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Agenda item:

THEMATIC DEBATE: “ONLINE PRIVACY AND FREEDOM OF EXPRESSION”

CONCEPT NOTE

EXECUTIVE SUMMARY

The 57th meeting of the IPDC Bureau agreed on the topic of ‘Online privacy and freedom of expression’ for the thematic debate at the 29th Council Session in November 2014. There are issues related to protection of each of these two rights online. The topic connects to Resolution 52 concerning Internet-related issues, adopted by the 37th General Conference of UNESCO in 2013. Five invited experts will have the opportunity to present at the session, with Council Members discussing the issues raised. The debate will be referenced in the Internet-related issues study, which itself will be presented to the 38th General Conference in November 2015. Regional representation and gender balance have been taken into account when inviting experts.

BACKGROUND

UNESCO is the United Nations specialized agency with a mandate to defend and promote freedom of expression and its corollary freedom of information. By Resolution 52 of the 37th General Conference in 2013, UNESCO is mandated to conduct a comprehensive and consultative study on Internet-related issues within its mandate, including access to information and knowledge, freedom of expression, privacy and ethical dimensions of the information society, the results of which should include options that inform the Organization’s reporting to the 38th General Conference in 2015. The study explores freedom of expression and privacy, amongst other issues of concern, and within the UNESCO conceptual framework of “Internet Universality” which promotes that Internet should be (i) human **Rights-based** (ii) “**Open**”, (iii) “**Accessible to all**” and (iv) nurtured by **Multi-stakeholder participation**.

United Nations Human Rights Council Resolutions 20/8 and 26/13 on “The promotion, protection and enjoyment of human rights on the Internet” affirm that the same rights that people have offline must also be protected online. These rights include freedom of expression, the right to information, and privacy, as also affirmed in the Final Statement of the World Summit on the Information Society (WSIS)+10 review event held at UNESCO in February 2013.

In consultations with UNESCO Member States on the Internet-related issues study during early 2014, the 29th Council session of IPDC was identified as one opportunity to take forward the research and

discussion. The subject relates to IPDC's mandate, which includes securing a healthy environment for the growth of free and pluralistic media in developing countries. IPDC also works to promote freedom of expression as well as innovation with regard to trends in communication. The Council sessions always feature thematic debates, and this lends itself to providing Member States with new information. This year's Council session represents an opportunity for Member States to respond in a way that can be factored into the Internet-issues study report.

SCOPE

The key issue in this thematic debate is the place of the rights to freedom of expression and privacy in the online environment. Amongst the many issues around these are those of balancing these rights in relation to each other, and to other rights (such as the right to life, liberty and security of person; and the right to development), how these rights can be protected across jurisdictions, and how balances can be established.

Five specific sub-topics of relevance to the Internet-issues study can be addressed in this regard. Elaborated below, these are: the "right to be forgotten"; privacy issues; post-2015 development, jurisdictional overlap and the multi-stakeholder model. Given the forum of IPDC, the focus will be especially on how these issues relate to media and to journalism.

As the concept note for the Internet-issues study noted, there is a complex balance between the two rights:

UNESCO follows the Universal Declaration of Human Rights (UDHR) which states that human rights are indivisible, recognizing thereby that particular actions concerning the right to privacy can impact on other rights, such as the right to freedom of expression, and vice versa. As noted in 37 C/Resolution 52, "privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and [...] such privacy should not be subject to arbitrary or unlawful interference". At the same time, as noted in the Discussion Paper prepared for the 37th General Conference, privacy may also not be used to shield violations of individual rights or to block the media from exposing these. Public interest must enter any calculation of reconciling rights, and Article 29 of the Universal Declaration of Human Rights sets out this test for the purpose and method required in this regard: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

These conditions for balancing all rights govern any legitimate limitation of rights, including in cyberspace. Particular aspects of cyberspace add further complexity to the equation of protecting rights against violations. Five specific issues can be identified that especially reveal this complexity:

(i) The 'right to be forgotten'

This issue was evident in the recent European Court of Justice decision¹ on a "right to be forgotten", which required Google to remove a link to an online newspaper archive, although it did

¹ European Commission. Factsheet on the "Right to be Forgotten" ruling. http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf

not require that archive to remove the e-article. At the same time, the Court stated that its ruling to delete search results about a particular individual's history would not apply to other information where there was overriding public interest in being able to discover the relevant facts. This issue about protecting individuals' rights to privacy and reputation, without violating freedom of expression and public interest, is one that merits unpacking.

(ii) Privacy issues in the digital age

The Internet lends itself not only to expanded freedom of expression, but also to expanded electronic tracking, surveillance and data-mining by various actors which can intrude on personal privacy and thereby also, in turn, have a chilling effect on online expression. In this way, for example national security issues in the online environment may compete with online privacy and/or free expression, whose balance international standards should help to inform. What this means in less general terms is not resolved. The UN General Assembly and the Office of the High Commissioner for Human Rights both underlined the importance of states reviewing their laws, policies, procedures and practices to enhance independent oversight and transparency. One debate is over more specific principles that could inform this exercise.

(iii) Post-2015 development and the Internet

Where free expression and the Internet fit into the post-2015 development agenda is a matter currently in debate. The extent to which these are background or extraneous issues, or whether they are fundamental to sustainable development is of global relevance. The 10-year review of the World Summit on the Information Society coincides with the process defining the post-2015 development agenda, thereby offering the international community an opportunity to consider the role of information and communication technologies and the Internet within the wider development agenda. Can development be conceived without specific reference to the rights to impart and receive information, and how does the Internet facilitate the right to development? How can "Internet development" be measured?

(iv) Jurisdictional overlap

Most of the Internet operates as a transnational information and communication space with many key Internet intermediaries operating in a cross-border manner. This frequently raises questions about competing jurisdictions where different interpretations and regimes exist concerning limits on privacy and/or free expression, but where actors within a given state may have access to content held or circulating outside that state. In this context, process-oriented options beyond a "clash of jurisdictions" can be explored which may provide for a balancing of rights according to local interpretation but also without any national limitation involved crossing the threshold and becoming violations.

(v) Multi-stakeholder model

Multi-stakeholder participation is a principle affirmed in the Final Statement of the WSIS+10 Review Event, which was endorsed at UNESCO's 37th General Conference in 2013. It is also part of the draft concept of Internet Universality, alongside human rights, openness and accessibility. There are debates about the meaning of multi-stakeholder model, and the realms to which it applies. One debate is whether the multi-stakeholder model of Internet governance apply not only to the governance of infrastructure and critical internet resources, but also to selected policy

issues, such as those related to privacy and freedom of expression. The multi-stakeholder model may have a valuable place in establishing balances of human rights online.

FORMAT AND SPEAKERS

The format is that the moderator to introduce the Internet-issues Study and provide an update on its progress, and then the five experts will each tackle one of the topics above. Each speaker will have 10 minutes to present. Subsequently, Member States will take the floor, and at the end, speakers will each have 5 minutes to respond to points made.