OSCE: June 2011 Joint Declaration by the Four Special International Mandates for Protecting Freedom of Expression

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On 1 June 2011 the four special IGO mandates for protecting freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) and the Special Rapporteur on Freedom of Expression and Access to Information, adopted a Joint Declaration. The Declaration was adopted with the assistance of the Centre for Law and Democracy and ARTICLE 19 (for former Joint Declarations see IRIS 2010-5/1, IRIS 2009-9/101, IRIS 2009-2/101, IRIS 2008-4/1, IRIS 2007-2/101, IRIS 2006-3/2, IRIS 2005-2/1 and IRIS 2004-2/12).

The 2011 Declaration builds on a significant focus on the Internet by some of the special mandates in recent years. The OSCE Representative has just launched a major survey of participating States' law and practice regarding the Internet, entitled "Freedom of Expression on the Internet". The Internet was also the main thrust of the 2011 Annual Report by the UN Rapporteur to the Human Rights Council.

The preamble to the Joint Declaration highlights both the unprecedented power of the Internet to enable realisation of freedom of expression and growing threats to freedom of the Internet. It notes the "transformative nature" of the Internet for people in countries all over the world, both in terms of giving them a voice and in enhancing access to information. But it also notes that billions of people still lack any, or at least good quality, access to the Internet. Furthermore, many States have actively sought to control Internet content, while others have, sometimes even in good faith, imposed excessive restrictions on Internet freedom. The preamble also notes that some States have sought to "deputise responsibility" for policing the Internet to the increasingly diverse range of intermediaries providing Internet services.

The main body of the Joint Declaration is divided into six sections dealing, respectively, with General Principles, Intermediary Liability, Filtering and Blocking, Criminal and Civil Liability, Network Neutrality and Access to the Internet. The first section makes the fairly obvious points that freedom of expression applies to the Internet, that regulatory systems designed for other technologies cannot simply

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be imposed on the Internet, that self-regulation can be an effective tool in addressing harmful speech on the Internet and that awareness-raising is important. It calls for more attention to be given to developing “alternative, tailored approaches” for the Internet. Importantly, it recognises the systemic nature of the Internet, calling for assessments of the proportionality of restrictions to take into account its overall power to “deliver positive freedom of expression outcomes”.

The Joint Declaration sets out strong standards of protection against intermediary liability. It calls for absolute protection against liability for content produced by others for those who simply provide technical Internet services, unless they intervene in that content or have been ordered by a court to remove it. It also recommends the same treatment for all intermediaries and, at a minimum, for intermediaries not to be required to monitor user-generated content or to be subject to extrajudicial content takedown rules (which is the case with most notice and takedown systems currently in place).

Section three of the Declaration rules out mandatory blocking except in the most extreme cases, for example to protect children against sexual abuse. It also rules out filtering systems that are imposed on users, which it describes as a form of prior censorship, and calls for strong transparency rules regarding products designed to facilitate end-user controlled filtering.

In terms of criminal and civil liability, the Joint Declaration calls for a “real and substantial connection” test, along with a requirement of “substantial harm”, before jurisdiction may be asserted. Limitation periods should start to run from the first time the content was uploaded, and only one action for damages should lie for that content (single publication rule). Once again, the Declaration stresses the need to advert not only to the public interest in specific content, but also to the wider public interest in protecting the forum in which the content was expressed.

The Declaration rules out discrimination in the treatment of Internet traffic (network neutrality) and calls for transparency in relation to any information management practices put in place by intermediaries.

Finally, the Declaration highlights the fact that States are under an obligation to promote universal access to the Internet, as part of their general obligation to promote freedom of expression. As a result, cutting off access to the Internet, as happened in Egypt earlier this year, is absolutely ruled out and it may be legitimate to deny individuals the right to access the Internet only in the most extreme cases, where ordered by a court. On the positive side, the Declaration calls for States to adopt multi-year actions plans for increasing access to the Internet and to consider a range of specific measures to this end, such as establishing community-based ICT centres and imposing universal service

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requirements on service providers.

Joint Declaration on Freedom of Expression and the Internet by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 1 June 2011

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