



For a Rights-Based Approach to Wireless Technology and Digital Dividend

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Introduction

The challenge placed upon me today is to demonstrate in 20 minutes that Human Rights have a great deal to offer to the wireless community movement at both a conceptual and operational level. Maybe many of you are already convinced so my apologies to you as you may find what I have to say redundant.

Maybe some of you may wonder why you should consider human rights while the human rights movement has taken so long to engage with you. This is a point well taken and I hope that my presence here, will go some way towards alleviating this experience. I can also assure you that while I am persuaded that the wireless movement will benefit a great deal from what international human rights has to offer, I am equally persuaded that the human rights movement will never be complete and effective without you. So if you could just bear with the fact that many of us human rights activists may be a bit of technological fossils, stuck in some middle ages, well that is ten years ago, I hope that we will find enough language and vision in common so that we can work together for the greater good of the protection and respect of the right of all to communicate¹.

We cannot afford to relegate human rights to the margins of what has been and still is the most important technological revolution of the last decade, with tremendous changes on our daily, social and political life. I believe that they should be at the core of what we do, now more than ever, given the important choices that lie ahead of us, particularly in the areas of spectrum allocation, new software and hardware developments, but also and most importantly because of the implications of this communication revolution on the exercise of many, almost all, human rights ...

¹ ARTICLE 19 defines the right to communicate as an umbrella term, encompassing within it a group of related, existing rights.

What I am proposing to do is to use the 20 minutes allocated as an imaginary canvass to draw in rough brushes some colours and shapes. I hope that you may be able to connect them with your own brushes, experiences and visions so that by the end of this conference or maybe a bit later, we will create a wireless painting whose vitality and energy will bind us together as a human rights, wireless, community.

1. INTERNATIONAL HUMAN RIGHTS AND THE WIRELESS MOVEMENT

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. Human rights are often expressed and guaranteed by national and international law.

Human rights within the United States are those rights recognized and guaranteed by its Constitution, including the Bill of Rights (the first ten amendments of the Constitution) and those recognized by international treaties ratified by the senate. The Constitution recognizes a number of inalienable human rights, including freedom of speech, freedom of the press and freedom of religion (first amendment), freedom from cruel and unusual punishment, and the right to a fair trial and trial by jury.

This paper is primarily concerned with rights guaranteed under international human rights law.

Sixty years ago, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948². The Declaration for the first time in human history, spelled out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, form the so – called International Bill of Human Rights³.

The wireless community may call upon a number of internationally recognised human rights through which it can frame its advocacy, work and policies proposals. By so doing, it may strengthen the legitimacy of these proposals while building strategic partnership and alliance with the international human rights movement.

The work of the wireless community may be guaranteed by the following rights. The list is not exhaustive though, and different aspects or objectives of the wireless movement may be grounded in other international human rights, such as the right to education (article 26 of the UDHR).

² For a copy of the UDHR, please refer to: <http://www.un.org/Overview/rights.html>

³ Please see the website of the Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

1.1. Article 19 – UDHR and ICCPR⁴

Article 19 of the *Universal Declaration on Human Rights* (UDHR)⁵ 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.

Article 19 of the Universal Declaration, and its twin Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),⁶ were carefully drafted to guarantee explicitly:

- an unfettered right to hold opinions;
- a right to express and disseminate ‘any information or ideas’;
- a right to have access to media;
- a right to seek and receive information and ideas.⁷

All three general regional treaties on human rights offer similar guarantees, specifically Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁸ Article 9 of the African Charter on Human and Peoples’ Rights,⁹ and Article 13 of the American Convention on Human Rights.¹⁰

The framers of the various international instruments guaranteeing the right to freedom of expression deliberately defined it in broad terms. In the first place, freedom of expression is not limited to the right to express oneself; it also includes the right to *seek* and to *receive* information from others. Second, the right to freedom of expression may be exercised *through any media*; it is not limited to traditional media such as newspapers or radio, but also covers any contemporary or future technology used for the exchange of ideas and information, including wireless communication devices¹¹.

1.2. Article 27 – freedom to practice one’s own culture

⁴ This subsection and the following two are extracted from ARTICLE 19, Statement on the Right to Communicate, 2003

⁵ UN General Assembly Resolution 217A(III), 10 December 1948.

⁶ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. As of December 2002, it had been ratified by 149 States.

⁷ See, for example, the UN Human Rights Committee’s General Comment No. 10, 29 June 1983, on the implementation of the similarly worded Article 19 of the International Covenant on Civil and Political Rights.

⁸ Adopted 4 November 1950, in force 3 September 1953.

⁹ Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.

¹⁰ Adopted at San José, Costa Rica, 22 November 1969, entered into force 18 July 1978.

¹¹ ARTICLE 19 internal note, The legitimacy of licence requirements for the use of wireless communications devices, 2007

The work of the wireless community may also be grounded in the freedom to practice one's own culture.

Article 27 of the UDHR states:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

A crucial aspect of one's culture is the right to use the language of one's choice. This is a right that is well-established in international law, both as an aspect of the right to freedom of expression and explicitly under Article 27 of the ICCPR which states that:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹² further elaborates on the rights and obligations arising from article 27 of the UDHR.

Article 15 recognizes the right of everyone:

- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Moreover, States parties to the ICESCR are explicitly required to take active steps to promote and diffuse culture and scientific knowledge:

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

As the UN Human Rights Committee has observed, culture presents itself in many forms, including a particular way of life associated with the use of land resources or such

¹² Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976. As of December 2002, it had been ratified by 146 States.

traditional activities as fishing or hunting. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹³

1.3. Article 25 – Right to participate in decision-making

Article 25 of the International Covenant of Civil and Political Rights (ICCPR) states:

Every citizen shall have the right and the opportunity ... without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

The Human Rights Committee has emphasised that the exercise of this right is closely linked to the right to freedom of expression, for example in its General Comment No. 25: “Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.”¹⁴

2. STATE OBLIGATIONS

The human rights project is state-centric: it aims at defining internationally binding obligations which states must meet. Governments have thus a duty to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Let me highlight what is meant as far as the right to freedom of expression is concerned:

2.1. Requirements of Non-discrimination

The requirement of non-discrimination is the most important, prevalent and powerful requirement in our human rights framework. Internationally, all human right texts include this requirement, whether they deal with all human rights, human rights of one population, one kind of right, etc. Any discrimination on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of rights constitutes a violation of international human rights.

¹³ UN Human Rights Committee, General Comment 23, 8 April 1994, para. 7.

¹⁴ UN Human Rights Committee, General Comment 25, 12 July 1996, para. 8.

States have the obligation to refrain from any discrimination in the right to freedom of expression as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status.

2.2. Obligations placed upon states to respect, protect and fulfil

Human rights impose three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.

The obligation to *respect* requires States parties not to take any measures that result in preventing the exercise of the right.

The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of the exercise of their rights.

The obligation to *fulfill (facilitate)* means the State must pro-actively engage in activities intended to strengthen people's exercise of their rights. Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right by the means at their disposal, States have the obligation to (*provide*) that right directly.

When applied to the right to freedom of expression:

- Obligation to *respect* requires states not to take any measures to prevent people from accessing the media, the internet, and from realizing their right to speech. This is more or less the obligation not to censor.
- Obligation to *protect* means that the states must ensure that for instance large broadcasting companies or individuals do not deprive other broadcasters of their right to communicate or do not deprive the population of their right to receive diverse and pluralistic information.
- The obligation to *fulfil* requires States to take such steps as are necessary to make freedom of expression a reality for everyone.¹⁵ These steps may include legislative or other regulatory steps, as well as 'practical' positive measures, for example through the establishment of public communication centres. States are further prohibited to take retrogressive measures, i.e. deliberate measures which result in the deterioration of current level of fulfillment of the right.

¹⁵ Article 2 of the ICCPR, places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." A similar obligation can be found in the pre-amble of the UDHR. See also various European Court of Human Rights' judgments, including *Fuentes Bobo v. Spain*, 29 February 2000, Application No. 39293/98, para. 38 and *Young, James and Webster v. United Kingdom*, 13 August 1981, Application Nos. 7601/76, 7806/77, para. 55.

3. PRINCIPLES OF STATE REGULATION¹⁶

Under international law, States are under a duty to ensure equitable access to the means of communication.

This implies both a ‘negative’ duty not to restrict access to the media (obligation to respect) and a positive duty to ensure plurality and diversity (obligation to protect and fulfil).

- States should not impose unreasonable regulatory obligations such as licensing or registration requirements for journalists, licensing of small publications or registration of Internet Service Providers.¹⁷
- Both public and private broadcast monopolies have been held to constitute illegitimate restrictions on freedom of expression and effective measures must be taken to ensure that they do not emerge, including through the regulatory system.¹⁸ As long ago as 1983, the UN Human Rights Committee recommended that States should implement “effective measures ... necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.”¹⁹ This reasoning extends to monopolies over all forms of communications, not just television and radio.
- Effective State action to ensure equitable access to the means of communication must also incorporate plurality and diversity, and universal access.

Pluralism

Under international human rights law, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to receive information from a variety of different sources

One aspect of pluralism is that all groups in society have access to the media. The Inter-American Court has held that freedom of expression requires that,

The communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.²⁰

¹⁶ This and the following sub section are based on ARTICLE 19, Statement on the Right to Communicate, 2003, op. cit.

¹⁷ See, for example, *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997 (UN Human Rights Committee) and the *Compulsory Membership* case, note 20.

¹⁸ See, for example, *Radio ABC v. Austria*, 20 October 1997, Application No. 19736/92 (European Court of Human Rights) and *United States v. American Telephone and Telegraph Co* (1982) 552 F Supp 131 (District Court of Columbia).

¹⁹ UN Human Rights Committee, General Comment, note 7.

²⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note para. 34.

The principle of plurality requires a diversity of communicators and legitimate regulation should promote diversity on the airwaves. Licensing of broadcasters is permitted under international law,²¹ as long as it meets certain conditions of independence and respect for freedom of expression. For example, promoting diversity should be one of the criteria for deciding between competing licence applications.²²

States are also required to take practical positive measures to create an environment in which the media, and diverse content, can flourish.

Specific measures will depend on the circumstances but examples include:

- setting up non-discriminatory media subsidy schemes,
- adopting rules on local content,
- encouraging community broadcasting,
- providing tax-breaks for new media outlets and
- promoting local content production.²³
- ensuring a constant supply of the goods necessary for different media, such as electricity or newsprint,
- promoting modern communications technologies
- providing adequate training opportunities.

A key instrument through which States are required to contribute to plurality in the media is *public service broadcasting*. This is not a concept or a kind of outlet that is well represented in the American broadcasting landscape. But it is present in many countries across the world, and should not be confused with state-controlled media. Public broadcasters must be sufficiently protected against government control and in transitional countries, State and government broadcasters transformed into true public service broadcasters.²⁴

Public service broadcasters should be required to promote a diversity of information and views through broadcasting. Such broadcasters can play a crucial role in supplementing the material provided by commercial broadcasters and by ensuring strong local and minority voices.

The German Federal Constitutional Court, for example, has held that promoting pluralism is a constitutional obligation for public service broadcasters.²⁵ As early as 1981, it held:

²¹ See, for example, the last sentence of Article 10(1) of the *European Convention on Human Rights* (ECHR), Adopted 4 November 1950, entered into force 3 September 1953.

²² See *Access to the Airwaves*, note 23, Principle 21.

²³ See, for example, Council of Europe Recommendation R(99)1 on measures to promote media pluralism, adopted by the Committee of Ministers on 19 January 1999. See also *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (London: ARTICLE 19, 2002), Principles 3 and 6-8.

²⁴ This has been stressed in numerous statements and court decisions. For an overview of the relevant principles, see *Access to the Airwaves*, note 23, Section 10.

²⁵ See *Fourth Television* case, 87 BverfGE 181 (1992).

Free individual and public formation of opinion by broadcasting initially requires that broadcasting be free of State dominance and influence...[But mere] freedom from the State does not mean that free, comprehensive formation of opinion by broadcasting is made possible; this mandate cannot be fulfilled by a mere negative duty...a positive order is necessary, which ensures that the variety of existing opinion is expressed in broadcasting...In order to achieve this, substantive, organizational and procedural rules are necessary that are oriented to the mandate of freedom of broadcasting.²⁶

Community broadcasting also enhances pluralism by providing a cheap, accessible form of communication for communities which would otherwise have no independent voice and it should, as a result, be recognised and promoted. Recent human rights declarations have begun to recognise this. For example, the *Declaration of Principles on Freedom of Expression in Africa*, adopted in October 2002, states:

The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:

- there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community; ... and
- community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.²⁷

In addition, the capacity of community broadcasters or publishers to disseminate their products over the Internet should be enhanced, including through the provision of the necessary hardware and software, as well as training.²⁸

Measures should also be taken to encourage access to the media by different minority or language groups, for example through funding for minority broadcasting or for programme productions dealing with minority issues and/or offering a dialogue between groups, and by ensuring that minority and language groups are properly represented in both the staff and through the programme content of public service broadcasters.²⁹

ARTICLE 19 - Principles on Freedom of Expression and Broadcast Regulation (2002) <http://www.article19.org/pdfs/standards/accessairwaves.pdf>

Principle 3: Promoting Diversity

3.1. Diversity implies pluralism of broadcasting organisations, of ownership of those

²⁶ 3. *Rundfunkurteil* (“Third Broadcasting Case”), 57 BverfGE 295 (1981).

²⁷ Adopted by the African Commission on Human and Peoples’ Rights at its 32nd Session, 17-23 October 2002, Principle V.

²⁸ See Principle 3, Part III of the African Charter on Broadcasting 2001, adopted by a representative conference of experts in Windhoek, Namibia, under the auspices of UNESCO and the Media Institute of Southern Africa (MISA).

²⁹ *Ibid.*, Article 9 and Explanatory Memorandum.

organisations, and of voices, viewpoints and languages within broadcast programming as a whole. In particular, diversity implies the existence of a wide range of independent broadcasters and programming that represents and reflects society as a whole.

3.2 The State has an obligation to take positive measures to promote the growth and development of broadcasting, and to ensure that it takes place in a manner which ensures maximum diversity. It also has an obligation to refrain from imposing restrictions on broadcasters which unnecessarily limit the overall growth and development of the sector.

3.3 Effective measures should be put in place to prevent undue concentration, and to promote diversity, of ownership both within the broadcast sector and between broadcasting and other media sectors. Such measures should take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable.

Universal Access

In the field of telecommunications, so-called ‘universal service’ commitments are now well-established, requiring service providers to ensure that their products, such as access to telephone lines, are universally available. In the United States, this goal was written into federal law as early as 1934.³⁰ The EU Voice Telephony Directive requires that all persons reasonably requesting it should be able to obtain a connection to the fixed public telephone network at an affordable price; the connection provided should be capable of national and international calls, supporting speech, facsimile and/or data communications.³¹

Similar reasoning has been extended to the Internet, as well as to reception of broadcasting services.³² The Internet provides an unparalleled opportunity for low-cost but effective dissemination of information and ideas, and is hence central to the right to communicate. Numerous statements have been made about the capacity of the Internet to give practical effect to freedom of expression.

The Genoa Plan of Action, adopted by the G8 countries, for example, provides that “local content on the Internet should be strengthened and encouraged, including by encouraging governments to provide freely-available access to State-owned information and local content, except where it is genuinely private or classified.”³³

UN bodies have stressed that governments should take action to make the Internet more accessible, including by bringing down the price of access. In his report to the UN Millennium Assembly, UN Secretary General Kofi Annan urged Member States to pursue a development agenda which includes a “review [of] policies in order to remove

³⁰ 47 USC 254.

³¹ Directive 98/10/EC, 26 February 1998, OJ L101/24, 1 April 1998.

³² See *Access to the Airwaves*, note 23, Principle 6.

³³ Genoa Plan of Action, proposed by the Digital Opportunity Task Force and adopted by the G8 Heads of State in Genoa, 2 July 2001

regulatory and pricing impediments to Internet access”.³⁴ Responding to this, ECOSOC adopted a Ministerial Declaration recommending that national programmes be established which “promote access to information and communications technology for all by supporting the provision of public access points.” This was endorsed by the UN Heads of State at the Millennium Assembly.³⁵

ARTICLE 19 - Principles on Freedom of Expression and Broadcast Regulation (2002) <http://www.article19.org/pdfs/standards/accessairwaves.pdf>

Principle 6: Universal Access

6.1 The State should promote universal and affordable access to the means of communication and reception of broadcasting services, including telephones, the Internet and electricity, regardless of whether such services are provided by the public or private sectors. One idea in this regard is communication centres in libraries and other places to which the public has access.

6.2 The State should take measures to ensure maximum geographical reach of broadcasting, including through the development of transmission systems. Access to publicly owned transmission systems should, subject to capacity limits, be provided to all broadcasters at reasonable rates and on a nondiscriminatory basis.

Principle 7: Infrastructure

7.1 The State should promote the necessary infrastructure for broadcast development, such as sufficient and constant electricity supply and access to adequate telecommunications services.

7.2 A special effort should be made to ensure that broadcasters can take advantage of modern information technologies, such as the Internet, and satellite and digital broadcasting.

IV – LEGITIMATE RESTRICTIONS TO THE RIGHT TO FREEDOM OF EXPRESSION

While the right to freedom of expression is universally recognised as one of fundamental importance, it is also accepted that the right is not absolute. Certain overriding public and private interests may justify restricting the right. A key question here is when and under what circumstances freedom of expression may be restricted.

³⁴ *United Nations, We the Peoples: The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary General of the United Nations (New York: United Nations, 2000), Key Proposals, <http://www.un.org/millennium/sg/report/key.htm>.

³⁵ United Nations Millennium Declaration, 18 September 2000, Doc. A/RES/55/2, Article 20. See also Recommendation R(99)14 on Universal Community Service concerning New Communication and Information Services, adopted by the Committee of Ministers of the Council of Europe on 9 September 1999.

Article 19(3) of the *International Covenant on Civil and Political Rights* sets out the basic test for assessing the legitimacy of restrictions on freedom of expression:

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.

This test includes three parts: first, the interference must be in accordance with a law or regulation; second, the legally sanctioned restriction must protect or promote an aim deemed legitimate in international law; and third, the restriction must be *necessary* for the protection or promotion of the legitimate aim.

The first condition means, first and foremost, that the interference cannot be merely the result of the whim of an official. There must actually be an enacted law or regulation which the official is applying. In other words, only restrictions which have been officially and formally recognised by those entrusted with law-making capacity may be legitimate. In addition, not all “laws” or “regulations” meet the standard of ‘provided by law’. The legislation must be clear and precise so that it is known in advance exactly what expressions are prohibited. Vaguely worded edicts with potentially very broad application will not meet this standard and are thus illegitimate restrictions on freedom of expression.

The second condition, that a restriction must serve a legitimate aim, is *not* open-ended. The list of legitimate aims provided in Article 19(3) of the *International Covenant on Civil and Political Rights* is exclusive and governments may not add to these. This includes only the following legitimate aims: respect for the rights and reputations of others, and protection of national security, public order (*ordre public*), public health or morals.

Finally, even if a restriction is in accordance with an acceptably clear law and if it is in the service of a legitimate aim, it will breach the right to freedom of expression unless it is ‘necessary’ for the protection of that legitimate aim. This has a number of implications.

In the first place, if another measure exists which would accomplish the same goal in a way less intrusive to the right to free expression, the restriction is not in fact necessary and is thus not legitimate.

Second the restriction must be narrowly tailored; it should impair the right as little as possible.

Third the impact of restrictions must be proportionate, in the sense that the harm to freedom of expression must not outweigh the benefit to the interest the restriction seeks

to protect. This implies a balancing exercise in which the harm caused by the restriction is compared with the harm that would result without it.

Where wireless communications devices are used as a means to exchange ideas or information -which is almost always the case- this constitutes an exercise of the right to freedom of expression, and any restriction on such use must meet the three-part test outlined above³⁶.

V. EXAMPLE: ADOPTING A HUMAN RIGHTS FRAMEWORK TO SPECTRUM ALLOCATION

The issue of spectrum allocation has become one of the key issues and debates in many countries across the world, triggered largely by the rapid technological/communication changes and the move from analog to digital communication.

Spectrum is not very tangible, at least not as food or water is. It is not very real to my eyes, but yet, it has an undeniable physical reality. It is also probably very real to all of you.

Spectrum may not be essential to ensuring people's right to life, in the same way as food and water are. But it is absolutely essential to the realisation of many other rights, such as:

- the right to freedom of expression,
- the right to participation,
- the right to education,
- the right to vote,
- the right to take part in cultural life,
- the right to enjoy the benefits of scientific knowledge and its application,
- the right of everyone to the continuous improvement of living conditions.

In general terms, access to frequencies is essential to the realisation of all rights which requires access to, and communication of, independent and plural information.

In 2002, ARTICLE 19 argued that frequency should be regulated according to the aforementioned principles of diversity and equity.

ARTICLE 19 - Principles on Freedom of Expression and Broadcast Regulation (2002) <http://www.article19.org/pdfs/standards/accessairwaves.pdf>

Principle 9: Frequency Planning

9.1 Decision-making processes at all levels, international and national, about the allocation of the frequency spectrum between all frequency users should be open and participatory, should involve bodies responsible for broadcast regulation, and should

³⁶ ARTICLE 19 internal note, The legitimacy of licence requirements for the use of wireless communications devices, 2007

ensure that a fair proportion of the spectrum is allocated to broadcasting uses.

9.2 A process should be put in place to develop a frequency plan for those frequencies allocated to broadcasting (broadcasting frequencies), in order to promote their optimal use as a means of ensuring diversity. The process should be open and participatory, and should be overseen by a body that is protected against political and commercial interference. The frequency plan, once adopted, should be published and widely disseminated.

9.3 The frequency plan should ensure that the broadcasting frequencies are shared equitably and in the public interest among the three tiers of broadcasting (public, commercial and community), the two types of broadcasters (radio and television) and broadcasters of different geographic reach (national, regional and local).

9.4 A frequency plan may provide that certain frequencies should be reserved for future use for specific categories of broadcasters in order to ensure diversity and equitable access to frequencies over time.

The digital dividend and the development of wireless communications have created new possibilities and opportunities for the realization of the right to freedom of expression, but there are many risks as well. Chief among them is the possibility that governments do not approach these developments from a human rights standpoint, but from an income generating perspective, while traditional human rights organizations have been too slow to pick up the human rights implications of these developments.

The sad reality is that our spectrum – the common good – is currently being sold to those that can offer the better prices to cash greedy governments with little concern for the principles of diversity and equity.

Let's consider:

Brazil: The country adopted a technology based on the Japanese digital system. The 6MHz of the digital TV were automatically transferred to the broadcasters holding concession agreements with the Ministry for open to air TV. The option was to use the digitalization only to improve the signal and broadcast in very high definition (it is alleged that only TV sets 39" and larger can actually take advantage of such a sharp image; standard and cheaper TV sets held by the great majority of the population will not really benefit from the high definition). The system adopted failed to take advantage of the shift to digitalization to allow the sharing of frequencies with new broadcasters, especially community ones. As far as Radio is concerned, Brazil is testing 2 systems; one of them is said to probably make the life of community broadcasters quite difficult in the long-run, because the frequencies reserved to them are at the end of the spectrum and they would basically be pushed out.

Mexico: The Media Law approved by the Congress in 2006 sets a deadline of 2012 for the final transfer from analog to digital radio and TV. The law concentrates on the deregulation of the digital spectrum, which is to be assigned to the two national television networks in the country: Televisa and TV Azteca. Stations that have already been

assigned a frequency will be able to branch out into digital services of all kinds, simply by notifying the government, while potential new competitors will have to participate in public tenders to obtain additional spectrum. The bill creates a committee whose members, who will serve for eight years, will be named by the president, thus raising a number of question regarding its independence and accountability Educational and community media sponsored by the government, municipalities and public universities, as well as independent community radio stations, are not even mentioned by the new law.

ARTICLE 19 has monitored internationally an increasing move towards the increased commoditisation of frequencies, and a digital switch over which will not benefit public service broadcasting, community based initiatives, or wireless initiatives.

There have been some better decisions and news which we may be able to build upon:

- The aforementioned Mexico Televisa law was successfully challenged in front of the Supreme Court and is currently under review.
- The Committee of European Ministers recently adopted a Declaration on the allocation and management of the digital dividend and the public interest (*Adopted by the Committee of Ministers on 20 February 2008 at the 1018th meeting of the Ministers' Deputies*) (See Annex One for the full text)

In the declaration, the Committee recognises that technical and legislative choices involved in the switchover to the digital environment should not be determined by economic factors alone but ought also to take account of social, cultural and political factors, and that a balance must be struck between economic interests and objectives of common interest; between the development of a purely market-based approach to spectrum allocation and management, on the one hand, and the promotion of pluralism, cultural and linguistic diversity and access of the public to audiovisual services in Europe, in particular free-to-air broadcasting, on the other hand.

CONCLUSION: BUILDING ALLIANCES

We need more of these examples

We need to challenge the allocation of frequencies to the highest bidders without due consideration to human rights, and particularly article 19, but possibly and also article 11, 13, 15 of the Universal Declaration for Human Rights, and without due consideration for the key principles at the heart of broadcasting and freedom of expression regulations, including diversity and pluralism.

We need to challenge any approach to the digital dividend which does not balance a market-based approach with the necessity to uphold the principles of diversity and equity.

We need to advocate for the opening of the interleaved channels (also called white space³⁷) to unlicensed use (provided the issue of interferences has been well addressed and the lack of interferences well demonstrated.)

To a large extent, governments have felt they could approach the digital dividend without due concerns for the protection and respect for human rights because the human rights community has failed to understand that spectrum is a public good and that a diverse and equitable share of, and access to, spectrum is a right that must be respected by all governments.

We did not listen to the wireless community.

Or maybe more truthfully we did not hear you well.

To be fair, this has been a difficult environment: Speaking loud enough in this post 9/11 context is indeed a real challenge. There have been so many interferences to the exercise of our rights: Guantanamo, Darfur, Burma, places where people are dying under the cloak of secrecy; the renewed legitimacy (or attempt to legitimise) of the use of torture, censorship, terrorism and counter-terrorism, etc.

These are very challenging times for any new emerging human rights claims because the old ones are so much under pressure and old violations have resurfaced with great intensity in places where we did not necessarily expect them.

But the challenges are real and the wireless and human rights community must be working together. The risks associated with not doing so are too scary to consider. The gains and benefits are or will be multiple.

The human rights framework may not offer everything the wireless community is looking for. As a framework, it comes with obligations and responsibilities. It certainly does not rule out restrictions, and thus regulations. Indeed, it requires state interventions to ensure protection and respect for human rights, including against anarchy of voices. Because one key principle of freedom of expression is that we need to be able to hear each other and ourselves.

I truly believe that the key principles of independence, diversity and pluralism and equity of content, access, ownership, those of public interest and public good, are the best tools at our disposal against the oppression of the minds. They have been so far and there is no reason to think that they cannot continue to play this essential function. True

³⁷ The interleaved channels or white space are the unassigned frequencies between broadcast TV channels. They are part of the so-called digital dividend, along with the frequencies that will be cleared of analogue television. Both cleared and interleaved spectrum is particularly attractive because of its capacity (bandwidth) and coverage (signals travel further and penetrate buildings more readily). This, in turn, means that it can be used for a very wide range of potential new services, such as additional television services delivered through DTT, local television, new types of mobile broadband, mobile television, wireless home networks, etc.

diversity, debates and dialogues, facilitated by, and through, human rights sensitive technology, is the best future for us all.

ANNEX ONE

Declaration of the Committee of Ministers on the allocation and management of the digital dividend and the public interest

(Adopted by the Committee of Ministers on 20 February 2008 at the 1018th meeting of the Ministers' Deputies)

The Committee of Ministers of the Council of Europe,

Recalling the commitment of member states to the fundamental right to freedom of expression and information, as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights – ETS No. 5);

Stressing the importance for democratic societies of the existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions, as stated in the Committee of Ministers' Declaration on the freedom of expression and information (29 April 1982);

Conscious of the advantages and opportunities but also the challenges for free and pluralist communication offered by digital technology, and of the need to safeguard essential public interest objectives in the digital environment, including freedom of expression and access to information, media pluralism and cultural diversity, social cohesion, democratic participation, consumer protection and privacy;

Aware of the fact that technical and legislative choices involved in the switchover to the digital environment should not be determined by economic factors alone but ought also to take account of social, cultural and political factors, and agreeing that a balance must be struck between economic interests and objectives of common interest;

Conscious that a balance might need to be struck between the development of a purely market-based approach to spectrum allocation and management, on the one hand, and the promotion of pluralism, cultural and linguistic diversity and access of the public to audiovisual services in Europe, in particular free-to-air broadcasting, on the other hand;

Aware, in particular, that radio spectrum will be freed as a result of the switchover from analogue to digital broadcasting and conscious of the need for states to take decisions in respect of the allocation and management of this scarce public resource in the common interest;

Stressing that the digital dividend¹ is an excellent opportunity to meet the rapidly growing demand for new services and that it can open up the spectrum for broadcasters to significantly develop and expand their services while, at the same time, ensuring that other important social and economic uses, such as broadband applications or mobile

multimedia capable of contributing to overcome the digital divide, are taken into account when allocating and managing this valuable resource;

Mindful of the importance of stepping up efforts to ensure effective and equitable access for all persons to the new communication services, education and knowledge, especially with a view to preventing digital exclusion and to narrowing or, ideally, bridging the digital divide;

Recalling Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting, and in particular its citizen-oriented approach and stipulations regarding the transition to digital broadcasting;

Recalling also Recommendation Rec(2007)3 on the remit of public service media in the information society, underlining the fundamental role of public service media in the new digital environment, which is to promote the values of democratic societies, in particular respect for human rights, cultures and political pluralism, offering a wide choice of programmes and services to all sectors of the public and promoting social cohesion, cultural diversity and pluralist communication accessible to everyone;

Recognising, without prejudice to ongoing efforts within other international fora to find a harmonised approach, the right of member states to define their own policies regarding the transition from analogue to digital broadcasting, and the use of the digital dividend, understood as radio spectrum capacity freed as a result of the switchover to the digital environment;

Aware of the different situations in which various member states find themselves with regard to the digital dividend for geographical, historical, political, cultural, linguistic or other reasons, which may be accommodated through international co-ordination and planning, but make rigid harmonisation difficult;

Stressing the need to guarantee to users stable reception of digital terrestrial broadcasting services and to resolve interference problems before a decision, if any, is taken to put broadcasting services and mobile telephone services in the same or adjacent bands,

Declares that member states:

- i. should acknowledge the public nature of the digital dividend resulting from the switchover and the need to manage such a public resource efficiently in the public interest, taking account of present and foreseeable future needs for radio spectrum;
- ii. should pay special attention to the promotion of innovation, pluralism, cultural and linguistic diversity, and access of the public to audiovisual services in the allocation and management of the digital dividend and, for this purpose, take in due account the needs of broadcasters and of the media at large, both public service and commercial media, as well as those of other existing or incoming spectrum users;

iii. should also consider the benefit that the allocation and management of the digital dividend may bring to society in terms of an increased number of diversified audiovisual services, including mobile services, with potentially improved geographical coverage and interactive capability, as well as services offering high definition technology, mobile reception, or easier and more affordable access.

¹ The radio spectrum freed as a result of the switchover from analogue to digital broadcasting.