Submission to the Inter-American Commission on Human Rights:

International Standards on the Regulation of Broadcasting

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18 July 2007

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1. Introduction

This Submission outlines international standards relevant to the regulation of broadcasting. It is intended as input to the Inter-American Commission on Human Rights (IACHR) to help it to determine how to address this issue from a human rights perspective. While the RCTV case has brought the importance of appropriate standards regarding broadcast regulation to the fore in the region in a dramatic manner, ARTICLE 19 has always viewed this as central to the wider question of respect for freedom of expression. It is, indeed, one of a relatively small number of key freedom of expression themes on which we have published a core set of principles setting out the main international standards of relevance, namely *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (the ARTICLE 19 Principles).[1]

This Submission will refer to standards established by various UN bodies, by regional systems for the protection of human rights and by leading national courts, as well, in some cases, as the established practice of democratic States. While many of these standards are not formally binding on countries in the Americas, they nevertheless provide an authoritative interpretation of the implications of general guarantees which are of some relevance to the understanding and interpretation of the guarantee of freedom of expression found at Article 13 of the *American Convention on Human Rights* (ACHR).[2]

[1] (London: March 2002). Available at: http://www.article19.org/pdfs/standards/accessairwaves.pdf.
[2] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.

Two key themes permeate international standards relating to broadcast regulation – independence and pluralism – and this Submission focuses mainly on these two themes. The first refers to the central idea that, while there is a need to regulate broadcasting, such regulation should not be subject to the control of political factions or commercial interests but, rather, should be overseen by an independent body in the wider public interest. The second refers to the idea that a key goal of broadcast regulation, in line with a wider understanding of the right to freedom of expression as including the right of the public to be able to access a diversity of information and ideas, should be to promote a pluralistic broadcasting sector, in terms of ownership, of types of media outlets and, most importantly, of content.

2. General Principles

It is beyond any doubt that international guarantees of freedom of expression apply to the broadcast media, as they do to other forms of communication. Article 19 of the *Universal Declaration of Human Rights* (UDHR), the flagship statement of international human rights,[3] protects the right to seek, receive and impart information and ideas through any media. Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR)[4] and Article 13 of the ACHR similarly protect the right to express oneself through any media.

The European *Convention for the Protection of Human Rights and Fundamental Freedoms*[5] specifically provides, at Article 10, that the right to freedom of expression shall not "prevent States from requiring the licensing of broadcasting, television or cinema enterprises." Licensing of broadcasters is justified on a number of grounds, including that the airwaves are a public resource which must be used in a manner which serves the overall public good and that, absent licensing, there would be chaos in the airwaves. These are valid arguments and almost every State has some system in place for licensing broadcasters.

At the same time, the case law of the European Court of Human Rights (ECHR) makes it quite clear that broadcast licensing must conform to general standards relating to the right to freedom of expression. In a case where this issue was raised as a barrier by the defendant State, the Court noted:

> [T]he Court considers that both broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 § 1 (art. 10-1).[6]

This principle has also been affirmed by the Inter-American Court of Human Rights in the *Baruch Ivcher Bronstein v. Peru* case.[7]

3. Independence

As noted above, one of two key implications of the right to freedom of expression is that broadcast regulation should be overseen by bodies which are independent, in the sense that

[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[4] UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, entered into force 3 January 1976.
[5] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.
[6] *Groppera Radio AG v. Switzerland*, 28 March 1990, Application No. 10890/84, para. 55.
[7] 6 February 2001, Series C, No. 74. See, for example, para. 147.

they are protected against political or commercial interference. This basic principle has been endorsed by several international bodies.

The *Declaration of Principles on Freedom of Expression in Africa* (African Declaration), adopted by the African Commission on Human and Peoples' Rights in 2002,[8] states very clearly, at Principle VII(1):

> 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.

Similarly, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media – noted in a Joint Declaration adopted in 2003:

> 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.[9]

Within Europe, an entire recommendation of the Council of Europe is devoted to this matter, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (COE Recommendation).[10] The very first substantive clause of this Recommendation states:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

Similarly, the ARTICLE 19 Principles state clearly:

> All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature.[11]

This view has been upheld by international and national courts. The reasons for this were set out elegantly in a decision of the Supreme Court of Sri Lanka holding that a broadcasting bill which gave a government minister substantial power over appointments to the broadcast regulator was incompatible with the constitutional guarantee of freedom of expression. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[12]

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[8] At the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.
[9] Adopted 18 December 2003. Available at: http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2003.pdf.
[10] Adopted by the Committee of Ministers on 20 December 2000.
[11] Principle 10.
[12] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

The *Inter-American Declaration of Principles on Freedom of Expression* (American Declaration), while it does not explicitly state the broadcast regulators must be independent, notes the underlying reason for this, stating, in Principle 13:

> [T]he concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law

The recent closure of RCTV in Venezuela demonstrates the importance of independent broadcast regulation. Whatever one's view on the closure itself – and ARTICLE 19 views the case as a clear violation of the right to freedom of expression – it is obviously very problematical that the very government of which the station had been highly critical took the decision not to renew its licence.

Recognising the principle of independent regulation is one thing, guaranteeing it in practice is quite another and experience in countries around the world shows that promoting independence is both institutionally complex and difficult to achieve in practice. At a minimum, States should establish independent broadcast regulatory bodies, which, although public in nature, operate at arms length from government, and this is supported by the practice of democratic States around the world.

The ARTICLE 19 Principles provide some guidance as to how independence may be guaranteed in practice:

> [The] institutional autonomy and independence [of broadcast regulators] should be guaranteed and protected by law, including in the following ways:
> - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
> - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
> - through the rules relating to membership;
> - by formal accountability to the public through a multi-party body; and
> - in funding arrangements.

The membership of the governing boards of these bodies is central to their independence and, in turn, the manner of appointing them is the key to this. The African Declaration states that the appointments process should be "open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party."[13] The 2002 COE Recommendation devotes some attention to this matter, calling for a democratic appointments process, rules of 'incompatibility' to prevent individuals with strong political connections from sitting on these bodies, prohibitions on members receiving instructions or a mandate from anyone other than pursuant to law, and rules protecting members against dismissal for political reasons.

Both the 2002 COE Recommendation and the ARTICLE 19 Principles note the importance of funding arrangements to independence. Similarly, both these documents, as well as the African Declaration, recognise that broadcast regulators need to be accountable to the public but that such accountability should be achieved in a manner that does not compromise independence. The African Declaration, for example, calls for accountability to be provided through a multi-party body rather than the government.

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[13] Principle VII(2).

4. Pluralism

The principle of independence conditions the manner in which broadcast regulation should take place while the principle of pluralism defines the goals such regulation should seek to promote. Pluralism has received extremely broad endorsement as a key aspect of the right to freedom of expression. Jurisprudentially, it derives from the multi-dimensional nature of the right, which protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas).[14]

This aspect of the right rules out arbitrary interferences by the State that prevent individuals from receiving information that others wish to impart to them.[15] However, the rights of the listener also place a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public. International law recognises generally that States must take positive measures to ensure rights. Article 2 of the ICCPR, for example, 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".[16] The specific need for positive measures to ensure respect for freedom of expression has been also recognised.[17]

Both negative and positive obligations to promote the right of the listener to seek and receive information and ideas are relevant to the question of broadcast regulation. Indeed, the authorities stress the particular importance of the media in ensuring pluralism, which is key to fulfilment of these rights of the listener.

The implications of the right to seek and receive information and ideas, a key aspect of the right to freedom of expression, has been elaborated upon clearly and forcefully by the Inter-American Court of Human Rights. The Court recognised early on the important implications of the dual nature of the right to freedom of expression:

> [W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others…. In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. [18]

The Court also recognised that the second aspect of freedom of expression requires the existence of a free and pluralistic media:

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[14] See, for example, the Inter-American Court's judgment in *Baruch Ivcher Bronstein v. Peru*, note 7, para. 146.
[15] See, for example, *Leander v. Sweden*, 26 March 1987, Application No. 9248/81 (European Court of Human Rights), para. 74.
[16] See also Article 2 of the ACHR.
[17] See, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights), para. 45. See also *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights).
[18] *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. 30-2.

> It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.[19]

This has been recognised by other authorities as well. The African Declaration, for example, states:

> Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.[20]

Within the European context, the issue of media diversity as an aspect of the right to freedom of expression has attracted considerable attention and, once again, the Council of Europe has adopted a specific document on the issue, Recommendation 2007(2) on Media Pluralism and Diversity of Media Content.[21] The whole Recommendation is devoted to the question of the importance of pluralism in the media and measures to promote it. This is supported by the jurisprudence of the European Court of Human Rights, which has frequently noted: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism."[22]

At least three distinct types of media-related pluralism or diversity have been identified: content, outlet and source.[23] Diversity of content, in the sense of the provision of a wide range of content that serves the needs and interests of different members of society, is the most obvious and ultimately the most important. Diversity of content, one aspect of which is giving voice to all voices in society, depends, among other things, on the existence of a plurality of media outlets. Specifically, democracy demands that the State create an environment in which different types of broadcasters – including public service, commercial and community broadcasters – which reflect different points of view and provide different types of programming, can flourish. The absence of source pluralism, reflected in the growing phenomenon of concentration of media ownership, can impact on content, as well as independence and quality, in important ways.

A number of authoritative statements support the idea that the right to freedom of expression places States under an obligation to promote all three types of pluralism – of source, of outlet and of content – including specifically through broadcast regulation. Some of these are more prescriptive in nature while others are simply good practice as implemented by democratic States.

The need to prevent undue concentration of media ownership, or **source pluralism**, is well-established within the Inter-American system. Principle 12 of the American Declaration specifically calls for measure to limit "[m]onopolies or oligopolies in the ownership and

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[19] *Ibid.*, para. 34.
[20] Principle III.
[21] Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.
[22] See, for example, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.
[23] Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry", in Chris Marsden & Stefaan Verhulst, eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157.

control of the communication media", on the basis that they undermine "the plurality and diversity which ensure the full exercise of people's right to information". The Inter-American Court of Human Rights has similarly called for the "barring of all monopolies [of ownership of the means of communication], in whatever form", again in service of pluralism.[24] The ARTICLE 19 Principles similarly call for effective measures to prevent undue concentration of ownership,[25] as does the African Declaration.[26] A 2007 Declaration of the Council of Europe highlights the problem of media concentration and makes a number of recommendations on how to address it, including through rules on transparency of ownership and prohibiting media concentrations above certain levels.[27]

In practice, most democratic States do have rules that address the issue of ownership concentration of the media and, in many countries, specific rules apply to media concentrations, given the important democratic and wider social role of the media. Licensing of broadcasters is an important means for enforcing rules relating to ownership. Such rules are also directly enforced in many countries, including by requiring licensed broadcasters to report on changes of ownership structure to the regulatory authority.

Many authoritative statements address the issue of **outlet pluralism** either implicitly or directly. The American Declaration calls for licensing to "take into account democratic criteria that provide equal opportunity of access for all individuals."[28] The 2003 Joint Declaration adopted by the special mandates on freedom of expression also refers to equitable access, stating: "The allocation of broadcast frequencies should be based on democratic criteria and should ensure equitable opportunity of access."[29] The African Declaration refers to the need to ensure "pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups".[30]

In practice, ensuring that licences are awarded to different types of broadcasters is a key means of promoting access to the media, since that is an effective way of broadening the range of voices and perspectives available through broadcasting. Public service broadcasters can, if effective, play an important role in extending access to the media in a number of ways and through a number of programming formats. Community broadcasters provide access to individuals and communities which commercial and even public service broadcasters cannot.

The African Declaration goes further, calling specifically for an equitable allocation of frequencies for private broadcasting between commercial and community broadcasters, the particular promotion of community broadcasting "given its potential to broaden access by poor and rural communities to the airwaves", and the transformation of State broadcasters into public service broadcasters.[31] The ARTICLE 19 Principles call for the equitable allocation of frequencies not only between the three types of broadcaster – public, commercial and community – but also between broadcasters of different geographic reach – national, regional

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[24] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 18, para. 34.
[25] Principle 3.3.
[26] Principle XIV(3). The African Declaration also rules out public broadcasting monopolies. See Principle V(1).
[27] Declaration of the Committee of Ministers of the Council of Europe on protecting the role of the media in democracy in the context of media concentration, adopted 31 January 2007. See also the 2007 Council of Europe Recommendation on media pluralism, note 21, clause I(2).
[28] Principle 12.
[29] Note 9.
[30] Principle III.
[31] See Principles V and VI.

and local – as well as between radio and television.[32] The 2007 Council of Europe Recommendation on media pluralism also calls for the encouragement of media "capable of making a contribution to pluralism and diversity and providing a space for dialogue", such as "community, local, minority or social media."[33]

Within Europe, considerable attention has been devoted to the importance of public service broadcasting and its ability to contribute to a pluralistic media environment. A Recommendation on the independence of public service broadcasting in 1996[34] was followed by a Declaration on the same issue ten years later in 2006.[35] The Council of Europe has also adopted a Recommendation specifically on the issue of the mandate of public service broadcasters. Among other things, this identifies providing "a reference point for all members of the public, offering universal access" and "a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals" as key public service broadcasting roles.[36]

In practice, democracies around the world are recognising the need for outlet pluralism. The important and different roles played by commercial and public service broadcasters has long been understood and accepted. Community broadcasting has gained widespread recognition in recent years and frequencies are increasingly being set aside for this form of broadcasting, while licensing rules are being amended to accommodate it.

The need to promote **content diversity** more generally has also received widespread recognition as a key aspect of pluralism and freedom of expression. The idea of equitable access to the media encompasses the need for diversity of content in the media, which serves to ensure access of all to information and ideas through the media of relevance to their particular situations and/or interests. The African Declaration specifically calls for licensing processes to be used to promote diversity,[37] and the 2007 Council of Europe Recommendation on media diversity similarly calls for the licensing process to be used to this end.[38] In practice, many democracies specifically include contributing to content diversity as one of the criteria for deciding between competing licence applications, alongside such things as financial and technical capacity.

Both the 2007 Council of Europe Recommendation and the African Declaration also include more specific calls for the promotion of content diversity. The former, for example, calls on States to consider "define and implement an active policy in this area", to encourage the media to provide diverse content while respecting editorial independence, to consider, where necessary, adopting 'must carry' rules, and gives as a possible example requiring broadcasters to produce a certain volume of original programmes.[39] The latter promotes the idea of promoting African voices, including through media in local languages.[40] If done appropriately, these apparent restrictions on broadcasters' right to freedom of expression

[32] Principle 9.4.
[33] Clause I(4).
[34] 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.
[35] Declaration of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting in the member states, 27 September 2006.
[36] Recommendation Rec(2007)3 of the Committee of Ministers of the Council of Europe to member states on the remit of public service media in the information society, adopted 31 January 2007, clause I(1).
[37] Principle V.
[38] Clause II(3). See also the ARTICLE 19 Principles, Principle 21.2.
[39] Clause II.
[40] Principle III.

actually serve the broader public's freedom of expression by enhancing the right to seek and receive information and ideas.

Once again, this is followed in practice in a number of States, for example through the imposition of minimum requirements relating to news, education, local content and so on. The European Convention on Transfrontier Television requires all States Parties to ensure that at least 50% of the programming carried by broadcasters within their jurisdiction is of European origin.[41]

5. Content Restrictions

In accordance with international guarantees, freedom of expression may be restricted where necessary to protect certain overriding public or private interests, such as national security, the rights or reputations of others, or public order. Such restrictions must comply with the three-part test which flows directly from international guarantees of freedom of expression. First, the restriction must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[42] Second, the restriction must pursue a legitimate aim. The list of aims in the various international treaties are exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[43]

All States impose certain general restrictions on content, for example in the form of defamation or obscenity laws. It is accepted that specific systems for regulating content, over and above laws of general application, may be imposed on broadcasters. Although it is difficult to identify clear and authoritative international statements on this, a number of principles may be drawn from the collective practice of democratic States.

As with all forms of media regulation, the oversight of such content regimes should be the responsibility of bodies that are independent of government. The standards noted above under Independence apply equally to content regulation as to licensing. In most countries, the same body undertakes licensing and content regulation.

As with all restrictions on content, it is essential to inform broadcasters in advance of the limits, so that they may conduct themselves so as not to fall foul of the rules. In most countries, this is achieved through the adoption of a code of conduct or similar document, setting out rules in a number of areas, such as portrayal of violence, protection of children, accuracy and balance in news and current affairs programming, and so on. These codes, which are often very detailed documents, are normally based on widespread consultation with interested stakeholders, including broadcasters.

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[41] Adopted 5 May 1989, E.T.S. 132, entered into force 1 May 1993, as amended by the Protocol, adopted 1 October 1998, E.T.S. 171, entered into force 1 March 2002.
[42] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[43] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

In most countries, in accordance with their primary aim – which is to set standards regarding what is acceptable programming, rather than to punish errant broadcasters – a range of sanctions is available for breach of these codes. The vast majority of breaches will lead simply to a warning or public recognition of the breach. Only in more serious cases, and normally only for repeated breaches and after warnings have failed to address the problem, are more intrusive sanctions, such as fines, applied. The most serious sanctions, such as the suspension, non-renewal or revocation of a broadcasting licence, are reserved for the most serious cases of gross and repeated breach of the rules, which the imposition of other sanctions have failed to address.

A system along these lines strikes an appropriate balance between two important social interests. On the one hand, there is the need to protect consumers from potential excesses through the admittedly powerful medium of broadcasting, particularly television, which penetrates into the living rooms of the nation in a way that is simply not true of the print media. On the other hand, there are the rights of broadcasters to freedom of expression and the rights of the general public to seek and receive a diversity of ideas, both of which demand a light touch when it comes to limits on content.