necessary" in international law implies that, when deciding to restrict freedom of expression, the government must be faced with a situation of need, not merely convenience. The European Court has held:

> [W]hilst the adjective "necessary", within the meaning of Article 10 (2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".[100]

Courts around the world have elaborated on the specific requirements of this test. Three distinct elements can be discerned. First, the measures taken must be carefully designed to meet the objective in question. They should not be arbitrary, unfair or irrational.[101] If a government cannot provide any evidence to show that a particular interference with freedom of expression is necessary, the restriction will fail on this ground.[102] While States may, and

[99] *R. v. Big M Drug Mart Ltd.*, (1985) 1 SCR 295, p. 331 (Supreme Court of Canada).
[100] *Sunday Times v. the United Kingdom*, note 89, para. 59.
[101] See *R. v. Oakes* (1986), 1 SCR 103, pp. 138-139 (Supreme Court of Canada).
[102] See, for example, *Autronic v. Switzerland* (22 May 1990, Application No. 12726/87, European Court of Human Rights) where the respondent State argued it needed to restrict the availability of satellite dishes in order to protect confidential satellite communications but could not provide any evidence that these signals could be

indeed should, protect various public and private interests, measures taken by them must be carefully designed so that they are effective in protecting those interests. It is a very serious matter to restrict a fundamental right and, when considering doing so, States are bound to reflect carefully on the various options open to them.[103]

Second, the interference should be designed to impair the right to freedom of expression "as little as possible".[104] If there are various options to protect a legitimate interest, then the one which least restricts the protected right must be selected.[105] In applying this rule, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But subject only to such practical limits, restrictions must not be overbroad. Constitutional courts such as the US Supreme Court have commented on the important nature of this requirement:

> Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.[106]

Third, there must be proportionality between the harm caused by the measures taken to freedom of expression and the benefits to the legitimate aim.[107] In particular, the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction that provided limited protection to reputation but which seriously undermined freedom of expression, for example, would not pass muster.[108] Democratic societies depend on the free flow of information and ideas and it is only when the overall public interest is served by restricting that flow that such a restriction can be justified. This implies that, for a restriction to be justified, its benefits of must outweigh its costs.

6.4 Comparative Constitutional Examples

Poland

Article 31(3) of the Polish Constitution provides:

Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

South Korea

Article 37(2) of the Constitution of South Korea provides:

The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

picked up with ordinary satellite dishes.

[103] For example, in *Observer and Guardian v. the United Kingdom*, note 47, the European Court of Human Rights found a violation of the newspapers' right to freedom of expression because the respondent government could have pursued other, less intrusive options and still have achieved the same result.

[104] *R. v. Big M Drug Mart Ltd.*, note 99, p. 352 (Supreme Court of Canada).

[105] See the judgment of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 31, para. 46.

[106] *Shelton v. Tucker*, 364 US 479 (1960), p. 488.

[107] *R. v. Oakes*, note 101, pp. 138-139 (Supreme Court of Canada).

[108] See, for example, *Open Door Counselling and Dublin Woman Well Centre and Others v. Ireland*, 29 October 1992, Application No. 1423/88 and 142335/88 (European Court of Human Rights), para. 73.

Angola
Article 52(1) of the Angolan Constitution provides:
The exercise of the rights, freedoms and guarantees of citizens may be restricted or suspended only in accordance with the law if such constitute a threat to public order, community interests, individual rights, freedoms and guarantees, or in the event of the declaration, a state of siege or emergency, and such restrictions shall always be limited to necessary and adequate measures to maintain public order, in the interest of the community and the restoration of constitutional normality.

Turkey
Article 13 of the Turkish Constitution provides:
(1) Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant Articles of the Constitution.
(2) General and specific grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed.

South Africa
Article 36 of the South African Constitution provides a detailed list of factors that should be taken into account when restricting rights, consistent with the commentary above:
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Bahrain
Article 31 of the Constitution of Bahrain provides:
The public rights and freedoms stated in this Constitution may only be regulated or limited by or in accordance with the law, and such regulation or limitation may not prejudice the essence of the right or freedom.

Fiji
Article 30(2) of the Constitution of Fiji states:
A law may limit, or may authorise the limitation of, the right to freedom of expression in the interests of:

a. national security, public safety, public order, public morality, public health or the orderly conduct of national or municipal elections;
b. the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including:

   (i) the right to be free from hate speech, whether directed against individuals or groups; and

   (ii) the right of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law;

c. preventing the disclosure, as appropriate, of information received in confidence;
d. preventing attacks on the dignity of individuals, groups or communities or respected offices or institutions in a manner likely to promote ill will between races or communities or the oppression of, or discrimination against, any person or persons;

e. maintaining the authority and independence of the courts;
f. imposing reasonable restrictions on the holders of public offices in order to secure their impartial and confidential service; or
g. regulating the technical administration of telecommunications;

but only to the extent that the limitation is reasonable and justifiable in a free and democratic society.

Canada

Section 1 of the Canadian Charter of Rights and Freedoms provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However, the Supreme Court has interpreted this as applying only for "a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees."[109]

Ethiopia

Article 29(6) of the Ethiopian Constitution provides:

These rights [to freedom of expression and of the press] can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.

Croatia

Article 16 of the Constitution of Croatia states:

(1) Freedoms and rights may only be restricted by law in order to protect freedoms and rights of others, public order, public morality and health.

(2) Every restriction of freedoms or rights shall be proportional to the nature of the necessity for restriction in each individual case.

[109] *R. v. Zundel*, (1992) 2 SCR 731, p. 733.

7. Enforcing the Right to Freedom of Expression

Recommendations:

- The constitutional guarantee of freedom of expression should be directly enforceable, against State as well as private bodies, and it should take precedence over domestic legislation that is incompatible with it to the extent of that incompatibility.
- Consideration should be given to a constitutional provision explicitly incorporating rights granted in international treaties into Iraqi law.

7.1 The Domestic Status of International Human Rights Law

International human rights law places a direct obligation on States to give effect to the rights they contain. Article 2 of the ICCPR provides:

> [E]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

In many countries, this obligation is discharged, in part, by providing for the direct enforceability of international law in the domestic legal order.

There are different ways of ensuring this. In some countries, international treaties are enforceable directly before the courts; in others, international law may 'inform' the interpretation of domestic law or some form of implementing legislation may be necessary to give effect to treaty rights. The Human Rights Committee, the body set up to supervise the implementation of the ICCPR, has acknowledged that all of these approaches are valid, so long as they result in effective implementation of rights. It has, however, expressed the strong preference that States should seek to make the rights granted in the ICCPR directly enforceable in the domestic legal system. In its General Comment No. 31, the Committee stated:

> Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.[110]

The situation in the UK can be taken as an example. Until October 2002, which was the date the Human Rights Act entered into force, international human rights law had a highly ambiguous status in UK law and was rarely applied by the courts. The Human Rights Act changed that by effectively incorporating the provisions of the ECHR into the domestic legal

[110] General Comment 31, on Article 2 of the Covenant: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 21 April 2004, UN Doc. CCPR/C/74/CRP.4/Rev.6.

system. This was warmly welcomed by the UN Human Rights Committee, which stated that "the resulting enhanced judicial scrutiny of executive and legislative action, and the legal duty placed upon the authorities to act consistently with rights [is] an important step towards ensuring compliance with, and remedies for breaches of, those Covenant rights."[111]

However, constitutional practice in other countries shows that it is not necessary to enact separate legislation to incorporate individual human rights treaties. The most straightforward way of achieving this is through a constitutional provision to the effect that rights found in international human rights treaties have 'direct effect' in the domestic legal system. Examples of such provisions can be found in a number of constitutions, such as those of Bulgaria and the Netherlands (see below under Comparative Constitutional Examples). Furthermore, the precise status of international treaties in the domestic legal system is also important. To provide effective implementation, international treaty provisions should prevail over any domestic legislation that is in conflict with it. The Committee has on several occasions expressed concern at situations where domestic law could 'override' rights guaranteed by the ICCPR.[112]

The French Constitution is one example of a constitution that confers superior status on international treaties. Article 55 of the Constitution states:

> Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.

Similar provisions are found in many other countries, such as the Netherlands and Algeria (see below under Comparative Constitutional Examples).

It may be noted that a number of constitutions make specific reference to the incorporation of international human rights law into the domestic legal system. This is an approach that may be considered by the drafters of Iraq's new constitution as well. For example, Bosnia and Herzegovina's new Constitution explicitly states that the provisions of the ECHR are directly applicable and "shall have priority over all other law".[113] Similarly, the Czech Republic's new Constitution states: "Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law." (see below under Comparative Constitutional Examples).

Afghanistan's new Constitution goes further and incorporates the UN Charter as well as the UDHR, even though the latter is not a treaty:

> The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.[114]

Similarly, Article 5 of Yemen's Constitution states:

[111] Concluding Observations on the implementation of the ICCPR in the United Kingdom, 6 December 2001, UN Doc. CCPR/CO/73/UKOT, para. 3.
[112] See, for example, the Concluding Observations made by the UN Human Rights Committee on the implementation of the ICCPR in Ukraine, 12 November 2001, UN Doc. CCPR/CO/73/UKR, para. 8; Concluding Observations on New Zealand, 7 august 2002, UN Doc. CCPR/CO/75/NZL, para. 8.
[113] Constitution of Bosnia Herzegovina, Article II(2).
[114] Article 7(1).

> The State shall abide by the United Nations Charter, the Universal Declaration of Human Rights, the Charter of the League of Arab States and the generally accepted norms of international law.

The Lebanese Constitution contains a similar provision in its preamble, stating that "Lebanon is … a founding and active member of the League of Arab States and abides by its pacts and covenants. Lebanon is also a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception."

7.2 Effective Remedies for Violations

International law requires States to ensure that individuals whose rights have been breached have an adequate remedy and, if necessary, access to a court or tribunal. Article 3 of the ICCPR states:

> Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This means that States must put in place appropriate judicial and administrative mechanisms to address claims of violations of rights. Such mechanisms should be easily accessible. The most straightforward way of providing remedies for violations of rights is through the normal judicial system. The ordinary courts should have jurisdiction to hear claims of violations; it should not be necessary to refer claims to a special constitutional court or tribunal. However, the UN Human Rights Committee has stressed that the establishment of an independent administrative body to investigate violations may be of particular importance:

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.[115]

Individuals whose rights have been breached should be provided with an effective remedy. The UN Human Rights Committee has noted that this generally entails "appropriate compensation", and that, where appropriate, reparations can involve "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[116] The underlying principle is that a remedy must be 'effective'.

In most countries, these remedies are not specifically provided for in the national constitution; they are within the powers of the courts or administrative bodies to order. However, Georgia's recently drafted Law on Freedom of Expression, a law that has some constitutional status, does spell out some of the remedies that may be provided, and also includes a 'preventive

[115] General Comment No. 31, note 110, para. 15.
[116] *Ibid.*, para. 16.

order', to stop a violation from taking place.[117] This allows, for example, a media outlet that has suffered harassment and intimidation from tax or financial authorities to seek a court order to stop these authorities from entering its premises unless the authorities have an objective and justifiable reason to do so.[118] Similarly, in a situation where local authorities have illegally prevented local NGOs from handing out leaflets, those NGOs might obtain an order prohibiting future interference.[119]

Finally, it is important that individuals are able to obtain a remedy for any violation of their rights, whether that violation is committed by the State or its agents or by private individuals.[120] If a State fails to ensure that remedies are available for violations of rights by a private actor, that failure in itself may constitute a violation of the rights concerned.[121]

7.3 Comparative Constitutional Examples

Bulgaria
Article 5 of the Constitution of Bulgaria provides, in part:
(2) The provisions of the Constitution shall apply directly.
(4) Any international instruments which have been ratified by the constitutionally established procedure, promulgated and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.

The Netherlands
Article 93 of the Constitution of the Netherlands provides:
Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

France
Article 55 of the French Constitution provides:
Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.

Bosnia and Herzegovina
Article II(2) of the Constitution of Bosnia and Herzegovina provides:
The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

Czech Republic
Article 10 of the Czech Constitution provides:
Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law.

Afghanistan
Article 7(1) of the Constitution of Afghanistan provides:

[117] Georgian Law on Free Speech, Article 6.
[118] See the judgment of the European Court of Human Rights in *Roemen and Schmit v. Luxembourg*, 25 February 2003, Application No. 51772/99.
[119] See the judgment of the UN Human Rights Committee in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[120] See General Comment No. 31 on Article 2 of the Covenant: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 21 April 2004, UN Doc. CCPR/C/74/CRP.4/Rev.6, para. 8.
[121] *Ibid.*

The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

Yemen
Article 5 of the Constitution of Yemen states:
The state shall abide by the United Nations Charter, the Universal Declaration of Human Rights, the Charter of the League of Arab States and the generally accepted norms of international law.

Lebanon
The preamble to the Lebanese Constitution provides:
Lebanon is Arab in its identity and in its association. It is a founding and active member of the League of Arab States and abides by its pacts and covenants. Lebanon is also a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception.

Oman
Articles 72 and 79 of the Constitution of Oman provide:
The application of this Basic Law shall not infringe the treaties and agreements concluded between the Sultanate of Oman and other States and international bodies and organisations.

Laws and procedures which have the force of law must conform to the provisions of the Basic Law of the State.

Algeria
Article 132 of the Algerian Constitution provides:
Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law.

Tunisia
Article 32 of the Constitution of Tunisia states:
Treaties duly ratified have an authority superior to laws.

Slovakia
Article 11 of the Constitution of Slovakia states:
International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties.

Russia
Article 15(4) of the Constitution of Russia states:
The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty apply.